**MINUTES OF COMMISSION MEETING**
February 16, 2005

Present at the meeting of the New Jersey Law Revision Commission held at 153 Halsey Street, 7th Floor, Newark, New Jersey, were Commissioners Albert Burstein, Vito A. Gagliardi, Jr., and Sylvia Pressler. Professor Bernard Bell of Rutgers Law School, Newark, attended on behalf of Commissioner Stuart Deutsch and Grace Bertone of McElroy, Deutsch & Mulvaney, attended on behalf of Commissioner Rayman Solomon.

Also present were Gerard J. Felt, Esq. And Arthur J. Raimon, Esq. of Pressler and Pressler, representing the New Jersey Creditors Bar.

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Chairman Burstein said that the members of the Commission listed on page three should be grouped by status.

Commissioner Gagliardi suggested that the description of the Commission's work, in the last sentence of the second paragraph on page five, be enlarged to read "and becomes law." The Commission directed staff to add to the Report the statistics of Reports which have become law during the lifetime of the Commission, and to highlight those which became law in the last year.

Chairman Burstein directed Staff's attention to the case citation on page 12 and asked that the spelling of the Defendant's name be checked. He also asked Staff to prepare a new draft of the report.

Minutes

Professor Bell asked that Staff make a change on page 1, in the Enforcement of Judgments section of the minutes. In the first sentence, the language after the words "that Professor Bell had" should be replaced with "suggested an index that could be used to adjust the homestead exemption over time for inflation in residential housing prices." He also suggested that on page 2, in the first full paragraph, the last sentence should end with the words "to satisfy an unpaid judgment."

Commissioner Gagliardi asked that, on page 1, in the Medical Peer Review section, the second sentence of the second paragraph should read "It is currently possible to obtain the information in the second category."

Commissioner Pressler noted that there was considerable discussion at the last meeting regarding the manner in which a hardship stay is granted and Mr. Cannel responded that the notes for that meeting pertaining to matters not involving a determination by the Commission were not as detailed as Staff would have liked.

Enforcement of Judgments

Commissioner Pressler asked where the language "collection order" came from. Mr. Cannel explained that the term had been included to replace the term "writ of execution" which has meaning for an individual experienced in the area of enforcement of judgment, but not for a lay person.

Arthur J. Raimon, Esq. explained that there are two types of writs of execution, those prepared by the Special Civil Part Clerk at the conclusion of an action based on information provided by the creditor, and those prepared by the attorney for the creditor and submitted for signature in the Law Division. Gerard J. Felt, Esq. said that the creditors bar prefers the term "writ of execution." Perhaps it could be called a "writ of collection." Commissioner Pressler agreed, noting that an "order" is generally a judicial act, and does not typically refer to an act performed by a clerk (even if a judge's name is stamped on the document).

Mr. Cannel said that the writ could be called a "writ of collection" or a "writ of enforcement." Professor Bell suggested calling it a writ of execution on property. Mr. Raimon said that the creditors bar will meet twice in March. He asked if he and Mr. Felt could discuss the issue with members of that bar and with court officers and then report to the Law Revision Commission. Chairman Burstein said that would be okay as the Commission is not in an urgent situation. Mr. Cannel said that he would use the phrase "writ of execution" in the next draft.

Commissioner Pressler raised the issue of the use of the term "levy." She understands that the priority of liens is established by levy, and asked precisely what the term levy meant in the context of the draft statute. Mr. Cannel said that the term "levy" was used only when an action was taken by the appropriate official. If a creditor obtains an order and delivers it to the Sheriff, that is not really a "levy" since, without more, the Sheriff will do nothing. Instead, action will be taken only when the property already has been identified for the Sheriff.

Regarding perfection of the lien to establish priority, Mr. Cannel said that current statutes do not reflect practice. If a creditor with a writ identifies items of property of the debtor to the sheriff, that creditor has priority as to those items against other creditors who have filed writs with the sheriff even if the other creditors levied first. Mr. Cannel said that the theory behind the old execution statutes assumes a "small town" situation, in which the Sheriff knows all of the property of the debtor without any information being provided by the creditor seeking to execute on that property. This no longer reflects the reality of the practice.

Commissioner Pressler asked for clarification regarding whether priority is established by the date a document is filed, or the date it is delivered to the appropriate official. Mr. Cannel said that the draft contains "referencing back" language because that

was the suggestion made at the last meeting, but that such language does not eliminate confusion in this area. Commissioner Pressler suggested that the language "From the time a collection order is issued" be removed from the first sentence in section C-3 ½.

Mr. Raimon brought to the attention of the Commission an issue regarding the interplay of bankruptcy law and state law regarding perfection and priority. Bankruptcy law says that you must refer to state law regarding perfection of the lien. Under the current statute, where there was a bank levy within the 90-day bankruptcy preference period but the issuance of the writ predated the 90-day period, since the issuance of the writ predated the preference period the creditor can retain the funds in issue. Mr. Cannel indicated that examples like this are the reason that the new statute dates priority from the time that instructions are issued to the sheriff because the first official act to perfect is giving the writ to the sheriff with instructions for execution. Mr. Cannel said that he would provide a memorandum to the Commission to deal with the bankruptcy issues, including the difference between the treatment of the trustee and the treatment of other creditors. Chairman Burstein asked him to see both the Bankruptcy Code and State statutes.

Chairman Burstein asked what the practical problem was with the new statute, leaving aside the specific bankruptcy issue addressed above. Mr. Raimon explained that there has to be a distinction in the statute between perfection and priority. Under the current statute, the creditor who levies first gets the property as between creditors of the same category. In response to an inquiry about why the law cannot be crafted to specifically address the bankruptcy problem, Mr. Cannel explained that since the bankruptcy law refers to the state statute, it means the state statute as crafted for all purposes, not to a special embedded bankruptcy provision. Mr. Cannel was asked to confirm this answer in his bankruptcy memorandum.

Commissioner Pressler asked why the term "suspend" is used instead of "stay" in Section S-7, observing that it looked as though the distinction was that as a result of age or disability, you could be afforded more preferential treatment. Mr. Cannel said that it took into account situations that were likely to be long-term (age or disability) as well as those that might be rather shorter in duration (unemployment). The standards were included to give judges guidance in order to achieve consistent decisions. Commissioner Gagliardi asked if there was ever a situation in which the sale of one's house would not be a hardship and, if not, should the term "extreme hardship" be used.

Professor Bell noted that the draft language did not really address his concern about the distinction between a current problem and a problem in the past for which a person without medical insurance, for example, had incurred debt for medical expenses. Chairman Burstein asked if by delaying sale of a residence, the statute was just putting off the inevitable. Mr. Raimon replied that creditors want to collect in the easiest way possible. If there is a situation in which an individual might be out of work now, but employed in six months, it is easier from the creditor's perspective to collect through

wage garnishment or voluntary payment. Mr. Felt added that it was inappropriate to consider the reason for the underlying indebtedness because that in effect, is relitigating the judgment.

Chairman Burstein asked what would happen during a six month period of stay, and if you stayed one sale, would that mean that a mortgage foreclosure sale would also be stayed. Mr. Cannel indicated that while that had not been his intention while drafting, that was a proper reading of the draft statute. Mr. Cannel referred to S-7, saying that a mortgage foreclosure is also stayed. Commissioner Pressler said that the draft should not affect mortgage foreclosure.

Commissioner Pressler asked if the language could be redrafted to say, as many other statutes and rules do, that the determination will be made in the judge's discretion, upon a showing of undue hardship, in light of all the circumstances. She noted that this was an adversary proceeding, so it should be left to the adversaries to present their case to the judge for consideration. Mr. Cannel clarified that the redrafted statute would include good cause shown, undue hardship, and a flexible time period. He said that the Commission would have a complete redraft for the next meeting.

Title 39

Laura C. Tharney reported meeting with the Director of the State Intoxicated Driver Program ("IDP") and the Director of the Intoxicated Driver Resources Program ("IDRP"). Both agreed to look at the redraft of 39:4-50 and give their comments to the Commission within a month.

Chapter 5 in the draft deals with Commercial Drivers Licenses. Ms. Tharney said that in 1994, The Commercial Motor Vehicle Act of 1986 disappeared and became part of the Transportation Equity Act of the 21st Century, which comprises more than 1,000 pages of the federal statute. The new Act changes the references to the federal statute that are embedded in the statute. Staff needs to change the references, and to put together another revision to address referencing federal law without mirroring it.

John Cannel suggested just mentioning the federal law in a general reference. Commissioner Pressler asked how one knows what the law is, and whether one needs to make a reader of the state statute aware of things like the specific provisions on blood alcohol levels. Ms. Tharney said it would be more helpful to identify the areas in which there is applicable federal law and to point out where in the federal law one should look. Vice-Chairman Gagliardi suggested identifying the law in comments to the relevant sections. Mr. Cannel said that there is ugly black letter law which states that when a law is referred to by statute number, then the law referred to is the referenced law at the time the statute with the reference is enacted, and does not include any updates. Commissioner Pressler noted that this is silly. She also asked if the penalties are all

federal law. Ms. Tharney replied that, in general, the requirements were found in the federal law, but state law sets the penalties.

Ms. Tharney told the Commission that many individual sections of Title 39 state that regulations must or may be adopted to carry out the Act. She asked if the draft has to repeat this language in each section. Chairman Burstein said it would be okay to state it just once.

Ms. Tharney said that 39A:5-CDL 3(e) provides an oral test for applicants who cannot comprehend a written test. She asked the Commission if it wants to have this provision in the statute. Chairman Burstein said to retain the oral test. Commissioner Pressler said to take out "shall" and put in "may," giving the Commissioner of Motor Vehicles discretion to administer the oral test or not.

Commissioner Pressler, referring to 39A:5-CDL 2(n) asked why the definition of "Serious traffic violation" does not pick up other language. Ms. Tharney advised that the state list is different from the federal list.

Ms. Tharney requested help with the expiration language in 39A:5-CDL 14(e). Mr. Cannel suggested "the last day of the month four years from issuance."

With regard to the license plate section addressed at the last meeting, Ms. Tharney said she has asked the Motor Vehicle Commission for feedback before any further consolidation since the initial consolidation made some assumptions about the meanings of different terms and it would be easier to check and see if those assumptions are correct at this point, before any further modification of the statute takes place.

Title 1

Commissioner Pressler pointed out that there were still terms included that needed to be removed, like "Canal Zone." Chairman Burstein asked that Staff take another pass through the document, regularize the definitions, make capitalization and punctuation consistent, and remove verbiage such as "Whenever there is a restriction under federal law…."

Commissioner Pressler suggested that in Section 1-6, the first four lines be eliminated and that the section read "Whenever any notice or other communication is or shall be…" In Section 1-7(c), the language after "to such re-enacted statute" should be eliminated. All citations within the document should use the N.J.S. citation form.

Professor Bell suggested that the definition of "registered mail" should include FedEx, UPS and courier service which provide the same services as registered mail. Commissioner Pressler said that the Court Rules refer to "commercial courier service" and it was suggested that the term used in the statute should be the same. Commissioner

Pressler said that she had a number of suggested language changes, and that she would provide her notes to Staff to make those corrections.

Commissioner Pressler also said that she had a substantive correction to recommend, explaining that the statute still gives the Appellate Division of the Superior Court original jurisdiction over certain matters in Section 9-1, and calls for actions that the Appellate Division is not equipped to do, such as taking testimony and issuing subpoenas. She said that this jurisdiction has been exercised only three times and recommended that this original jurisdiction more properly belongs in the trial court. The Commission agreed that this provision should be redrafted.

## Miscellaneous

The next meeting is scheduled for March 17, 2005. Chairman Burstein directed staff to place Enforcement of Judgments first on the agenda.