

MINUTES OF COMMISSION MEETING

April 15, 2021

Present at the New Jersey Law Revision Commission meeting, held via video conference, were: Chairman Vito A. Gagliardi, Jr.; Commissioner Andrew O. Bunn; Commissioner Louis Rainone; Professor Bernard W. Bell, of Rutgers Law School, attending on behalf of Commissioner David Lopez; Professor John K. Cornwell, of Seton Hall University School of Law, attending on behalf of Commissioner Kathleen M. Boozang; and, Grace Bertone, of Bertone Piccini, LLP, attending on behalf of Commissioner Kimberly Mutcherson.

In Attendance

Maeve Cannon, Esq., of Stevens & Lee, representing Mitchell International Inc.; Susan Stryker, Esq., of Bressler Amery & Ross, P.C., representing the New Jersey Insurance Council; Mark Setaro, Esq., Chair of the Workers' Compensation Executive Committee, of the New Jersey State Bar Association, Workers' Compensation Section; Ann DeBellis, Esq., Chair-Elect of the Workers' Compensation Executive Committee, of the New Jersey State Bar Association, Workers' Compensation Section, were in attendance.

Minutes

The Minutes of the March 18, 2021, meeting were unanimously approved by the Commission on the motion of Commissioner Bunn, seconded by Commissioner Bell.

Preliminary Matters

As a preliminary matter, Chairman Gagliardi advised that neither the Draft Final Report on Parentage or the update memorandum on Under the Influence would be considered at this meeting.

County Committee

New Jersey's election statute contains requirements that the election of county committee members, and the selection of the committee chair and vice-chair, be based on gender. These requirements were added to the statute to "equalize opportunity between the genders in the political forum and to encourage women's involvement in politics." In recent years, however, these provisions have been called into question by those seeking political office.

Samuel Silver stated that in the case of *Hartman v. Covert*, 303 N.J. Super. 326 (Law Div. 1997, and later in *Central Jersey Progressive Democrats v. Flynn*, MER-L-00732-19 (Law Div. Sept. 02, 2020)), the Law Division considered the constitutionality of the statute that restricted the position of political party committee chair and vice-chair to persons of opposite genders. Both Courts determined that N.J.S. 19:5-3 was unconstitutional because it did so. Mr. Silver noted that

the statute may also unconstitutionally preclude individuals who identify as gender non-binary from appearing on a ballot for county committee or its leadership.

At the January 21, 2021, meeting of the Commission, Mr. Silver was asked to prepare a Draft Final Report that included language that would bring this issue to the attention of the Legislature. Subsequently, at the March 16, 2021, Commission meeting, he was asked to revise the Draft Final Report to incorporate the language received from Commissioner Bell.

Mr. Silver thanked Commissioner Bell for the language designed to better express the urgent tone of this issue, and to provide additional background to the Legislature regarding the constitutional questions that it involved. Mr. Silver explained that additional research resulted in the inclusion of supportive language. The revisions were incorporated into the Revised Draft Final Report, and divided into three sections: Equal Protection, Impact of the Evaluation of a Statue and Updating of Statutory Language.

Chairman Gagliardi suggested that the language in the second paragraph, second sentence of the conclusion be modified to express the importance of the issues considered by the Commission. The Chairman suggested that the following language be added to the conclusion: “[t]he Commission is urging the Legislature to consider this issue and take action as appropriate”, to capture the sentiment of the Commission regarding this matter. Commissioners Bell, Bunn, and Bertone concurred with Chairman Gagliardi’s recommended language change.

Subject to the requested modification and on the motion of Commissioner Bell, which was seconded by Commissioner Bunn, the Commission unanimously voted to release the Final Report.

Workhouse

Samuel Silver discussed a Draft Final Report proposing statutory modifications to eliminate references to the term “workhouse” from the New Jersey statutes where appropriate. At the December 17, 2020, meeting of the Commission, Staff was authorized to conduct research regarding the types of county institutions in which a defendant may be imprisoned – specifically including the term “workhouse.”

Mr. Silver stated that amid a state and national move to reexamine statutory terms rooted in systemic racism, the presence of the term “workhouse” in the New Jersey statutes is of concern since it ties back to the oppressive ideals of its colonial-era origins.

Originally appearing in New Jersey resolutions as early as Dec. 16, 1748, which authorized construction of Middlesex County and New Jersey’s first workhouse, the term remains in the statutes. In 1976 the transfer of powers and duties of the Commissioner of Institutions and Agencies with respect to all county workhouses was transferred to the Department of Corrections.

In addition to its history, the term workhouse is not defined in the New Jersey statutes even though it is found in 53 statutes spanning 12 titles. The Appendix to the Final Report recommends the substitution of the term “county correctional facility” for “workhouse.”

Mr. Silver stated that he reached out to stakeholders for comment, and that the New Jersey Department of Corrections (DOC) advised that it “has no objection to the proposed revisions to eliminate the term ‘workhouse’ in New Jersey Statutes.” Further, the DOC stated that “reference[s] to ‘workhouse’ is outdated and inappropriate.” The Office of the Bergen County Counsel also provided comments in support of the Commission’s work in this area, and asked that the statutes that contained the term County Freeholder also be modified to reflect County Commissioner in accordance with New Jersey law. Mr. Silver advised the Commission that the Appendix reflects these modifications.

Chairman Gagliardi stated that he was glad to hear about the positive feedback received regarding this project.

On the motion of Commissioner Bertone, seconded by Commissioner Bell, the Commission unanimously voted to release the Final Report.

Workers’ Compensation – Statute of Limitations

Samuel Silver discussed a Revised Tentative Report proposing changes to N.J.S. 34:15-15 and N.J.S. 34:15-51 to clarify the statute of limitations in workers’ compensation actions. This project was brought to the Commission’s attention as a result of the New Jersey Supreme Court decision in *Plastic Surgery Center, P.A. v. Malouf Chevrolet-Cadillac, Inc.*, 241 N.J. 112 (2020).

The Workers’ Compensation statute, at N.J.S. 34:15-51, provides that every claimant for workers’ compensation shall submit to the Division of Workers’ Compensation a petition filed and verified within two years after the date on which the accident occurred, or within two years from the failure of the employer to make payment pursuant to the terms of an agreement with the claimant for compensation.

In *Plastic Surg. Ctr. v. Malouf Chevrolet-Cadillac*, the New Jersey Supreme Court considered whether medical provider claims for payment of services rendered to injured employees were subject to a two-year statute of limitation, or to the traditional six-year statute of limitations pertaining to contract law. The Appellate Division held that N.J.S. 34:15-51 does not limit disputed medical provider claims to a two-year statute of limitations. The New Jersey Supreme Court affirmed. The Supreme Court also stated that in the 2012 amendment to the Workers’ Compensation statute, specifically N.J.S. 34:15-15, the Legislature did not expressly address the statute of limitations; however, the Legislature was invited by the Court to do so in the future.

At the June 18, 2020, Commission meeting, the Commission authorized the release of a Draft Tentative Report with proposed modifications incorporating a six-year statute of limitations as set forth in N.J.S. 2A:14-1. The Draft Tentative Report was distributed to stakeholders, including the Workers’ Compensation section of the New Jersey State Bar Association (NJSBA); the New Jersey Council on Safety and Health; the New Jersey Compensation Association; the New Jersey Department of Labor; the New Jersey Self-Insurers Association; the Insurance Council of New Jersey; and private practitioners.

Based on the comments received, there was consensus for clear legislative direction regarding the time within which a medical provider must file an application for payment. Mr. Silver advised the Commission, however, that there was universal opposition to a six-year statute of limitations. The majority of stakeholders who responded to the outreach favored a two-year statute of limitations. The expressed rationale for the opposition to a six-year statute of limitations was grounded in historical, policy, economical, and practical concerns.

The results of a 50-state survey to see how other states deal with issue revealed that 44 states utilize fee schedules; New Jersey is not one of them.

Mr. Silver added that there was also no consensus regarding when the limitation period should begin to run. Proposed options included the date of the worker's accident, the date the medical provider receives payment and disputes it, and the date service is provided to the injured individual. The final option would make clear to the medical provider when legal action must be taken if payment is disputed, and it would eliminate the filing of medical provider claims long after the underlying claim is adjudicated.

In its current form N.J.S. 34:15-15 is composed of six undesignated paragraphs. The proposed language restructures these paragraphs and replaces archaic phrasing to promote accessibility. In N.J.S. 34:15-15 subsection f., the proposed language calculates the time period based on the date of service, and includes a phase-in provision. In subsection f.(2), the proposed language uses the date on which services are rendered or the date on which the first notice of dispute of the medical charges was received – whichever is later.

N.J.S. 34:15-51 is currently one block paragraph. The proposed language is divided into numbered and lettered paragraphs for clarity. Newly drafted subsection e. makes reference to N.J.S. 34:15-15 and make it clear that medical providers are not considered "claimants" for the purposes of the two-year statute of limitations.

Commissioner Bell questioned the phase-in provision in subsection f. If there is a six-year statute of limitations, Commissioner Bell inquired how the two-year transition period would affect those who are within the statute of limitations period now, but would be outside of this period after the statute is modified. Mr. Silver noted that subsection f.(2) would allow for an extension in this circumstance with which medical providers could bring their claim. Commissioner Bunn believed that the transition period should be modified to reflect that applications for payment may be made "two years from the date of service, or one year from date of enactment, whichever is later." Chairman Gagliardi agreed that a definitive transition date is needed, and added that additional outreach to stakeholders may be needed to decide a definitive transition provision.

Ann DeBellis, the Chair-Elect of the Workers' Compensation Executive Committee, of the NJSBA Workers' Compensation Section, addressed Commissioner Bell's concern regarding how medical providers treat outstanding workers compensation claims. First, she noted that in 2012, the Legislature granted the Division of Workers' Compensation exclusive jurisdiction of all claims because certain medical providers were engaging in the practice of filing civil lawsuits against workers for the balance of their bills because they believed they were entitled to be fully

compensated for their services. As of 2020, medical provider claims accounted for more than 25% of all of the claims that were filed in the Division of Workers' Compensation. Moreover, Ms. DeBellis stated that in her experience, 95% of all medical provider claims are filed by lawyers within the statute of limitations. Ms. DeBellis suggested that the doctors in *Plastic Surgery Center, P.A. v. Malouf Chevrolet-Cadillac, Inc.*, were outliers. The medical providers filing claims in New Jersey are those who refuse to join medical networks, and generally include plastic surgeons, anesthesiologists, and medical monitoring sections. Finally, Ms. DeBellis noted that, other than Wisconsin, New Jersey has the highest medical bill payments for workers compensation.

Mark Setaro, Chair of the Workers' Compensation Executive Committee, of the NJSBA Workers' Compensation Section, concurred with Ann DeBellis. He added that he sat on a subcommittee which led to the current version of the subject medical provider statute and noted that the clear intention of that committee was to create these laws to protect injured workers. Mr. Setaro stated that a six-year statute of limitations would be contrary to the committee's intentions. Moreover, Mr. Setaro expressed his belief that the New Jersey Appellate Division and Supreme Court erred in relying on contract law in determining the statute of limitations, and instead they should have relied on workers' compensation law.

Susan Stryker, Esq., of Bressler Amery & Ross, P.C., representing the New Jersey Insurance Council, described the Court's ruling in *Plastic Surgery Center* as the result of an absence of guidance on the two-year vs. six-year statute of limitations issue. She noted that a two-year statute of limitations period would be more consistent with the entirety of the Workers' Compensation Act, stating that this is not a contract issue. Further, Ms. Stryker referred to the Report's 50-state survey and observed that since 44 states have a fee schedule, New Jersey is clearly an outlier with a six-year statute of limitations adding that it causes problems for insurers who must determine what to reserve, and that a two-year statute would help with timely claims.

Maeve E. Cannon, Esq., of Stevens & Lee, representing Mitchell International, urged the Commission to consider revising the Revised Draft Tentative Report to adopt the medical provider's "receipt of payment" as the trigger for the statute of limitations. She stated that this would be the most practical trigger event because under traditional principles of New Jersey law, a cause of action accrues when a breach of duty has been discovered. Ms. Cannon also urged the Commission to adopt a two-year statute of limitations period for medical provider claims based on policy, economic, and practical reasons. Ms. Cannon noted that neighboring northeastern states are fee schedule states and that a two-year statute of limitations is ample time within which to file. Finally, she stated that in her experience, the majority of medical providers file applications for payment within one year.

Commissioner Bunn reiterated the need to address the transitional issue raised by Commissioner Bell during this meeting. Chairman Gagliardi emphasized that a six-year statute of limitations is certainly an outlier and based upon the 50-state survey, a two-year statute of limitations would still render New Jersey an outlier. Commissioner Bunn added that leaving to the Legislature the determination regarding the number of years or months for the statute of limitations

is appropriate, but that the Commission should let the Legislature know what it has heard from commenters.

Commissioner Bell questioned why New Jersey does not have a fee schedule system. Ms. DeBellis replied that the argument against fee schedules is in part due to the fact that an employer can direct an employee to care and therefore should not have to be bound by a fee schedule. She continued by stating that the Workers' Compensation Research Institute shows that this is an outlier and that most states have a schedule and some form of directed care. Commissioner Bell asked whether this is being considered by the Legislature at this time. Ms. DeBellis replied that it is a thorny issue that has not been in serious consideration for several years.

On motion by Commissioner Bunn, seconded by Commissioner Bertone, the Commission unanimously voted to release the Revised Tentative Report.

Inhabitant

Legislative Law Clerk Alyssa Brandley discussed an Update Memorandum concerning the distinction between preambles and legislative findings and proposed a project to clarify the use of the term "inhabitant" in New Jersey's Law Against Discrimination, N.J.S. §§ 10:5-1 *et seq.*, as discussed in *Calabotta v. Phibro Animal Health Corp.*, 460 N.J. Super. 38 (App. Div. 2019).

At the February 18, 2021, Commission meeting, the Commission discussed the use of the term "inhabitants" in the New Jersey Law Against Discrimination, focusing specifically on N.J.S. 10:5-3, entitled "Legislative findings and declarations."

The Plaintiff in *Calabotta v. Phibro Animal Health Corporation* was an Illinois resident, employed by a subsidiary of a New Jersey corporation, who brought suit against the parent company. At issue in *Calabotta* was the inconsistent use of the term "inhabitants," with other provisions of the NJLAD and with the broader purpose of protecting all people from discrimination.

Ms. Brandley explained that in *Calabotta*, the Appellate Division determined that the protection of the NJLAD extended to the Plaintiff, who resided out of state. The Court, in its decision, referred to N.J.S. 10:5-3 as a preamble. The distinction between a preamble and a legislative finding is a technical one. Research revealed that a preamble is a clause that precedes an enacting clause, while a legislative finding typically follows. Accordingly, a preamble is not considered substantive, while a legislative finding will be taken into consideration for purposes of statutory interpretation.

The current version of the NJLAD contains three separate statutory sections entitled "Findings and Declarations." The first is the section at issue, N.J.S. 10:5-3, entitled "Legislative Findings and Declarations." The second is N.J.S. 10:5-3.1, entitled "Findings, Declarations, and Intent Regarding Workplace Discrimination of Women who are Pregnant or Recovering from Childbirth." The third is N.J.S. 10:5-44, which provides legislative findings and declarations as they relate to the Genetic Privacy Act.

These three sections all appear after the enacting clause of the statute, suggesting that the Legislature intended them to be a part of the body of the Act. In a technical sense, then, Section 10:5-3 is not a true preamble, but rather a legislative finding that should be afforded weight when construing the Act's provisions. Since N.J.S. 10:5-3 is to be considered by the courts when discerning the Legislature's intent, it should be unambiguous and consistent with the other statutory provisions.

Commissioner Bunn stated that this project has an important statutory construction element on which the Commission could provide some useful guidance. He further noted that if there is any uncertainty as to whether it is a preamble or a finding, it is better to clear up that ambiguity.

Chairman Gagliardi noted that this is a particularly timely project because there may be numerous people who live outside of New Jersey and are working remotely for a New Jersey company. Commissioner Bunn added that the Commission should also examine the structure of the statute, noting that if one part of the statute contradicts another, it should be fixed. Regardless of whether this is a preamble or finding, the Commission should explain why it is or is not important. Commissioner Bell and Commissioner Bertone concurred with Commissioner Bunn. The Commission authorized further research on this project.

Uniform Recognition and Enforcement of Canadian Domestic Violence Protection Orders Act

Jennifer Weitz discussed a Draft Tentative Report proposing modifications to New Jersey statutes to permit recognition of Canadian domestic violence protection orders through incorporation of provisions of the Uniform Act into existing New Jersey law.

In 2011, the Canadian government granted recognition of protective orders issued in the United States through the Uniform Enforcement of Canadian Judgments and Decrees Act (UECJDA). In response, the Uniform Law Commission (ULC) drafted the Uniform Recognition and Enforcement of Canadian Domestic Violence Protection Orders Act (RECDVPOA). The RECDVPOA would grant similar recognition in the United States to domestic violence protection orders issued by Canadian courts.

Ms. Weitz stated that six states enacted the RECDVPOA, and Colorado is considering the ULC Act in its current legislative session. The RECDVPOA mirrors the UECJDA by focusing on the immediate threat of domestic violence. It does not include any provisions relating to custody or visitation. Both the RECDVPOA and the PDVA provide immunity for law enforcement personnel acting in good faith to enforce protective orders, and both contain due process protections for individuals named in a protective order.

The Appendix reflects proposed modifications to the PDVA that would extend its protections to recognize Canadian domestic violence protection orders, but the substance of the PDVA would not be altered or expanded in any other way. Similarly, proposed revisions to N.J.S. 2C:25-31 and N.J.S. 2C:29-9, addressing contempt of a domestic violence protection order, would allow for enforcement of these subsections as they relate to Canadian orders. Lastly, a Canadian order would be able to be registered with the central registry as per N.J.S. 2C:25-34.

Commissioner Bunn questioned whether the Canadian order under this Act would be treated any differently than a New York order. Ms. Weitz replied that RECDVPA would put both the orders on equal footing, giving them the same recognition as an order from another state. He further asked whether a defendant could challenge the enforceability of the order on the grounds of personal jurisdiction in New Jersey. Ms. Weitz stated that she would follow up on this issue with the Commission and would clarify it in the Appendix.

Commissioner Bell requested some clarification on the subsection pertaining to “order of relief”. He questioned whether domestic violence protection order from United Kingdom would be recognized under this Act. Ms. Weitz responded that as the project currently stands, the modification would only recognize Canadian order because that was the focus of the ULC. She further suggested that due to the geographic proximity to Canada, ULC wanted to recognize Canadian domestic violence protection orders as it may be more of a concern in the United States than orders from other international jurisdictions.

Commissioner Bunn questioned how a domestic violence protection order issued in the United Kingdom would be treated in New Jersey. Under the current law, he asked whether there was a way to domesticate the U.K. order or whether the parties must commence the protection process under state law. Commissioner Rainone asked if there is any case law involving orders of protection issued by foreign jurisdictions. Ms. Weitz stated that the proposed statutory modifications have been drafted to recognize Canadian domestic violence orders. She added that it was her understanding that that parties to orders from other international jurisdictions would be required to commence a new action in the United States, but that she would confirm this.

Commissioner Bunn suggested than an examination of an international treaty on this subject may shed some light on this issue. Staff was directed to conduct further research into what the Legislature meant when it referred to “another jurisdiction” in N.J.S. 2C:25-29 (a)(6).

On the motion of Commissioner Bunn, which was seconded by Commissioner Rainone, the Commission unanimously voted to release this Report as a Tentative Report.

Wiretapping

Legislative Law Clerk Joe Miller discussed a Memorandum proposing a project to consider the clarification of New Jersey’s wiretap statute regarding the use of civilian personnel in wiretapping investigations pursuant to N.J.S. 2A:156A-12 and as discussed in *State v. Burns*, 462 N.J. Super. 235 (App. Div. 2020).

The New Jersey Wiretapping and Electronic Surveillance Control Act (the Act) regulates the interception of communication in New Jersey. Specifically, the act contains a minimization section which is intended to reduce the intrusion of law enforcement investigations on privacy rights under the Fourth Amendment and attorney-client privilege by limiting the interception of communication to conversations that are germane to the investigation. Subsection e. of the minimization section allows "investigative or law enforcement officers" to participate in wiretap

investigations. This subsection makes no mention of whether the State may utilize civilians as monitors in a criminal investigation.

In *State v. Burns*, the Appellate Division considered, as a matter of first impression, whether the State's use of "federally-contracted civilian monitors" to intercept communications was lawful under the Act. Following an 18-month investigation conducted by the Burlington County prosecutor's office in conjunction with the DEA, the defendants were indicted on various charges associated with drug trafficking. The investigation included the interception of communication of four cell phone facilities subscribed to by the defendants.

Mr. Miller explained that in order to obtain approval to conduct a wiretap investigation a law enforcement agency must submit an application to a wiretap judge. In this case, the prosecutor's office submitted a 66-page affidavit in addition to the standard wiretap application. The affidavit indicated that DEA agents and contracted civilian monitors would participate in the surveillance. The contracted civilians were sworn in and deputized by the prosecutor himself as "Special County Investigators". Additionally, the civilian monitors were provided with written and oral minimization instructions and were supervised by an assistant prosecutor.

At trial, the defendants moved to suppress the evidence acquired as a result of the wiretap investigation, claiming that the minimization section does not allow the use of civilian monitors and that the prosecutor did not have the authority to appoint special county investigators to monitor intercepted communications. The Law Division denied the defendants' motion, highlighting the lack of precedent on this issue of prohibiting the use of civilian monitors. Further, the Court noted that civilian monitors were sworn in as "law enforcement officers."

The New Jersey Supreme Court previously acknowledged that the state wiretap act is "more restrictive" than Title III, its federal counterpart. The federal minimization section was amended to account for the use of civilian personnel to monitor intercepted communications. The New Jersey Legislature has amended the New Jersey minimization section three times, but has not added language expressly permitting or restricting the use of civilian personnel in wiretapping cases.

The Appellate Court concluded that the prosecutor's office was permitted to use the civilian monitors to participate in wiretap investigations because they had been deputized as "special county investigators" and as such met the definition of "investigative or law enforcement officers" under the Act. The Court declined to review whether the Legislature intended to include civilian monitors under the minimization section because they viewed the DEA civilian contractors as deputized "investigators." The Court noted that this decision did not require it to determine whether the minimization section permits non-deputized civilian personnel to monitor intercepted communications. Instead, they stated that this determination would be best left to the Legislature and Executive branch. The New Jersey Supreme Court denied a petition for certification.

Mr. Miller concluded his presentation by stating that there are seven bills currently pending in the legislature which would affect the wiretap act, however none of those bills apply to the minimization section and they do not address civilian participation in wiretapping investigations.

Commissioner Cornwell approved of the project, and Commissioner Rainone agreed. Chairman Gagliardi added that in some instances, third-party vendors and or contractors are used to monitor communications; they act as agents of the agency. Commissioner Bunn observed that most if not all states have some form of wiretap acts, and that the Staff will have this rich source of information for researching the issue. Commissioner Cornwell asked what motivated the use of civilian monitors in this context and whether it was reflective of a national trend. Mr. Silver explained that there was a determination at the federal level that the use of the FBI's investigative agents was better spent in the field as opposed to monitoring transmissions. Since the use of civilian monitors was authorized on the federal level, the states followed the federal practice. Commissioner Rainone added that in instances of wiretapping involving conversations in languages other than English, the use of interpreters as civilian monitors can be essential.

Staff was authorized by the Commission to engage in additional research and outreach.

Adjournment

The meeting was adjourned on the motion of Commissioner Cornwell, which was seconded by Commissioner Bertone.

The next Commission meeting is scheduled for May 20, 2021, at 4:30 p.m.