MINUTES OF COMMISSION MEETING

May 18, 2017

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7th Floor, Newark, New Jersey, were: Commissioner Andrew O. Bunn; 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, attended on behalf of Commissioner Kathleen M. Boozang; and Grace C. Bertone, Esq., of Bertone Piccini LLP, attended on behalf of Commissioner Michael T. Cahill.

Also in attendance was Alida Kass, Esq., Chief Counsel, New Jersey Civil Justice Institute.

Minutes

The Minutes of the April 2017 Commission meeting, as amended, were approved on motion of Commissioner Hartnett, seconded by Commissioner Bell.

Affidavit of Merit Statute

Laura Tharney began with a discussion of the Memorandum, drafted by Jayne Johnson, which set forth the status of this project. She noted that the Memorandum proposed revisions to the Affidavit of Merit Statute.

Ms. Tharney explained that Staff was seeking the guidance of the Commission regarding the interplay between draft sections a. and b. of N.J.S. 2A:53A-27. Specifically, she expressed concern with regard to the practical impact of the proposed changes to the statute, suggesting that section a. says that in the absence of an affidavit, a party does not have a cause of action, while section b. provides 60 days after the filing of an answer by the defendant within which the plaintiff may provide each defendant with an affidavit. As a result, Ms. Tharney suggested that sections a. and b. appeared to be in conflict with one another. In response to plaintiff's filing, she theorized, the defendant would file a motion to dismiss rather than an answer, potentially resulting in additional litigation.

Commissioner Bunn stated that paragraph a. should end after the first sentence. He went on to note the plaintiff should allege the existence of the affidavit in his/her complaint. The requirements of section a., he suggested, would be met if the affidavit merely existed and that no filing requirement was necessary. Commissioner Bunn theorized there need not be any reference to "filing" in section a. Thus, the balance of this section could be omitted.

Ms. Tharney acknowledged that Ms. Kass was present to discuss the draft statute. Ms. Kass noted that if the affidavit is not filed on the same date as the complaint, the statute of limitations would still be running. She noted the concern that the failure to file a sufficient affidavit was not being discovered early enough in the litigation process, adding that this was the concern set forth by the Third Circuit Court Judge in case of *Endl v. State of New Jersey*.[1] Ms. Kass also noted that paragraph b. was designed to try to eliminate "gamesmanship" from the litigation process.

Commissioner Bunn observed that in the absence of an affidavit, a defense attorney would likely move to dismiss the complaint. If the affidavit did not conform to the statutory requirements, it would be deemed not to exist and the complaint would also be subject to a motion to dismiss. In response to such a motion, a plaintiff may choose to amend the complaint, or not.

Commissioner Hartnett questioned why the statute was originally written to provide for the delay between the filing of the pleading and of the affidavit. Commissioner Bunn theorized that the time-frame set forth in the statue was a mechanism designed not to punish a litigant whose attorney did not meet the statutory requirements necessary to perfect the cause of action, and to allow for situations in which a litigant does not seek an attorney sufficiently in advance of the running of the statute of limitations. He noted that he was not sure that section b. was necessary, because it merely contains a procedural process that presumes a filing requirement.

As a practical matter, in litigation generally, Commissioner Bunn noted that litigants are afforded an opportunity to remedy a defect rather than have their case dismissed for failure to file a proper affidavit. He continued that the amendment imposes real pressure on the plaintiff to properly prepare his or her case. Commissioner Hartnett observed that the amended structure may not be "plaintiff friendly" because it forces the plaintiff to have the documents ready at the time of filing.

Ms. Tharney asked whether the Commission was suggesting the removal of section b. She observed that the elimination of this section would remove the references to the familiar timelines that it contained, and could be interpreted to mean that there were no longer applicable timelines. Regardless of the court in which a claim is brought, Commissioner Bunn commented that the intention of the Commission is to have the law applied the same way throughout the State. He noted that his concern regarding section b. is that it is largely procedural, rather than substantive – in effect, it is telling the judiciary how to do its job.

Alida Kass observed that section a. has changed the opportunity for the defendant to raise the absence or the deficiency of the affidavit of merit in any court. In addition she noted that the

[1] *Endl v. State of New Jersey*, Civ. No. 2:12-3564 (D. N.J. filed March 13, 2014).

time limit within which to file an affidavit of merit is preserved in section b. Having any issues regarding the affidavit of merit decided at the outset, she concluded, is a benefit to both the plaintiff and the defendant.

Ultimately, Commissioner Bunn suggested that section b. should not be stricken. He went on to state that if a court does not feel that this section applies, it may apply section a. Furthermore, he suggested the following language be added to section b:

> (b) In any action for damages for personal injuries, wrongful death, or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, no later than 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices.

Commissioner Bell agreed with the addition of this language.

Commissioner Bunn suggested that the Supreme Court Committee on Civil Practice be included in the discussion. Ms. Kass concurred noting that it would be beneficial to speak with the individuals involved in this practice area to ensure that the stakeholders are not affected by any changes to the statute. Ms. Tharney noted that since this was a project on which the Commission was working at the invitation of a member of the Legislature, authorization for outreach would be sought.

The Commission directed that Staff make the changes to the proposed language as discussed, and include a note in the commentary regarding the project regarding severability and making it clear that if one section is deemed to be unconstitutional, the other sections survive. The Commission also directed that authorization to engage in outreach be sought before contacting stakeholders. With regard to the outreach to be done, the Commission specifically asked that potential commenters be asked whether the proposed language works, and whether section b. can be eliminated in light of draft section a.

Alternative Procedure for Dispute Resolution Act (APDRA)

Samuel Silver discussed a Draft Tentative Report setting forth the ambiguity in the language of N.J.S. 2A:23A-13(a) which was recognized by the New Jersey Appellate Division in

Citizen United Reciprocal Exch. v. N. NJ Orthopedic Specialists. As drafted, Mr. Silver noted that the statute provides a party with time frames within which to commence a summary action after receiving an award; or, after receiving an award modified pursuant to subsection d. of the statute. He noted the statute does not, however, provide a timeframe for a party to commence a summary action where an umpire denies modification of the award. Finally, Mr. Silver stated that the statute does not set forth the amount of time a party has to challenge an award when the application to modify is made pursuant to rules adopted by the arbitrating organization and not N.J.S. 2A:23A-12 subsection d.

Having received authorization at the April 2017, Commission meeting to conduct additional research and commence initial outreach to interested stakeholders, Mr. Silver presented proposed revisions to the statutory language of N.J.S. 2A:23A-13 section a. to include the 30-day time limits identified by the Appellate Division in *Citizen United Reciprocal Exch. v. N. NJ Orthopedic Specialists*. He further requested that the Commission authorize the release of a Tentative Report on this issue so that comment could be sought on the proposed language.

Commissioner Bell began by asking if there was a limit to the number of applications for modification that could be made, asking if the answer to this question was clear in the statute and suggesting that it should be.

The question was then raised regarding whether the matter from which the application results is properly referred to as an order or an award. Staff was asked to check the terms and definitions to confirm that no violence is inadvertently done to the statute as a result of the insertion of additional terms. It was also suggested that the time periods in both subsections (1) and (2) should be calculated from the time that the award is received by the applicant, using basically the same wording in both subsections.

To simplify subsection (2), the Commissioners discussed eliminating the end of the subsection (beginning with the words "pursuant to…" so that it does not limit the source of the means for the request for modification since a contract between the parties can do that as well as the statute or the rules of the dispute organization.

A concern was also expressed that if a determination of an umpire is conveyed by phone or email, it may not be clear when the time period begins to run.

Commissioner Bunn asked what happens if there is a simple math or reasoning error in the determination, and in response to the request to modify, the umpire says "no" – he asked whether the aggrieved party was appealing from the denial of the request for modification or from the underlying award. John Cannel asked what the impact was if a party was notified that the award had been modified, but it was not clear what the terms were.

Commissioner Bell expressed a concern with a quick hypothetical: what if there is an award on January 5th; an application for modification thereafter; the award is modified on February 15th; there is another application for modification; and the request for modification is denied March 10th. How many days, he asked, does the party have within which to commence the summary action? Commission Bunn also suggested that Staff make sure that the right of review "reaches back" and is plenary if subsequent modifications are permitted.

The Comments of the Commissioners included revisions to the proposed draft as follows (new proposed revisions are shown in italics and double-strikethrough below).

N.J. Stat. Ann. § 2A:23A-13(a)

> Unless the parties shall extend the time in writing, a party to an alternative resolution proceeding shall commence a summary application in the Superior Court for its vacation, modification or correction within:
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> (1) 45 days after *receipt of the award by* ~~the award is delivered to~~ the applicant;~~,~~ or
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> (2) ~~within~~ 30 days after receipt of ~~an~~ *a denial or an amended award by the applicant.* ~~order granting, or denying the modification of an award~~ ~~modified pursuant to subsection d. of section 12 of this act, or the rules of the dispute resolution organization,~~ ~~unless the parties shall extend the time in writing.~~
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> The award of the umpire shall become final unless the action is commenced as required by this subsection.

Title 44 – The Poor Law

John Cannel discussed his Memorandum regarding Title 44, The Poor Law. He recalled in February of 2009, the Commission published a report revising the whole of Title 44. Mr. Cannel noted the two main programs - "Work First New Jersey" act and the Work First New Jersey General Assistance Act have confusingly similar names. He also pointed out the following: County welfare agencies administer the majority of general assistance programs; 103 of New Jersey's 566 municipalities maintain offices for local administration; and the State funds general assistance.

Mr. Cannel advised the Commission that the relationship between the two "Work First" laws is obfuscated by their statutory language. In addition, he pointed out the law is so confusing that the agencies that operate under it do not generally rely on the statutes; instead, they rely on

regulations and administrative practices. Mr. Cannel explained that many of the statutes in place before the enactment of current welfare programs are archaic and do not reflect current reality and practice.

Mr. Cannel said that he had considered whether an individual or member of an assistance unit who has received "Temporary Assistance to Needy Families" (TANF) or "General Assistance" (GA) is required to reimburse the state if they acquire assets in excess of those necessary for that individual's ordinary support. Presently, the answer to this question is unclear. In order to address this situation, a provision was drafted that contemplated repayment of the assistance for a period of five years from the receipt of funds through TANF or GA programs established under Work First New Jersey.

Commissioner Hartnett asked Mr. Cannel about the difference between "maintenance at home" and "out-of-door support" Mr. Cannel stated that there was no difference now between the two, explaining that the distinction was to "indoor" and "outdoor" relief in the nineteenth century.

Commissioner Bunn questioned whether the statutes were presently in use. Mr. Cannel replied that the statutes are so anachronistic and so muddled that no one can use them anymore, so the parties have chosen to rely on regulations. Commissioner Hartnett expressed concern about eliminating the language that discusses the requirement for support. He questioned whether such action would eliminate a duty of support for children.

In response, Commissioner Bunn suggested that parental support for children is an issue for the Division of Child Protection and Permanency. He further noted that parents have financial obligations to support their minor children. He cautioned, however, that care should be taken when reviewing these statutes and before proposing the elimination of the statutory basis for such obligations.

Commissioner Bell stated that the statutes in question deal with the obligation to support another person the duty to reimburse governmental entities. Mr. Cannel pointed out that the statutes require the reimbursement of governmental entities that are no longer responsible for the collection of these funds. The deletion of these statutes would affect only a duty to repay for TANF and GA funds, not a general duty to support.

In order to ascertain which laws were still being used, Commissioner Bunn suggested circulating a report proposing the repeal all of these statutes. Given the confusing nature of the law in this area, Commissioner Bell concurred, suggesting stakeholders be afforded the opportunity to comment on such a proposal.

The Commission directed that Staff to continue the review of these statutes.

Pre-Trial Intervention Admission and Denial

Laura Tharney summarized a Memorandum, prepared by law student Adrian Altunkara, relating to the definition of "supervisory treatment" as set forth in N.J.S. 2C:43-12(g)(1). She noted Commission Staff was seeking authorization to conduct additional research regarding New Jersey's admission criteria for the statewide pre-trial intervention program in light of the Appellate Division's decision in *State v. Austin*.[2]

Ms. Tharney explained that in *State v. Austin* the Appellate Division determined that the term "supervisory treatment" used in N.J.S. 2C:43-12(g)(1) refers only to diversionary programs within the state and not to diversionary programs operated under the laws of other states.[3] She further noted that the Court found the prosecutor's reliance on previously dismissed or diverted charges from another state to deny defendant's admission into "Pre-Trial Intervention" ("P.T.I.") in New Jersey amounted to an abuse of discretion.[4]

Commissioner Bunn said that there was no ambiguity in the definition of the term "supervisory treatment." He also observed that the New Jersey courts have defined the term in the same way. Commissioner Bunn indicated that in deciding *State v. Austin*, the Appellate Division was following the statute, and that it was being interpreted as written. He added that admission to Pre-Trial Intervention was essentially a policy issue.

John Cannel posed a hypothetical involving a defendant who had been admitted into a diversionary program in another state and is then arrested in New Jersey. Commissioner Hartnett opined that a defendant's involvement in another supervisory treatment program, is a factor that can be considered when reviewing a P.T.I. application. Mr. Cannel noted the subsequent arrest could serve as a basis to disqualify the applicant from New Jersey's "Pre-Trial Intervention Program."

Commissioner Bell suggested that the "supervisory treatment" language was clear, but the logic was not. He proposed a hypothetical scenario in which an individual is admitted to a comparable program in Pennsylvania and is then eligible for P.T.I. in New Jersey. He noted that in New Jersey, the individual admitted into P.T.I. would not receive the benefit of a "second chance" to be diverted from the criminal justice system. Commissioner Bell suggested that perhaps the appropriate governmental entity in New Jersey could examine and compare the programs in other states to New Jersey's P.T.I. program.

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[2] *State v. Austin*, No. A-1046-14T3, 2016 WL 3004807, at *2 (App. Div. 2016).
[3] *Id.*
[4] *Id*. at *3.

Commissioner Bunn inquired whether other states have disqualifications to their diversionary programs based upon an applicant's prior admission to another state's diversionary program. Ms. Tharney advised the Commission that she did not know, but that that additional research into this area could be conducted by Staff.

Commissioner Bell suggested that this is an area that does not require action by the Commission at this time, and the Commission concurred.

Miscellaneous

The meeting concluded with no legislative updates, and was adjourned on motion of Commissioner Bertone, seconded by Commissioner Bell.