

MINUTES OF COMMISSION MEETING

September 19, 2017

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 Virginia Long (via telephone). 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.

Minutes

The Minutes of the July 2017 Commission meeting were approved on motion of Commissioner Bunn, seconded by Commissioner Long.

Conviction

John Cannel presented a Draft Final Report relating to the definition of “Conviction” in a matter initially brought to the attention of the Commission by *In re J.S.*, 444 N.J. Super. 303 (App. Div. 2016). The proposed revision to the statute adds a subsection s. to N.J.S. 2C:1-14.

Commissioner Hartnett suggested that the language on the first line of the proposed new subsection s. be modified by striking “conviction of” after “The date of”. The other Commissioners were in agreement with the proposed modification.

With the modification proposed at the Commission meeting, the Commission voted unanimously to release the Final Report on motion of Commissioner Long, seconded by Commissioner Bell.

Alternative Procedure for Dispute Resolution Act (APDRA)

Samuel Silver discussed a Draft Final Report intended to ameliorate 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*. He noted that the statute currently provides a party with certain time periods within which to commence a summary action after receiving an award; or, after receiving an award that had been modified pursuant to subsection d. of the statute.

Mr. Silver reminded the Commission that the statute does not provide a time period within which an applicant shall commence a summary action where an umpire *denies* a request to modify the award, or a time period within which 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.

Commissioner Hartnett requested clarification of the proposed language to N.J.S. 2A:23A-13(a), specifically the proposed subsection (2). In response, Commissioner Long suggested a reunification of the statute and provided suggested language as direction for Staff.

Rather than spontaneously formulate a revision to the statute at the meeting, Staff was asked to draft proposed language for the Commission's consideration at the next meeting.

Partnership Trade Name Certificates

Samuel Silver discussed a Memorandum regarding the Partnership Trade Name Certificate registration requirements in New Jersey. Mr. Silver indicated that, during a review of the Model Entity Transaction Act ("M.E.T.A."), he reviewed Title 56 – Trade Names, Trade Marks and Unfair Trade Practices. To his surprise he noted that a violation of this section subjects partners to criminal liability.

Pursuant to N.J.S. 56:1-4, it is a misdemeanor for a partnership to conduct business in New Jersey if they fail to file a "Trade Name Certificate" with the County Clerk's Office in each county in which the partnership conducts business. Mr. Silver noted that the statute is presently silent regarding the punishment to be imposed against those who do not provide each county clerk with the compulsory information required by Title 56. The general penalties associated with "misdemeanors" are set forth in Title 2C. A misdemeanor is the modern equivalent of a crime of the fourth degree, which subjects a violator to up to eighteen months incarceration and up to a \$10,000 fine. Mr. Silver noted that the statute does not distinguish between a "knowing" or "accidental" violation of the statute.

According to Mr. Silver's research, New Jersey's initial statutes in this area reflected an "aggregate theory" of partnerships, under which New Jersey partnerships are seen as a collection of individual partners. In 2000, New Jersey abandoned this line of thinking in favor of the "entity theory" under which the entity is distinct from the partners.

Commissioner Hartnett asked whether it was the general practice to file such a certificate in each county of New Jersey where a partnership conducted business. Commissioner Bell indicated that such a filing should not be necessary and that there is likely a state database created through other, more recent, filing requirements which should supersede the antiquated misdemeanor provision.

Mr. Silver said that the statute does necessitate filing a trade name certificate in each county. He further noted that, as currently drafted, the statute could expose partners to criminal

liability for failing to file the certificate regardless of whether the violation was knowing or negligent. Mr. Silver sought approval from the Commission to research further and address this issue.

Commissioner Bell inquired whether a law partnership would be required to re-file the partnership certificate each time a partner was added or removed to the firm or when other such changes are made. Mr. Silver indicated that as written, it would appear to be a statutory requirement.

Commissioner Long stated that addressing the issue sounded like a worthwhile endeavor. Commissioner Bunn commented that the Commission should, based on its findings, consider the repeal of such an anachronistic statute. Chairman Gagliardi indicated that further research should be conducted on this issue and Staff was authorized to move forward with the project.

Public Safety Law/Seatbelt Use (*State v. Lenihan*)

Timothy Prol discussed a memorandum regarding the legislative history and status of the Commission's Public Health and Safety project. In July, 2015, Staff sought approval from the Commission to undertake a project addressing the issue of notice with regard to the interplay between N.J.S. 39:3-76.2f (“Seat Belt Law”) and N.J.S. 2C:40-18 (“Public Health and Safety Statute”) in response to the New Jersey Supreme Court decision in *State v. Lenihan*, which held that the Seat Belt Law could form the basis for criminal liability under the Public Health and Safety Statute.

Mr. Prol indicated that his research regarding the legislative history led him to examination of the contemporaneous news articles of the time referring to introduction and passage of the bill which became N.J.S. 2C:40-18 and also amended N.J.S. 2C:2-1. Mr. Prol stated that the articles written at the time, taken together with the package of bills which was introduced, showed that the intent of the legislation which created N.J.S. 2C:40-18 seemed to focus on violations of New Jersey building codes by night clubs and similar establishments. Mr. Prol indicated that the incident which gave rise to introduction of the legislation was a stampede in an overcrowded night club which led to the deaths of four people as a result of the inadequate numbers of accessible emergency exits which contributed to the inability of patrons to safely exit the premises.

Mr. Prol contended that there was a strong likelihood that expansion of the scope of N.J.S. 2C:40-18 to include statutes such as N.J.S. 39:3-76.2f as predicate offenses was beyond the scope of the statute as originally contemplated by the Legislature.

Commissioner Long stated that as a result of the broad language of the statute, even if it were narrowed to building issues, it was not clear that it would be applied in a manner limited to the kinds of negative consequences contemplated by the Legislature. She noted that one possible approach would be to identify the types of laws to which the statute would not apply. She asked whether it would be possible to ask the Legislature. Chairman Gagliardi indicated that Staff should reach out to the Legislature to determine if the scope of the law and the direction in which the Courts are seemingly going after the decision in *State v. Lenihan* is consistent with Legislative intent or is an unintended result such that the Legislature might wish to limit the scope of the legislation to those violations initially contemplated at the time the bill was introduced.

Commissioner Bunn suggested that the Commission could consider stripping off the catch-all provisions of the Public Health and Safety Statute and, if appropriate, replace it with a reference to the seatbelt violation if the Commission's focus is accepting the determination in the case that gave rise to the project.

Commissioner Bell indicated that the Court's decision in *Lenihan* appears to have broadened the scope of the statute beyond what was initially intended by the Legislature, but indicated that it has not yet been resolved as to how broad the statute could become. Commissioner Bell stated that it was possibly too broad and/or vague and that it would be difficult to come up with a solution absent Legislative input.

Commissioner Hartnett suggested that one area to modify the statute could be to carve out the motor vehicle provisions because that area of the law is, itself, very highly regulated. He indicated that preserving a result which, in light of the Legislative history presented, included the Seat Belt Law as a predicate offense under 2C:40-18 seemed inappropriate.

Staff was asked to contact the Legislature to assess whether the direction taken by the Court is within the scope of what the statute was intended to encompass, or whether something more limited was intended at the time, and then to determine whether it is possible to pick and choose the kinds of violations that seem to fall within the legislative rubric.

Title 44 – The Poor Law

John Cannel discussed a Memorandum regarding whether to recommend for repeal sections of Title 44 which impose on relatives financial responsibility for the county and municipal welfare costs of an indigent family member or whether to revise these old statutes apply to the current Work-First programs they pre-date. Specifically, Mr. Cannel noted that the issues of financial responsibility of relatives to repay welfare benefits paid, and the financial responsibility of the beneficiary to repay welfare benefits paid remained outstanding. With regard to the issue of

relatives' financial responsibility to repay welfare benefits paid, Mr. Cannel noted that, while it was possible to look to support by the spouse and adult children under certain circumstances, the simplest way to address the issue would be to remove the outdated provisions of the statute requiring support from adult children.

Regarding the financial responsibility of the beneficiary to repay welfare benefits paid, Mr. Cannel noted that the long-running practice has been to require beneficiaries to sign a promissory declaration to repay at the time benefits are applied for. Commissioner Bunn asked for clarification concerning whether there were limitations on this promise.

Commissioner Hartnett asked about the statutory authority underpinning the repayment promise. Mr. Cannel indicated that a common situation involving repayment occurs when an individual receives welfare benefits during the time prior to a worker's compensation award, with those benefits being repaid upon receipt of the full worker's compensation award.

Commissioner Hartnett indicated that it is one thing to repeal the authorization to collect money in a way that many say is outdated, but it is yet another to create new statutory authority to take money from the poor when it is unclear that the authority exists. Mr. Cannel stated that based on all of the information gathered to this time, including feedback from the Department, there is no reason to believe that the Department collects from beneficiaries' children or even attempts to.

Chairman Gagliardi noted that any recommendation made by the Commission would be to recommend revision of the law to codify what has been long-standing enforcement practice for more than thirty (30) years. He agreed with Commissioner Hartnett's contention that the Commission's role was not to create new law or policy and did not want to recommend new Departmental authority which is not already in the statute.

Laura Tharney suggested that instead of incorporating the practice of making individuals sign a promise, while neglecting to enforce that promise, there may very well be no reason to continue to compel people to sign if the Department refrains from using those signed promises as enforcement measures.

Commissioner Long indicated that it could be problematic for the Commission to take a position regarding changes to the substance of the statute. Commissioner Bell stated that the Commission should ultimately address in a comment in its Report the current practice, the fact that the Commission has been unable to identify statutory support for the practice, and that this creates a situation rife with potential for arbitrariness. Chairman Gagliardi indicated that the Commission would address the issue at an upcoming meeting of the Commission.

Expungement

Jayne Johnson presented a Memorandum providing a status update and the additional research requested by the Commission regarding the project proposing revisions to N.J.S. 2C:52-4.1, which governs the expungement of juvenile adjudications.

Ms. Johnson stated that during the past year, expungements were the focus of Legislative activity and several state appellate decisions. The Legislature, in a bipartisan effort led by the Governor to extend the “Opportunity to Compete” – also known as the “Ban the Box” measure, crafted a trio of bills aimed at easing the process for expunging juvenile adjudications and adult convictions.

Ms. Johnson observed that the pending legislation, does not reconcile the legislative intent of N.J.S. 2C:52-4.1 with its plain language meaning, as identified by the *In re D.J.B.* decision, 216 N.J. 433 (2014).

Commissioner Bell stated that the proposed revisions should provide cross-referencing throughout the New Jersey Criminal Code identifying statutes which govern expungement of adult convictions and juvenile dispositions. Commissioner Bunn also suggested a statutory framework for consolidating the expungement process for a petitioner seeking to expunge both juvenile dispositions and adult convictions – allowing for the filing of a single petition.

Commissioner Hartnett inquired whether the sponsors of the pending legislation were aware of the Commission’s work in this area of the law. Ms. Johnson indicated that Staff was interested in contacting the sponsors of the pending legislation to determine whether the work of the Commission may be of assistance. Chairman Gagliardi indicated that Staff should reach out to the bill sponsor and update the Commission concerning this project at an upcoming meeting.

Gap-time Credit

Laura Tharney discussed a memorandum regarding whether gap-time credits pursuant to N.J.S. 2C:44-5 apply to offenses outside of the Criminal Code.

Ms. Tharney stated that *State v. Franklin* applies to the issue of whether gap-time credits exist outside of the Criminal Code – in this case, to imprisonment as a result of a Title 39 violation. The Court noted that gap-time credit has already been applied beyond the code in the context of juvenile offenses.

Ms. Tharney pointed out that there was a bill pending before the Legislature dealing with this issue, which seems as though it would significantly limit the application of gap-time credit. The bill was introduced in February of 2016 and referred to committee, but has not moved since that time.

The Commission determined that it would be appropriate to await further action by the Legislature in this area.

Rent Security Deposit Act

Erik Topp discussed a Memorandum which examined the result in *Baker v. La Pierre, Inc.*, in which the Appellate Division considered the propriety of forum selection clauses that allow a landlord to lock a tenant into litigation in a county of the landlord's choice under the terms of their lease agreements.

Mr. Topp indicated that it seems as though there is a gap in the statute that could have the practical effect of limiting tenants recovery of a security deposits. He said that tenants may be unwilling to pursue the course of action that Baker did and might instead end up sacrificing their security deposits rather than litigating the issue in an inconvenient jurisdiction. Preliminary research has revealed no other written opinions on this issue, in New Jersey or any other state; this limited judicial and legislative guidance may lead to inconsistent application of the law. Preliminary interest in the project was expressed by Legal Services of New Jersey.

Commissioner Bunn asked what the result would be if the tenant moved to another county and wanted to bring the claim in that jurisdiction. He further inquired as to whether it would be a *Winberry* issue. Commissioner Hartnett indicated that the statute seems to indicate that venue is waivable.

John Cannel stated that a portion of the Commission's previous Landlord Tenant project includes relevant information on point that would be of assistance to Staff. The Commission authorized Staff to conduct further research on the issue.

Miscellaneous

Ms. Tharney identified the four bills enacted so far this legislative session that involve work done by the Commission (Pejorative Terms, Uniform Fiduciary Access to Digital Assets Act, Overseas Residents Absentee Voting Law, and Millers of Grain). The meeting concluded and was adjourned on motion of Commissioner Hartnett, seconded by Commissioner Bell. The October meeting is a morning meeting – beginning at 10:00 a.m.