

MINUTES OF COMMISSION MEETING
November 8, 2001

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, Peter Buchsbaum and Vito Gagliardi, Jr. Professor Bernard Bell, Rutgers Law School, attended on behalf of Commission Stuart Deutsh; Professor William Garland, Seton Hall Law School, attended on behalf of Commissioner Patrick Hobbs.

Also attending were Rebecca A. Moll, esq., Sills Cummis Radin Tischman Epstein & Gross, PA, Newark, New Jersey.

Minutes

The Commission accepted the amended Minutes of September 20, 2001 and accepted the Minutes of October 18, 2001 as submitted.

Title Recordation

The Commission considered a provision to deal with the effect of improperly indexed documents of title. The provision proposed a new statutory requirement that would require a person recording a document to do a continuation search within thirty days of the recording to make sure the clerk had indexed the document properly.

The purpose of the provision was to protect a subsequent purchaser from relying on the indexing system and failing to obtain notice of the improperly filed document. As to documents recorded serially within a short time frame, such as those depriving the parties of verifying the accuracy of the indexing, the first to record rule would apply and the subsequent innocent purchaser would lose.

Staff informed the Commission that the counties did not have a uniform practice as to the time it took to index a document. The proposed statute would require them to index the document within two days of the recording, a time frame generally recognized as not practical.

Professor Garland expressed his concern for preservation of the race-notice doctrine. His objective was to protect the innocent person relying on the records. The risk of faulty indexing should be borne by the person recording the document because that person is the only person with the ability to verify whether the document has been indexed correctly. If the person does a

continuation search and learns of an error, that person has the burden to inform the clerk to make the correction.

The Commission decided on a ten calendar day period. Thirty days appeared to be too long in conjunction with the two-day statutory requirement to index. Title companies now ordinarily do a continuation search prior to issuing a final policy. However, this practice appears to take a substantial amount of time.

Commissioner Buchsbaum was concerned that a letter informing the clerk of the improperly indexed document would be required to be recorded. That would constitute a new step in the recording process and require clerks to maintain a new set of books to contain these letters. The Commission did not find that the additional duty would be onerous, and directed staff to modify the time requirement to ten calendar days. Commissioner Buchsbaum dissented, stating that a person has a right to rely on the government's doing it right. He asked staff to highlight that new provision to solicit comment on its reasonableness.

Commissioner Bell questioned the use of the term "appropriately recorded" as being too vague, and whether there were other types of errors in indexing other than the wrong name. The Commission directed staff to use "indexed as required by" and to clarify that the letter notification negates disability under section (e).

The Commission approved these changes and asked that a revised draft be circulated to the Commissioners prior to the next meeting. If no problems are found in that draft, a tentative report can be released before the December meeting.

Uniform Mediation Act

John Burke explained that the uniform law provides the confidentiality privilege to all parties to the mediation proceeding. The New Jersey court rule gives the privilege to parties to the case, not to the mediator, the experts nor other witnesses. That is the main difference from the uniform law, which gives the privilege to the mediator and others. There are other exceptions in the New Jersey law. The Act also contains a conflict of interest provision.

The objective of the uniform law is to make the law uniform throughout the states. No state has yet adopted the law. The Commission asked staff to find out whether any state already extends the privilege to non-parties, to identify the need for the new Act and to explain how the uniform law would affect New Jersey law. Staff will prepare a draft Tentative Report for the next meeting.

Election Law

Judith Ungar stated that changes suggested by the Commissioners at the last meeting had been made to the draft. She noted one change, regarding civil service. She also reported on comments made by county election officials to staff by telephone or in writing prior to the meeting. The Administrator of the Hunterdon County Board of Elections proposed that the county executive director concept be tried first only in First Class Counties.

A Commissioner in Camden County opposes having a single executive director in any county and opposes the involvement in the election process of the county clerk who is an elected official, on conflict grounds. Staff proposed the permissive use of a single executive director to conform to differences in local cultures among the counties. The provision also gives the executive director tenure. The Union County Administrator told staff that would be counter-productive because the person will be replaced regardless of ability.

The Union County Administrator also spoke about the requirement to print election notices and ballots in languages other than English. Some native-born United States citizens, Puerto Ricans for example, are speakers of Spanish. As a result, she thought that it was justified to treat the Spanish language as different from other languages. She proposed a compromise: if the census revealed that 10% of the voters in a district have a primary language other than English, the ballots would be printed in two languages. Reliance on official census data would at least make it clear when foreign language materials would need to be prepared.

Membership of State Commission, its Role and Function

Commissioner Gagliardi, referring to 19A:1-3, asked how the bi-partisan membership of the County Board of Election would work. The Commission found reference to a "County committee" amorphous. The Commission preferred the present system of four people" the county chairmen, vice chair

lady, state committeeman and state committeewoman, and directed staff to incorporate it in the next draft.

Commissioner Garland identified an error in 1-3(a), line 9: the term should be the "County Board" not "Commission."

Regarding 19A:1-1, after considering various alternatives, the Commission decided that the state commission should be bi-partisan.

Commissioner Buchsbaum referred to subsections (d)8 and (d)9 which specify the tasks of the state commission. These sections would serve as good starting points for analyzing the composition of a state commission. The Commission asked staff to identify the types of issues likely to be encountered by the state commission and to specify what duties the state commission would be given under the statute.

Commissioner Garland, identifying several hypothetical scenarios, questioned the open-ended power to the state commission to assess penalties against county boards for violations of its rules. He said that the draft should limit and make these powers more specific.

Chairman Burstein stated that the original idea in the earlier election reform report, of forming a state commission to govern the counties was based on the lack of uniform practices among the counties. Since then, practices in the counties have changed, undercutting the need for centralization. Commissioner Bell asked in concrete administrative problems at the county level exist that a state commission would be designed to handle. The experience of Passaic County was cited as an example where state intervention might be needed to compel the county to comply with election law requirements.

Delegation of authority to Regulatory Board

Mr. Burke suggested that the problem of leaving detail to the statutes is that it is frozen in time. There is no national pattern about voting and the election process. There is tremendous diversity, and experimentation is going on among the states. The regulatory process is needed to implement new practices and remove those that do not work. If the procedures are stated in the statute, then the counties cannot change those procedures even if new and better procedures come along and evolve over time. Professor Bell stated that the

Legislature, not an agency, should make major policy decisions. For example, the Legislature, not a non-elected board, should decide whether a particular method of voting is permitted. The state agency would fill in the details.

Commissioner Buchsbaum expressed discomfort about making judgments as to structure of the state election process since the Commission had not yet identified the substantive changes to be made in the system.

Early Voting and other Voting Innovations

Statistics show that if a state allows people to vote early, up to 25% of them will do so. In addition, states have different cut-off periods. Staff could not state whether this approach is good or bad. Rebecca Moll asked whether results of early voting are disclosed to the public prior to Election Day. Staff explained that these results were not made public and are counted with the other votes after the polling place has closed.

Chairman Burstein stated that the public deserves a full view of the candidate until the Election Day. Although it was acknowledged that some relaxation of absentee voting requirements was desired, Ms. Ungar asked whether expanding absentee voting would ultimately result in widespread early voting. Chairman Burstein asked whether early voting expanded the number of people who cast votes.

Commissioner Gagliardi posed the question of how one can run a campaign if the election campaign does not know when the voter is going to cast his vote. He asked for specific information about how other states handle early voting. Commissioner Gagliardi expressed his discomfort with some new practices. In tightly fought elections, the procedures must be certain, and the vote must be secure. He asked for a statistical analysis of foreign state experience and law.

Staff stressed that there is no pattern; therefore, the next step is to learn why some states chose to adopt different procedures.

The Commission directed staff to specify in more detail the substantive changes to be proposed, such as statewide registration, list purging, choice of machines, signature comparison, early voting, and provisional and absentee ballots. Staff will provide facts on out-of-state experience on the consequences of

changing election procedures and whether they affect voting patterns and whether they offer a compelling reason for change. Commissioner Gagliardi asked staff to find news accounts of the impact of election procedure changes.

Miscellaneous

Commissioner Buchsbaum requested that the abandoned building project be put on the agenda for the next meeting.

The next Commission meeting is scheduled for December 13, 2001.