MINUTES OF COMMISSION MEETING
November 20, 2008

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7th Floor, Newark, New Jersey were Commissioner Vito Gagliardi, Commissioner Andrew Bunn, Commissioner Albert Burstein and Commissioner Sylvia Pressler. Grace Bertone, Esq. of McElroy, Deutsch, Mulvaney & Carpenter, LLP, attended on behalf of Commissioner Rayman Solomon and Professor William Garland of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs.

Also in attendance were Lawrence Fineberg, Esq. from the Land Title Association; Thomas Perry, Esq. of Golub & Israel, P.C.; Charles Kenny, Esq., of Peckar & Abramson; and Gary Forshner, Esq. of Stark & Stark.

Minutes

The Minutes of the October 16, 2008 meeting were accepted as submitted on a motion by Commissioner Bunn and seconded by Commissioner Burstein.

Miscellaneous

John Cannel announced that Ksenia Takhistova, who had been the Law Student Intern for the Commission, was leaving the Staff. Commission Staff members praised the quality and volume of her work and the Commission extended its best wishes to her.

Title 9

Mr. Cannel advised the Commission that a first meeting had been held on the Title 9 project and that some general concepts had been agreed upon by the participants. Another meeting is scheduled for the first week in December and, at that time, Mr. Cannel hopes that the project will be reviewed line-by-line. He noted that one of the goals of the project is to harmonize the law with practice, streamline the process and eliminate the two different sets of procedures found in the current law. The draft revised Title on which he is working will have the information from Title 9 and the pertinent information from Title 30. Because of the nature of the revision, he suggested that a full table of dispositions will be needed.

Commissioner Bunn noted that in Section 1a, there is a reference in the introductory sentence to "his custody and control" and asked if it should instead read "his or her" or "the child's". Commissioner Burstein suggested that the language should be replaced with "a person", which would tie in with the definition of a "child" as "a person under the age of 18". Commissioner Pressler suggested the alternate phrasing of "a child whose parents".

Commissioner Bunn also pointed out that in Section 2e, which defines "day school", the definition should be revised to read "kindergarten through 12 or any of them" since day schools exist without all those grades. Chairman Gagliardi pointed out that there is a Governor's initiative that will require schools to offer programs for children 3 and 4 years of age. He

suggested that the language be modified to say "in the pre-school grades through grade 12" to accommodate the initiative.

Commissioner Bunn also pointed out that Section 5b provides that "anybody making a report of abuse gets immunity" while the other two subsections contain a good faith requirement. He suggested that this section should contain such a requirement. He also suggested that the language in Section 5c looks as though it describes an employment discrimination context and asked if it was included in the LAD. Mr. Cannel said that it was currently a disorderly persons offense to fail to report abuse. He explained that he could imagine prosecution for a professional, like a doctor or a teacher, but not anyone else. Commissioner Pressler said she could not imagine prosecution for a neighbor and suggested that the language be clarified so that it no longer reads "any person". Chairman Gagliardi suggested that the Legislature might not be receptive to a modification that required fewer people to report abuse. Mr. Cannel said that he would discuss this issue with his working group and ask for their comments.

Construction Lien Law

Marna Brown advised the Commission that it appeared some outstanding issues had been resolved but others remained. She advised that the definition of "lien claim" already had been revised by consensus. Ms. Brown also indicated that a consensus may have been reached regarding the definition of "lien fund" and the use of the term "final" before the term "completion" in proposed section 2A:44A-6d. She explained that accommodating the concern of Mr. Sussna, an architect and commenter, regarding the definition of "contract price" remained an issue. He had explained that the contract price is not necessarily a sum certain at all stages of the project. An architect's design work is tied to different factors and may not be determined until construction is underway or completed.

Commissioner Pressler said that she did not understand why the concern about the lack of a sum certain contract price remained a problem, questioning how it could be said that the amount of compensation could not be calculated. Commissioner Burstein stated any concerns with the bonding issue had been addressed, and if the contract price changed an amendment could be filed. Charles Kenny said that difficulties can arise in situations in which the architect's contract states that the architect will receive 10% of the contract price and then the architect undertakes some amount of work but the contract never comes into existence through no fault of the architect. Under those circumstances, the architect, concerned about not being protected, will lien for 10% of the anticipated worth of the job. Professor Garland suggested that if no construction contract comes into existence, the architect's agreement to provide services should set an hourly fee for services rendered. Commissioner Pressler agreed that this is something that should be addressed in the contract between the parties. Mr. Kenny suggested that similar issues arise in situations where there is a "cost plus" contract because it requires the liening party to be creative with the lien form and, at the same time, careful that the lien amount is not exaggerated.

Regarding the outstanding issue of "final completion", Ms. Brown explained that "completion" is a word that requires a great deal of flexibility depending on the context, *i.e.*, who is completing what, how "complete" the work really is, whether substantial, final, or complete but for the punch list. The commenters with whom she had discussed a solution agreed that an explanation of "final completion", for purposes of proposed section 2A:44A-6d., could be in the Comment rather than in the text.

Commissioner Bunn said that if the purpose of the definition of "completion" is to determine when the time period for the filing of the lien claim begins to run, and if the draft is going to err on the side of ambiguity, the language could become problematic in the case of a general contractor whose work is done in various stages. He asked if such an individual can wait until completion of the very last thing on the project before liening for work completed in the initial 15% of the job. Mr. Cannel said that this area of the law is very fact-sensitive and there are good reasons to say that the general contractor in Commissioner Bunn's hypothetical should not be able to wait, if 50% of the payment for the job was due on 1/1/08, until the next payment is due on 6/1/08, and then file lien claims for both.

Commissioner Pressler said that the contract for any job will always define when the right of payment accrues, and that date should be the "completion" date. Commissioner Burstein asked what the industry standards were in this regard. Ms. Brown said that while American Institute of Architects (AIA) standards exist, they are not used industry-wide. Commissioner Pressler suggested that the point of the lien is that someone on the job, who should have been paid, did not get paid. The filing should occur within 90 days after the point when that party realizes payment was not made. Professor Garland said that, if the initial lien filing proves insufficient because additional outstanding amounts accrue, the lien claim could be amended or multiple liens could be filed. Mr. Kenny explained that once an individual or entity files a lien, they are really no longer on the job because the lien poisons the relationship.

Mr. Kenny noted that the purpose of "completion" in this section of the statute was to determine the point for commencement of the 90 days, after which, a claimant cannot file a lien. Mr. Kenny asked for clarification of the Commission's position with regard to "completion", suggesting that the current language has not been a significant problem or source of litigation and could be left the way it is. Chairman Gagliardi agreed that this was a matter that can be resolved by contract between the parties, and that it is not necessary to do so in the statute. Chairman Gagliardi instructed Staff to leave the definition of "completion" in its present form without insertion of the word "final". He added that in light of the consensus that the Commission has heard regarding this issue, no detailed explanation is required in the Comment to this section.

Commissioner Pressler questioned the point of the definition of "lien fund". Mr. Cannel explained that the lien fund concept encompassed three concepts: (1) it represents the fund from which money is to be paid, (2) it is the maximum amount for which an owner can be liable, and

(3) it is the maximum amount of liens that can be placed on an owner's interest in the property. Commissioner Pressler observed that those concepts are not a definition of a lien fund, but a limitation on the amount of the lien fund and, for the sake of clarity, the definition should be divided into several sentences as follows: "The lien fund is a pool of money from which one or more lien claims may be paid. The lien fund may not exceed the maximum amount for which an owner can be liable. The lien on the owner's interest in the property cannot exceed the lien fund."

Ms. Brown advised that the question of whether security services should be lienable remains an outstanding issue. Concern had been expressed that including security guard services in the definition of "work" or "services" would open the door to a large number of other providers of services seeking to be included. Ms. Brown explained that language referring to "security guard services" had been placed tentatively in the proposed definitions of "services" and "work". Mr. Forshner said that, from a policy perspective, the inclusion of security services in the statute appears to be anomalous, and that, if such services were included, it was unclear why marketers, exterminators, landscapers, and similarly situated services also should not be included.

Commissioner Pressler said that the categories presently included in the statute all represent professions involved with physical preparation of the land for construction. She expressed concerns about including security services with other professionals who prepare the land for the project while not including accountants, lawyers and others who are involved in the transaction but in a different capacity. Commissioner Burstein added that the information provided at the last meeting had highlighted the fact that security services do not add value to the project itself in the same way as the presently-included categories do. Commissioner Bunn suggested that the Commission was faced with a line-drawing exercise and the line that has already been drawn is that suggested by Commissioners Pressler and Burstein. Any modification to that line may represent a policy decision more appropriately made by the Legislature than by the Commission. Professor Garland said that if the Commission elects not to include security services, the issue and the Commission's reasoning should be included in the Comment so that the Legislature will be made aware of the issue.

Chairman Gagliardi asked Mr. Perry if the lien laws of other states provide protection for security services, to which he replied that of the five states whose laws he has reviewed (his client works in those states) none offer protection at this time. Mr. Perry also pointed out that the value added to a property by an architect is similar to the value added by other ancillary service providers.

Commissioner Pressler observed that the statute makes a distinction between the planning and construction stages of a job. She noted that perhaps the Comment should include reference to those individuals and entities whose collateral input is not directly related to either the planning or construction stages, such as accountants, attorneys, insurance providers. If the

protection afforded by the law is going to be expanded, then perhaps it should include anyone who provides any kind of service to construction. She also said that if the definition of "work" were broadened, it could include those collateral work and service providers currently excluded from the protections of the statute. She explained that, as a general rule, the owner is ultimately going to be liable for the costs associated with the collateral work and therefore should have value to show for the extent of its liability. Commissioners Pressler and Burstein suggested the Commission's views and reasoning be included in the Comment to the "work" definition.

Mr. Forshner said that under proposed paragraph 2A:44A-3e., if a tenant contracts for improvements, the leasehold is subject to a lien. He said that the current draft proposes to extend liability to an owner for a tenant's improvements and that, under the current formulation, merely consenting to improvements exposes an owner to a lien and liability. Mr. Forshner said that the typical lease contains language that says that a tenant cannot contract for improvements without owner approval. Professor Garland suggested that the writing that the owner signs authorizing the work must also subject the owner to lien. Mr. Forshner requested that language be added to the draft saying: "and the writing provides that it is subject to a lien for these improvements". Professor Garland suggested that the statute should refer to Title 22A regarding any fees rather than including a fee schedule in the construction lien law provisions.

Title 22A

Laura Tharney advised the Commission of the October 22nd and October 24th meetings that she attended regarding this project. She explained that those meetings, with representatives of the Surrogates and County Clerks, had been very helpful and that she had received detailed comments that had resulted in substantial revisions to the sections of the draft pertaining to those offices. She indicated that in addition to the comments received at those meetings, she had also received comments from the Administrative Office of the Courts which included feedback from the Civil, Municipal, Tax and Criminal Divisions of the AOC as well as the Superior Court Clerks. Ms. Tharney said that she had also been contacted by the Tax Court and advised that her attempt to integrate the Tax Court fee provisions with the other Superior Court fee provisions had resulted in errors since the language of the current statute is no longer accurate and the fees for the Tax Court are presently found only in the Court Rules.

Ms. Tharney explained that the current draft contains new information pertaining to the Tax Court and that she anticipated receiving additional comments from the Surrogates and the County Clerks after they had an opportunity to review the most current draft. While she had hoped for a detailed review of the draft by the Commission at this meeting, Ms. Tharney suggested that since the review of the latest draft was still ongoing, the Commission's detailed review could wait for a later meeting.

Ms. Tharney also said that in addition to awaiting feedback, there were two areas in which she wished to conduct additional research. The first concerned a provision in the current

statute that listed a charge of $150 for electronic copies of data. She said that at least some of the Surrogates were troubled by this charge and had begun considering how to modify the charge to make it more rational and technologically neutral. Another area that Ms. Tharney wanted to review was whether the Tax Court fees could and should remain in the Court Rules while the fees for all other Courts are contained in the statute. She indicated that she would advise the Commission of the results of her research.

Ms. Tharney asked for the Commission's view on the inclusion of a definitions section, explaining Staff's concerns about including such a section in this Title. The Commission agreed that a definitions section was unnecessary, and Commissioner Pressler suggested that any ambiguity with regard to any of the terms could be noted in the Comments.

Commissioner Pressler suggested that the structure of the Title required still more revision, and that it should be reordered as follows: (1) Civil; (2) Probate; (3) Criminal; (4) Court officers; (4) County Clerks and Municipal Clerks; (5) a separate section for the payments to witnesses and jurors; and then (6) the payment allocation and other administrative sections. She suggested that the beginning of each section should describe the applicability of the section, clarifying the courts or other entities to which the provisions of the section apply.

Ms. Tharney requested guidance from the Commission on the issue of copying fees. She explained that the AOC had suggested that the copy fees should be more aligned with the fee schedule set forth in the Open Public Records Act, but that modifying the fees in the current statute would potentially cause significant problems for the budgets of the Surrogates and County Clerks. Commissioner Pressler suggested that aligning the copying charges with OPRA is a good idea. Chairman Gagliardi pointed out that by making an OPRA request for the same documents, one could obtain them for the fee schedule set forth in OPRA, and agreed that the copying charges be aligned with OPRA. Commissioner Pressler suggested that, as an alternative, the charges could be left in their current form and a Comment provided explaining the issue. She also suggested that an Attorney General's Opinion pertaining to electronic document fees existed that might contain some useful language.

Ms. Tharney also requested Commission guidance on the issue of fees for service and execution of documents by the Sheriffs and Special Civil Part Officers. The AOC had suggested the implementation of a flat fee of $15 rather than the current draft charges for service range, which range from $10 to $20. Commissioner Pressler recommended that the uniform fee of $15 replace the language of the current draft.

Uniform Child Abduction Act

Commissioner Pressler said that there was no power provided by the Uniform Act that Chancery judges do not now have and exercise. She moved to conclude the project without recommending its enactment. Professor Garland seconded the motion. In order to adhere to Commission procedure in these matters, Chairman Gagliardi asked that the standard final report

be prepared for the December meeting stating that the Commission was recommending no action on this uniform law. Commissioner Burstein asked that NCCUSL be contacted to determine its reaction before the next meeting.

Miscellaneous

The meeting was adjourned on motion from Commissioner Pressler seconded by Commissioner Burstein. The next meeting is scheduled for December 18, 2008.