MINUTES OF COMMISSION MEETING
December 16, 2004

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, Vito A. Gagliardi, Jr, and Sylvia Pressler. Professor Bernard Bell of Rutgers Law School, Newark, attended on behalf of Commissioner Stuart Deutsch, Professor William Garland of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs, and Grace Bertone of McElroy, Deutsch & Mulvaney, attended on behalf of Commissioner Rayman Solomon.

Chairman Burstein and Vice-Chairman Vito Gagliardi, Jr. welcomed new Commissioner Sylvia Pressler.

Minutes

Commissioner Gagliardi requested that in the section discussing medical peer review, the phrase "brought this issue to the Commission's attention, Dr. Coates" be deleted, and that the phrase "a typographical errors" be corrected.

Title 39

Laura Tharney reported that a second revision of the draft provisions concerning required equipment eliminated overlapping federal provisions. Ms. Tharney also told the Commission that on December 1, she attended the State Traffic Safety Officers Association meeting. The Association extended an invitation to the Commission to join the Association or to attend as many meetings as would be helpful. Ms. Tharney said that she would attend the Association's meetings as appropriate, and seek input from the members. The Association is willing to review the Commission's work and has set up a committee to do so. On December 9, Ms. Tharney was invited to, and attended, a joint meeting of the Monmouth and Ocean County Traffic Safety Officers Association. The members were receptive to the Commission's project, and some offered preliminary comments and suggestions.

Regarding the draft language pertaining to required equipment, Ms. Tharney said that she would forward it to the Motor Vehicle Commission and ask for comments.

Commissioner Gagliardi noted that it may be appropriate to expand the draft language concerning windshields to cover all windows. He also asked whether the language in 39A:12-SL3 which requires the use of amber warning lights by U.S. Postal Service employees is current law. It is. Commissioner Gagliardi asked if federal law required such a provision and Ms. Tharney said that she did not know and would find out.

Mr. Cannel mentioned 39A:11-E6 regarding optional lamps and indicated that we do not know if this is still relevant, or just of historic interest. He said that some time ago Staff was contacted by one of the auto manufacturers; he believed it to be General Motors,

that wanted to manufacture an SUV with an extra light in the rear but asked whether they would be able to sell it in New Jersey. According to current law, it was not a permissible optional lamp.

Enforcement of Judgments

John Cannel stated that the question remaining is whether and under what circumstances real property is accessible to satisfy a judgment regardless of the fact that personal property has not been exhausted. He noted that the Commission's initial position was that there should be no distinction between real and personal property.

Professor Garland said that if the judgment debtor does not want real property executed on, he should come forth and make personal property sufficient to satisfy the judgment available. He said that the creditor should be allowed to go after the real property without having to exhaust personal property unless the debtor offers up personal property. He stressed that once the enforcement stage of the proceeding is reached, the enforcement of the judgment should proceed without the need to keep going back before a judge.

Professor Bell responded that the New Jersey approach is essentially operated as a homestead exemption since we do not have such a protective exemption. He explained that he is concerned about doing away with a protective mechanism if the result is that individuals would lose their homes. Professor Bell indicated that there is a considerable amount of consumer debt; a portion of which results from medical care. He is concerned about people who have incurred debts from medical services losing their houses. He is also concerned with the fluidity and weakness of the job market and the fact that many people spend some period of time unemployed and support themselves by incurring additional debt.

Professor Garland said that ultimately the creditor will be able to go after the real property, but it will just cause more expense and delay.

Chairman Burstein asked Professor Bell if his approach was to completely protect real property from creditors. Professor Bell replied that he is actually in favor of something akin to a mini-homestead exemption. He added that he is hesitant to remove something that now operates, in practical terms, as a homestead exemption since New Jersey does not formally have a homestead exemption and is not likely to have one.

Professor Garland added that a discussion of whether a debt is justifiable is a prejudgment argument. If the judgment should not be entered, or should not have been entered, that is an argument for the debtor to make before the judgment, or afterward, by way of a motion to vacate. He said that he did not see the current New Jersey practice as a homestead protection. He also asked if the Commission wasn't focusing on individual debtors rather than commercial debtors. Professor Garland noted that a number of states

provide protection for a primary residence, but not for additional residences or commercial properties.

Commissioner Pressler asked why the Commission did not try to create a homestead exemption. She also asked if there was a question of a cloud on the title at an execution sale because there was available personal property. Mr. Cannel answered that there is a reluctance to execute on real estate because of problems with title.

Chairman Burstein asked Staff to draft a homestead-like exemption for the Commission's review. Mr. Cannel said that Staff would provide a draft for the January meeting. Commissioner Gagliardi asked if the draft would include a cap on the exemption; Mr. Cannel said that it would. When Professor Bell asked if there would be a separate cap for real property, Professor Garland mentioned that the federal bankruptcy code has an exemption, and noted that it is not a particularly generous one. Chairman Burstein observed that the Commission might be nearing an acceptable compromise on this project.

U.C.C. Article 7

Mr. Cannel said that Revised Article 1 is out as a Tentative Draft. He has not heard of anyone taking issue with the revisions to Article 7. Chairman Burstein said to send out the project as a Tentative Report.

Peer Review

Judith Ungar told the Commission that Staff is trying to contact at least two hospitals in every state and has reached about 50 so far. Staff asks three questions regarding the extent of the protection afforded peer review materials. The responses, from attorneys and Risk Management Managers, have been substantially uniform. 1) Can a government agency obtain peer review committee materials? Answer: it cannot. 2) Does a physician on the peer review committee or the committee as a whole ever wish to waive the protection? Answer: no. Many respondents said that they could not imagine a situation in which this would occur. 3) Would physicians be more reluctant to discuss their peers without the protections afforded peer review materials? Answer: yes. Most people she had spoken with were amazed that New Jersey did not offer peer review materials protection from disclosure.

Mr. Cannel reiterated that the responses had been consistent and that everyone asked believes that the privilege is essential. Mr. Cannel said that in cases seeking removal of privileges to practice, the physician in question would be participating in the proceeding. As a result, the privilege would not have to be waived in order to provide the physician with any information he or she might wish to have, as the physician would be in attendance.

Commissioner Pressler asked if a physician could obtain otherwise privileged information once the State Board obtains it. Mr. Cannel responded that the State entity could be selective about the information it requested, but noted that there remains a question as to whether if the State uses any of the information, they have to disclose all of it. He asked if there are any hospitals which only have a proceeding and send a letter. Commissioner Pressler responded that they are all supposed to have a hearing in every case. She also said that all hospitals have mortality and morbidity ("M&M") committees and asked if these would be considered peer review proceedings. Ms. Ungar said that these committees are not the same as peer review committees, adding that hospitals are required to report all M&M committee findings regarding both mortality events and near-events to the State. Commissioner Pressler said that since all accredited hospitals have M&M committees, if there is a difference in treatment between the two types of committees, it is easy to see where the bulk of the investigation would take place. As a result, the M&M committees would be left with only statistics. There was additional discussion of whether M&M and peer review were truly a "dual track" system and whether there was overlap between the two.

Chairman Burstein asked that Staff ask the management of New Jersey hospitals if there is a reluctance to testify or expose people in New Jersey peer review since we lack the protections afforded by other states. Ms. Ungar responded that an individual who had been a Director of Medicine at a Bergen County hospital and is associated with other hospitals said there was definitely a reluctance to participate in peer review in New Jersey. That individual also suggested to Ms. Ungar that doctors would speak more candidly and would be more amenable to serving on peer review committees if the materials looked at and generated by the committee were protected from disclosure.

Commissioner Pressler observed that there is a significant difference between immunity and privilege and that they should not necessarily be discussed congruently. Mr. Cannel noted that everyone is focused on the use of peer review information in malpractice cases, and that maybe we should limit the peer review protection to malpractice matters. There was discussion of the possibility that other sorts of matters would then be initiated in order to obtain the materials.

Commissioner Pressler asked if a patient opens up an investigation into his or her own treatment, whether the information is covered by HIPAA (the federal Health Insurance Portability and Accountability Act).

Chairman Burstein asked Staff to prepare a legal memorandum citing the established law in this State, including the impact of HIPAA for the next meeting.

Recompilation

Mr. Cannel said that he had met with the Office of Legislative Services (OLS) which told him that it had comments on the issue of recompilation, which it would provide to Staff. One issue is the having the power to recompile. Mr. Cannel suggested that the OLS would be reluctant to use it. A second issue is the imposition of a requirement for a "paper trail" on any recompilation and corrections. Currently, there is no such requirement, and, as a result, no record of the changes made or the reasons for them. Mr. Cannel said that while some changes to the statute are simply the correction of a spelling or the insertion of a comma, other instances are more substantive.

Chairman Burstein recalled an omnibus correction document that dealt with a number of different statutory sections. Mr. Cannel agreed that there had been such a document, but that it no longer applies consistently. He noted that most corrections are small; the addition or absence of a comma is normally trivial, but not always. Mr. Cannel reminded the Commission of its having brought to OLS's attention a section of a bill that was passed in which all of the portions to be deleted had been left in, and all of the portions to be added had been left out. Mr. Cannel said that a paper trail is useful in cases like that one. There are perhaps dozens of technical corrections a year that are handled only by a letter to the law publishers.

Mr. Cannel suggested that a final issue for the recompilation project is the citation system. He is not in favor of retaining the tripartite system. The citation issue is basically a cutting of the Gordian knot; the Legislature now uses a system of citation so complicated that it sometimes causes errors requiring additional legislation to correct. The problem with using "N.J.S.A." as a uniform citation is that it is proprietary.

Chairman Burstein said that in years past, this information appearing on our website would have led to inquiries from publishing companies which wanted to produce the compilation, and asked if we had had any responses. Mr. Cannel said that Staff had received one contact from a West representative, but West was not interested after it was made clear that we were discussing an alternate means of compilation.

Weights and Measures

Mr. Cannel has been contacted by numerous Weights and Measures professionals who have primarily expressed concerns about the revised penalty provisions. He will pursue this issue with them.

Election Law

Mr. Cannel said that Senator Bernard Kenny had set up a meeting for Commission representatives with Senator Gill to discuss the Election Law Report and that there is a chance that a portion of that Report may move forward. Chairman Burstein said that he

would send a letter to Paul Fader reiterating Mr. Cannel's offer of the Commission's services in drafting any changes required.

Miscellaneous

The 2005 schedule of proposed meeting dates was adopted as proposed, with changes to be made as necessary to accommodate the schedules of the Commissioners.

The next meeting is scheduled for January 20, 2005.