

**MINUTES OF COMMISSION MEETING**  
**December 16, 1999**

Present at the meeting of the New Jersey Law Revision Commission held at 153 Halsey Street, 7<sup>th</sup> Floor, Newark, New Jersey were Commissioners Albert Burstein, Peter Buchsbaum, Vito Gagliardi, Jr., and Hugo Pfaltz, Jr. Professor William Garland attended on behalf of Commissioner Patrick Hobbs.

Also attending were: Pat Tumulty, New Jersey Librarians Association; Riva Kinstlick, Prudential; Dawn Shanahan and Tisha Adams, Division of Consumer Affairs; Carol Roehrenbeck, Rutgers Law School Library; Richard Stokes, Insurance Council of New Jersey; Mary Kay Roberts, Riker, Danzig; and Christina Strong, Counsel to the New Jersey Organ and Tissue Sharing Network.

Minutes

The Commission approved the Minutes of the November 18, 1999 meeting as submitted.

Uniform Anatomical Gift Act

Judith Ungar referred to the November 8, 1999 memorandum held over from last month's Commission meeting. The memorandum presented three draft options for N.J.S. 26:6-58.1, the "required request" law enacted in 1987 (the sole issue remaining before the Commission prior to its reaching a final report). Christina Strong, Counsel to the New Jersey Organ and Tissue Sharing Network, explained her preference for Option 1: it most accurately follows the uniform law, yet its language is clearer than that of the uniform law. Its clarity will aid lay readers.

Professor Garland asked whether licensing statutes other than the one referenced in Option 1 exist. Ms. Strong said that statute was the only one. Commissioner Gagliardi questioned the deletion in Option 1 of the second sentence in subsection (b)(2): "Consent or refusal need only be obtained from a person in the highest priority class available." Ms. Ungar noted that the Commission's preferred language had been added as the second to last sentence in subsection (a).

The Commission then voted unanimously to adopt the first option and to release the Final Report and Recommendations to the Legislature.

Uniform Computer Information Transaction Act (UCITA)

Maureen Garde stated that the December 6, 1999 memorandum was a running start on UCITA. Threshold questions with respect to undertaking the project itself were outlined in the memorandum. ALI's lack of support reflects problems people in general have with UCITA. It may be problematic to proceed with the project in view of ALI's withdrawal from process. While there are many problems with particular provisions, one positive thing about UCITA is that it begins to establish a theoretical basis for treating mass-market contracts differently from other contracts. However, it does too little in this regard. There are already many critiques of UCITA. Professor Rice, for example, in a memorandum distributed to the Commission, identifies the problem arising from the interface between the proposed Act and federal intellectual property law.

While UCITA recognizes mass market and shrink-wrap transactions as a separate category, the draft still clings to old concepts of offer, acceptance and meeting of the minds. In most software transactions, there is no opportunity to get a true meeting of the minds. Default provisions then would apply in most cases. Commissioner Burstein asked whether it would be possible to use the default provisions of the Commission's Standard Form Contract Act. John Cannel stated that it would be a big job to merge the Standard Form Contract Act with UCITA, but it could be done. He also stated that the first question is whether UCITA requires a thorough going examination. If so, then the second part is to deal with provisions in detail. The memorandum highlights some of these issues. Mr. Cannel asked the Commission for guidance.

Mr. Cannel stated that the New Jersey Library Association has problems with UCITA as do Prudential and Johnson & Johnson. Chairman Burstein stated that the Commission had an obligation to act on NCCUSL proposals and that the Commission ought to try to work out ways to consider the project. To drop it would not be appropriate. Ms. Garde stated that in her opinion it was likely that UCITA eventually would be introduced in bill form but the question was whether it would get to the Committee process. If it is going to get that far, she stated, it would be useful for the Legislature to have an analysis from the Commission.

Commissioner Buchsbaum stated that he had an opportunity to talk with Senator William Gormley who stated that e-commerce was a high priority for the Legislature. This priority implicates the UCITA project. He also thinks the

project meshes with the Standard Form Contract Act. He supported going ahead with the project.

Commissioner Pfaltz remarked that the Commission had discussed earlier whether state laws were the appropriate vehicle for UCITA's subject matter. UCITA is broad and if fifty jurisdictions have different versions of the Act, transactions would be subject to different legal rules depending on haphazard factors. The federal government has authority under the Commerce Clause to regulate these transactions. Mr. Cannel stated that NCCSL correctly opposes federal exercise power in this area because Congress most likely would not pass a comprehensive code but deal with a few niche issues. Commissioner Buchsbaum stated it might be appropriate to have federal legislation and to recommend to local representatives that any federal legislation should contain a baseline of certain elements.

Pat Tumulty, Executive Director of the New Jersey Library Association, stated that the American Library Association opposes UCITA. While she did not present in detail the Association's objections, she stated that they surrounded issues such as balancing UCITA with copyright in terms of software. Commissioner Burstein replied that NCCUSL recognized that it will be difficult to get uniformity in this area.

Carol Roehrenbeck, of Rutgers Law School Library, representing the American Association of Law Librarians, also opposed UCITA and stated she would like to submit a written statement to staff. Her organization's concerns related to warranty, privacy and intellectual property issues. Chairman Burstein asked her to submit the statement to staff. Commissioner Pfaltz asked guests whether anyone had considered specifically whether it would be better to regulate these subjects with federal rather than state law. Ms. Tumulty replied that her sense is that ALA would favor federal law; she said she would find out specific problems involving copyright issue.

Riva Kinstlick from Prudential stated that one of the Uniform Law Commissioners at the November 1999 meeting had stated that UCITA would help e-commerce, but in her opinion the Uniform Electronic Transactions Act (UETA) adopted by NCCUSL at the same time as UCITA was more important. UETA is supported universally with some reservations as to certain consumer transactions. Commissioner Buchsbaum remarked that the Commission had studied UETA and had determined it was not needed in New Jersey. Ms. Garde stated that the Commission did not review the final version of UETA; the

Commission was involved in its own project on electronic signatures. Ms. Garde stated that the underlying premise of UETA is incorrect. The theory is that there are state laws that block the development of e-commerce and that these laws should be repealed. The reality is that in New Jersey there are hardly any barriers to private e-commerce.

Pending federal e-commerce bills contain provisions to force states to adopt UETA. The assumption is that something is needed now until states have had a chance to adopt UETA; in the meantime, state laws would be pre-empted. Ms. Garde stated that the Commission had had some success impacting the House bill and that the Senate bill has been trimmed back so that if enacted it would not pose a problem. The House bill, however, would pre-empt state law. It also would very broadly re-define the terms "writing" and "signature," as well as apply to state record requirements. In its current draft, it exempts transactions between citizens and the government, for example an applicant before the DEP, but does not exempt state-imposed record keeping requirements such as for doctors and pharmacists. The two bills have passed in their own houses and are going to conference soon. If the final bill resembles the House bill, New Jersey law would be pre-empted until passage of UETA.

UETA itself is not a problem. It can be trimmed to meet New Jersey interests. But certain provisions, for example, the provision on evidence, may not be enforceable in New Jersey. UETA also is badly drafted. The main reason for UETA is that companies and their counsel want an explicit rule providing that electronic transactions are enforceable. There is a tremendous push in this field to enact something to give comfort to corporate counsel with respect to electronic transactions.

Commissioner Gagliardi asked Ms. Garde if it would be irresponsible not to do anything in regard to UETA in view of fact that a version of the federal bills might be enacted with state pre-emption provisions. Ms. Garde concurred that that federal bill might make it necessary to report immediately to the Legislature on the UETA. As soon as there is a conference committee report, staff will prepare an analysis for the Commission to minimize the delay between enactment of federal legislation and the Commission's report to the Legislature.

Chairman Burstein stated that UETA, UCITA and other proposals regarding electronic commerce appear to be aspects of the same legal issue and suggested dealing with them in one comprehensive act. Ms. Garde stated that there is an end of the millennium mentality driving the demand for some

legislation authorizing electronic contracts and signatures. She noted that even though companies maintain that the status of their electronic transactions is insecure, a representative from Charles Schwab has stated that his company does 2 billion a day in Internet brokerage transactions. In addition, before the Internet, brokers did business by telephone over which no special rules applied.

Returning to the question of whether to go forward with the project on UCITA, Chairman Burstein found that the issues in the memorandum – choice of forum, choice of law, mass-market contracts, copyright, etc. – are worthy of further consideration.

Commissioner Gagliardi asked about the impact of Article 2 revisions on UCITA. Ms. Garde stated that she gets drafts as they are released. Ms. Garde had hoped to provide solid comparisons between the Article 2 rules and those of UCITA. Even though Article 2 revisions are incomplete, it should not stop development of UCITA analysis. Mr. Cannel noted that ALI might raise problems with revised Article 2 and prevent its final approval, but that comparisons with current law and drafts can be made.

The Commission decided to go forward with an analysis of UCITA.

#### Rehabilitative Sentencing of Drug Offenders

Mr. Cannel stated that suggested changes were narrowly tailored to the Court's opinion. Professor Garland raised a number of questions about the wording of 2C:35-14. Mr. Cannel agreed that some of the drafting was not ideal but it seemed wiser not to tinker with the statute since the Attorney General may have strong preferences for particular language. Commissioner Burstein asked whether the phrase "at any time" be deleted. Mr. Cannel stated that the "at any time" language is exactly what the Attorney General wants, that is, to be able to impose restitution later if a defendant inherits money at a later date. Commissioner Buchsbaum stated that this statute refers to reimbursement not restitution; therefore there is no ex post facto problem. It is similar to reimbursing the state for welfare payments.

Commissioner Burstein stated that the Commission should stay within the narrow scope of the Court decision. Professor Garland asked whether the "shall" used in subsection (d) referring to revocation of probation should be "may." Mr. Cannel stated that "shall" is correct. A second violation results in automatic revocation of probation. Professor Garland remarked that the last

time of subsection (d) is a separate operative provision worthy of being set forth separately. Mr. Cannel stated that because of sensitivity of the subject matter, he did not want to alter the statute beyond what was necessary to cure the one problem.

The Commission voted to release it as a Tentative Report.

#### Uniform Common Interest Ownership Act

The Commission agreed to defer consideration of this project until after Mr. Cannel, Commissioner Buchsbaum and Professor Garland completed their work on the present draft and prepared a memorandum outlining the most important issues for the Commission's deliberation. That memorandum will be ready by the January 2000 meeting.

#### New Projects

Ms. Garde explained that staff had been asked by a law firm if the Commission would consider a project to amend the corporation law to eliminate the provision permitting a certain percentage of shareholders to call a special meeting. The law firm had stated that the New Jersey provision was the reason why many corporations avoided incorporation in the state. The State of Delaware eliminated the shareholder right altogether. The Commission determined that the project was one of public policy and not within the competence of the Commission.

#### Status of Bills

Two bills are now on the Governor's desk: Service of Process and Evidence, and Lost and Abandoned Property. At the next meeting the Commission will receive a draft of the annual report showing that five Commission recommendations have been enacted last year. In addition, seven or eight final reports and one tentative report were filed.

Commissioner Burstein hoped that the focus next year would be on the Standard Form Contract Act.

Miscellaneous

The next Commission meeting is scheduled for January 27, 2000. The Commission will consider dates for later meetings at that time.