

MINUTES OF COMMISSION MEETING

March 16, 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 Andrew Bunn, Commissioner Anthony Suarez, and 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.

Also in attendance were Alida Kass, Esq., Chief Counsel, New Jersey Civil Justice Institute, and Jonathan Sternesky, Legislative Director for Assemblywoman Nancy J. Pinkin.

Minutes

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

Affidavit of Merit

Jayne Johnson discussed a Memorandum regarding the proposed revisions to the statutes governing the affidavit of merit requirement, along with the results of Staff's research regarding federal court decisions concerning the New Jersey statutes and similar statutes in other jurisdictions.

Ms. Johnson explained that the outcomes of the federal decisions concerning affidavit of merit statutes vary considerably from one jurisdiction to another, without giving clear guidance as to what aspects of the statutes may conflict with the federal rules. The Third Circuit, in *Chamberlain v. Giampapa*, 210 F.3d 154 (3rd Cir. 2000) identified select provisions of the existing New Jersey statute when ruling that the statute governing an affidavit required in certain actions against licensed persons does not conflict with the Federal Rules of Civil Procedure.

Ms. Johnson added that given the unsettled state of this area of law, it may be advisable to maintain the components of the statute already recognized and affirmed by the Third Circuit. She further explained that the United States Supreme Court, in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010), determined that conflict with a federal rule does not doom a state law that effects substantive goals by procedural aims; however, revisions to the New Jersey statute that do not resemble pleadings are more likely to stand side-by-side with the federal rules and withstand challenge.

Ms. Johnson introduced Alida Kass, Esq., Chief Counsel for the New Jersey Civil Justice Institute, and Jonathan Sternesky, Legislative Director for Assemblywoman Nancy J. Pinkin who were in attendance at the meeting. Ms. Kass complimented Ms. Johnson on her Memorandum and commented that revisions to the statute must achieve substantive, as opposed to procedural, objectives. She added that revisions should identify the required duty of care and as a result better identify what constitutes a breach of the duty of care.

Commissioner Hartnett observed that the starting point of the analysis is whether the federal rules cover the question. He added that a statutory provision is less likely to run afoul of the Federal Rules of Civil Procedure, when it does not resemble a pleading.

Commissioner Long noted that unfortunately the *Ferraira* conferences have not operated as effectively as the New Jersey Supreme Court intended. She also observed that the proposed draft language disturbs aspects of the statute that Third Circuit found did not conflict with the federal rules.

Commissioner Hartnett added that a non-simultaneous filing looks less like a pleading, and revisions should not preclude federal courts from applying the statute. He observed that the safeguards offered by the *Ferrarira* conference were not available in federal court, but that the issues may be addressed through a Rule 16 conference.

Chairman Gagliardi asked whether federal district court judge Hon. Kevin McNulty provided insight during his remarks from the bench, whether a move toward use of a Rule 16 conference would address the concerns he raised with the New Jersey state statute. Ms. Johnson replied that while a Rule 16 conference may address some of the issues raised by Judge McNulty, the crux of his concern involved the statutory scheme and constraints imposed by the statute. Commissioner Bunn observed that the intent of the proposed revisions is to allow the expert report to be provided as early as possible. The revisions are not intended to resemble a pleading. Mr. Sternesky agreed with Commissioner Bunn's assessment.

Commissioner Bunn proposed specific language to amend the statute, stating that the Legislature is empowered to define the elements of a cause of action. As a result, he suggested that it might be most effective to identify the affidavit of merit as an element of the cause of action. He said that it is not appropriate to state, by statute, what is required in a pleading, but, focusing on the elements of the cause of action, he suggested that language stating, for example, that "there shall be no cause of action for professional malpractice until an affidavit of merit exists." This was characterized by Chairman Gagliardi as worthwhile and, on initial consideration, might be likely to withstand judicial scrutiny. Commissioner Bunn described the goal as dismissing a case if it does not meet the merit threshold, adding that there is no cause of

action without an affidavit of merit. Asked whether it could be required before the action is filed, Commissioner Bunn answered in the affirmative, but that requiring the document at the same time as filing would be procedural. He said that, because of *Winberry v. Salisbury* concerns, the court would determine the required content of a complaint, and that it is better for purposes of statutory drafting to identify a requirement of the cause of action rather than to describe what should be included in a complaint.

Commissioner Hartnett asked about potential objections by the plaintiffs' bar as a result of the potential shortening of the statute of limitations. Commissioner Bunn replied that the Commission would need to consider when the statute of limitations accrues, noting that the statute does not begin to run if there is no cause of action. A discussion regarding the wording of a reference to the statute of limitations provision resulted in a suggestion by Commissioner Bunn that the provision include the words "this section shall not affect the statute of limitations."

Hand-held Devices

Vito Petitti discussed a Draft Final Report concerning the use of a hand-held device by the operator of a moving vehicle on a public road or highway, pursuant to N.J.S. 39:4-97.3. Mr. Petitti noted that a member of the public apprised the Commission of a concern that the statute negatively impacts the ability of traffic officers to protect the public from distracted drivers since it permits "the use of either hand to activate, deactivate, or initiate a function of the telephone."

Mr. Petitti added that after conducting preliminary research and outreach to interested parties, the Commission became aware of work in this area by Senator Richard J. Codey and Assemblyman John S. Wisniewski, both of whom introduced bills to address the issue of cell phone use while temporarily stopped in traffic.

Accordingly, in deference to the Legislative consideration of this issue, the Draft Final Report proposed finalizing the Commission's work in this area, and offers the Commission's support to the Legislature regarding the provisions of Senate Bill No. 1773 and the identical Assembly Bill No. 4005, as they pertain to the issue of cell phone use.

Commissioner Bell inquired whether Staff was aware of pending legislation prohibiting motorist, whether behind the wheel of a stationary or moving vehicle, from dialing or otherwise operating a mobile or wireless device. Mr. Petitti responded that he was not aware of any pending legislation addressing this issue, but noted that Staff continues to monitor bills related to the issues brought to the Commission's attention, including S1773 and A4005.

Referencing the last line on page 20 of the Draft Final Report, Commissioner Long asked whether New Jersey would receive the Moving Ahead for Progress in the 21st Century Act (MAP-21) grant without enactment of a bill containing the relevant provisions. Ms. Tharney advised the Commission that Staff was not sure whether the State would receive the grant without such legislation and indicated that Staff would conduct further research regarding this issue.

The Commission voted unanimously to release the Final Report on motion of Commissioner Bunn, seconded by Commissioner Bell.

Meaning of “conviction” in N.J.S. 2C:7-2(f)

John Cannel presented a Draft Tentative Report which proposes adding a definition for the term “conviction” to N.J.S. 2C:1-14. The Commission’s work in this area was begun in response to the case of *In re J.S.*, 444 N.J. Super. 303 (App. Div. 2016), in which the Appellate Division considered whether the term “conviction” as used in N.J.S. 2C:7-2(f), refers to a plea of guilty, or to the entry of a judgment of conviction.

Mr. Cannel observed, after examining the statutes that use the term “conviction,” that the meaning of the term “conviction” was not consistent. As a result, the Report does not propose to define the word “conviction” in all situations and in all statutory uses. A “one size fits all” such as equating a conviction with a formal judgment of conviction definition would not work in every case. Instead, the Report recommends defining the term under Title 2C, as subsection (s) of N.J.S. 2C:1-14 for calculation of time from a conviction.

Commissioner Bunn observed that the first sentence of the proposed language may be rephrased to reduce the number of references to the term “conviction.” Commissioner Hartnett suggested indicating in the comments section of the Report that the proposed amendments are not attempting to affect the Rules of Evidence.

The Commission unanimously voted to release the Draft Tentative Report as amended pursuant to Commissioner Hartnett’s suggestion, on motion of Commissioner Hartnett that was seconded by Commissioner Bunn.

Model Entity Transaction Act

Vito Petitti discussed a Memorandum, prepared by the Legislative Law Clerks and NJIT student interns working with the Commission this semester, that was intended to provide background information to the Commission regarding the Model Entity Transactions Act (META). META was drafted by the Uniform Law Commission (ULC) and designed to allow

conversion of one kind of business organization to another, “domestication” of foreign businesses, and the merger of two or more business organizations into one organization. Initially released by the ULC in 2007, META was subsequently amended in 2011 and 2013.

The most current version of META represents a collaborative effort between the ULC and the American Bar Association (ABA) to address an issue that cuts across their traditional shared areas of expertise. To this time, META has been enacted in: Alaska, Arizona, Connecticut, Idaho, Kansas, and Washington, D.C. It was also enacted in part by Arkansas and Montana, and introduced in Indiana.

Mr. Petitti noted that New Jersey is one of only about ten states that do *not* allow statutory conversions of corporations to other business forms. Instead, New Jersey only allows statutory mergers, which are governed by N.J.S. 14A:10-1. Mr. Petitti added that it has been suggested that this may be a problem for ‘legacy’ businesses – those that were created before newer business forms became available.

Commissioner Hartnett observed that the issues pertaining to the “domestication” of a foreign entity are varied, and often include federal considerations of personal or subject matter jurisdiction. Mr. Petitti explained that since New Jersey lacks a comprehensive statutory scheme for domestication of all types of entities, META could provide a vehicle for efficient domestication of foreign entities.

Mr. Petitti said that based on the preliminary research conducted to this time by the students assisting the Commission, it would be beneficial to continue the research and review of META, and to reach out to knowledgeable commenters who can provide feedback regarding whether enactment of META, or the incorporation of certain selected provisions not now found in New Jersey law, could enhance New Jersey’s body of statutes.

Justice Long stated that it would be worthwhile to research the Act further for consideration in New Jersey. Commissioner Bunn stated that the issues involving conversions addressed by the Act, often arise during law firm mergers and that the New Jersey State Bar Association, particularly the Business section, might be a good source for outreach.

Chairman Gagliardi asked whether states, other than Connecticut, with economies and demographics similar to New Jersey have considered the Act. He added that it may be helpful to identify the issues considered by other jurisdictions when determining whether or not to adopt the entire Act, as well as the issues considered by states that adopted select provisions of the Act or modified versions of META.

With that guidance to Staff, the Commission approved the project for further research and consideration.

Meaning of "Material" in N.J.S. 2C:21-4.6 (*State v. Goodwin*)

Laura Tharney began by summarizing a Memorandum relating to the meaning of “material” in N.J.S. 2C:21-4.6 of the insurance fraud statute in response to the New Jersey Supreme Court’s determination in *State v. Goodwin*, 224 N.J. 102 (2016). She explained that, in that case, the Court found that the term “material,” referred to a fact which could have reasonably affected the decision by an insurance company in providing insurance or decisions regarding a claim and does not require actual reliance. The term “material” is not now defined in the insurance fraud context, but it is defined in other statutory and common law contexts that the Court relied upon to make its determination.

Commissioner Bunn observed that the definition of “material” comes from common law fraud, citing as an example the question, “If you had known a particular fact, would the outcome be different?” He added that any difference in outcome would make the fact material, and that the court in *State v. Goodwin* used a broad standard.

Commissioner Hartnett pointed out that materiality and reliance are two separate elements. Commissioner Bell doubted the relevance of materiality in the determination, saying that it was not confusing.

The Commission considered whether, because this is a criminal statute that benefits from clarity, a modification could be made to the statute in response to the Court’s decision that would be of assistance. The Commission determined that it could be helpful to defendants and to the insurance industry to codify and clarify the *Goodwin* holding, and authorized Staff to move forward with a project in this area.

Miscellaneous

The meeting was adjourned on motion of Commissioner Bunn, seconded by Commissioner Long.