

## **MINUTES OF COMMISSION MEETING**

**April 18, 2019**

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 O. Bunn; Commissioner Virginia Long; Professor Bernard W. Bell, of Rutgers Law School, attending on behalf of Commissioner David Lopez; and Grace Bertone, Bertone Piccini, LLP, attending on behalf of Commissioner Kimberly Mutcherson.

### **Minutes**

Commissioner Bunn asked that the preposition “to” be added in between the words “investigation” and “determine” which appear in the second sentence of the second paragraph on page 6. With this correction, the Minutes of the March 21, 2019, Commission meeting were unanimously approved on the motion of Commissioner Long, which was seconded by Commissioner Bell.

### **Revised Standard Form Contracts**

John Cannel discussed with the Commission a Draft Final Report proposing updates to the Commission’s 1998 Report regarding Standard Form Contracts. The New Jersey Law Revision Commission published a Report on Standard Form Contracts in 1998. The Report recognized that the overwhelming majority of contracts are not negotiable and recommended replacement of the current law applicable to those contracts with a statute that more accurately reflects their nature.

Mr. Cannel explained the Commission’s 1998 Report gained some academic recognition, but a bill to enact it was not introduced until a number of years after it was released. A bill to do so has been reintroduced in the current legislative session. With this introduction, the issues in the Report assume renewed importance. After 20 years, the Commission decided to reconsider the Report and revise it to bring it up to date.

The Act provides a legislative solution to the legal problem posed by standard form contracts. These contracts, which represent the majority of contracts used in commerce, pose the legal problem of whether the terms that they contain, which are set beforehand and usually unread by the non-authoring party, are enforceable. Ordinarily, contract terms are enforced because they are the subject of consent and the result of mutual give and take between the parties. The formation of standard form contracts is not based on consent and does not result from bargaining. To negotiate and to read standard form contracts prior to their formation would be impractical and wasteful.

David McMillin attended the meeting on behalf of Legal Services of New Jersey. He discussed with the Commission that the doctrine of unconscionability has been part of the common law of contract for centuries, appearing in English Chancery Court decisions as early as the seventeenth century. He explained that, as numerous recent commentators have recognized, unconscionability remains to this day both workable and beneficial. Indeed, Rutgers law professor Jacob Hale Russell's forthcoming article concludes that reports of unconscionability's death are greatly exaggerated. Mr. McMillin further noted that this article documents, in stark contrast to the conventional wisdom, that the unconscionability doctrine has flourished in the courts in recent years. New Jersey state and federal courts unanimously recognize unconscionability as an established doctrine of contract law. Citing a recent decision of the New Jersey Supreme Court, Mr. McMillin added that, "it is well settled that courts may refuse to enforce contracts that are unconscionable."

Mr. McMillin discussed that the Draft Final Report proposes a radical and unprecedented change in contract law. It would replace unconscionability with a newly-fashioned standard – never adopted by any New Jersey court, legislative body, or administrative agency or in any other state – providing that certain contract provisions may be unenforceable if "at the time of sale, the term would have caused a reasonable consumer to reject the sale." It is his belief that this is an approach that cannot be squared with any conception of applicable economic principles.

Another of Mr. McMillin's concerns with the proposed modifications to the existing law is that they would reach – and abrogate – well-recognized contract law beyond the consumer-oriented procedural/substantive unconscionability framework. Areas of decisional law that would be significantly affected by a "supersede unconscionability" regime include the business judgment rule, equitable distribution, and intervention in tax foreclosure cases.

Mr. McMillin stated that the unconscionability doctrine is of central importance to low-income people in New Jersey. It would be a sea change in the law to repeal it – and the magnitude of the policy change would only be exacerbated by creating in its place a regime dependent on the concept of a hypothetical and non-existent "reasonable consumer." He recommended that the Commission not pursue this effort to remake existing law in a way that would abolish legal protections of particular importance to low-income and other vulnerable consumers.

Commissioner Long questioned whether Section 3 supersedes any law, asking whether the Consumer Fraud Act already covers the issue of unconscionability. Commissioner Bunn stated that unconscionability does not apply to every contract.

Mr. McMillin responded that the concept of "unconscionability" is alive and well and if it were removed, or limited by statute, it would leave people in a worse position. He advised the

Commission that common law unconscionability dates back to the 1650s. According to Mr. McMillin, if a judge found the contract to be unconscionable, it would be unenforceable.

Commissioner Bunn inquired about whether the inequality of bargaining power matters when using the reasonable person standard. John Cannel responded that the inequality of bargaining power does not matter when using the reasonable person standard. Commissioner Bunn followed-up by asking whether the “reasonable consumer” standard meant reasonable generally or whether it applied to a specific transaction. Mr. Cannel stated that because the term has never been used in this context, he did not know the answer to that question. In response, Commissioner Bunn suggested that the Commission should know how to measure the reasonable consumer. He concluded by stating that he is open-minded about changing the standard if it improves the law and that unequal bargaining power is not the key – rather, the key is what is fair.

The Commission engaged in a discussion of a number of hypotheticals involving standard form contracts. Commissioner Bell noted that there are many essential products that consumers require and it would take a lot for them to cancel the deal. He questioned whether many consumers would continue with a transaction under ideal circumstances or whether they would accept the terms because they want the product at that moment.

Chairman Gagliardi inquired whether any other jurisdiction uses the reasonable consumer standard. John Cannel replied that he was unaware of any. Commissioner Bunn added that he likes the creativity and boldness of this project and its attempt to modernize the statutes. He asked whether the Commission, by statute, could eliminate inequality of bargaining power. John Cannel stated that it could be eliminated; this would also remove any issues with the UCC or the Consumer Fraud laws.

David McMillin reiterated that bargaining power is core to the element of unconscionability and is the law of this state. He continued by stating that, and the degree of economic comparison, are key arguments for low-income consumers in contract litigation, and often argued to a judge. Chairman Gagliardi noted that these individuals would no longer have to prove the issue of unconscionability in contract litigation under the proposed modifications. Mr. McMillin suggested that it may make sense to consider a statutory scheme that incorporates the unconscionability test plus another test. Commissioner Bell indicated that he would be in favor of a proposed change that incorporated both the reasonable consumer standard and the concept of unconscionability.

Within the parameters set by the Commission, Staff was asked to revise the Draft Final Report to include language that included both the reasonable consumer standard and the concept of unconscionability.

Commissioner Long serves on the Board of New Jersey Legal Services and therefore recused herself.

## School Board Reclassification

Samuel Silver discussed with the Commission a Draft Tentative Report which addresses school board reclassification. The members of a school board in a Type I school district are appointed by the mayor. The members of a Type II school board are selected by the electorate. A Type I school district is permitted to become a Type II school district, and vice versa, by way of a statutory process known as reclassification. In 2003, the reclassification process was statutorily amended to prohibit the question of reclassification from being placed before the voters within four years after an election shall have been held pursuant to any resolution adopted or petition filed pursuant to the statute.

Of the 601 school districts in New Jersey, there are currently 15 Type I school boards and 541 Type II school boards. The Type I school boards are not limited to any one geographic region. The Type I school boards are currently found in the following counties and in the following number: Atlantic (5); Bergen (1); Essex (2); Gloucester (1); Hudson (3); Mercer (1); and Union (1).

In *City of Orange Twp. Bd. of Ed. v. City of Orange Twp.*, the Court addressed the City of Orange Township's attempt to reclassify its board of education. In 2016, the School Board challenged the City's referendum to reclassify the board from one appointed by the mayor to one chosen by the electorate. After reviewing the matter, the Court voided the election results. In 2017, the School Board objected when the City attempted to place a second referendum to reclassify the school district on the ballot. The Board argued that a plain reading of the statute forbade the referendum from appearing on the ballot within four years of the previous ballot question.

The Court disagreed with the Board of Education, finding that the statute did not contemplate the ramifications of a voided election. In the absence of any statutory guidance, the Court interpreted the language "after an election has been held" to mean "void" or "meaningless" if the election results were voided by the Court.

Mr. Silver noted that in an attempt to ameliorate this issue, Staff proposed a modification of the statute. Newly drafted paragraphs a. and b. do not alter the substance of the current statute. A new section, paragraph c., adds the following language: "[f]or purposes of this section, if a court determines the results of the election to be void, that election shall not be considered to have been held." This language is then carried throughout the affected sections, N.J.S. 18A:9-5 and N.J.S. 18A:9-6.

Chairman Gagliardi observed that the verb 'to be' should be added to the proposed language in N.J.S. 18A:9-5 between the words "election" and "void." With the addition recommended by Chairman Gagliardi the Commission voted unanimously to release the Report as a Tentative Report.

## Harassment

John Cannel discussed with the Commission a Draft Tentative Report proposing the modification of N.J.S. 2C:33-4 to criminalize expressive activity narrowly to avoid any conflict with the constitutional right to free speech. Mr. Cannel stated that this project came to the Commission's attention after a review of the New Jersey Supreme Court decision in *State v. Burkert*.

The issue in *Burkert* was whether the creation of lewd flyers that seriously annoyed the subject they portrayed was constitutionally protected free speech, or criminal harassment under N.J.S. 2C:33-4(c). The Supreme Court considered the context of the phrases in issue and explained that the Court "must construe a statute that criminalizes expressive activity narrowly to avoid any conflict with the constitutional right to free speech." The Court also referred to the Model Penal Code (MPC) and examined the manner in which courts in other jurisdictions had addressed similar statutes to determine the level of precision required.

In finding the Legislature's intent was to address harassing by action rather than communication, the Court read the terms "alarm" and "annoy" narrowly and stated that the phrase "any other course of alarming conduct" and "acts with purpose to alarm or seriously annoy" as repeated communications directed at a person which reasonably put that person in fear for his safety or security or that intolerably interfere with that person's reasonable expectation of privacy. In determining that subsection (c) was never intended to protect against common stresses, shocks, and insults of life that come from exposure to crude remarks or other offensive or inappropriate behavior, the Court found that although Burkert displayed "appalling insensitivity," he did not engage in repeated unwanted communications that intolerably interfered with another's reasonable expectation of privacy.

Mr. Cannel began with the questions, "What are we doing with this statute and why are we doing it?" He noted that the New Jersey judiciary has decided a number of harassment cases, so there may be a need for a harassment statute. The type of behavior sought to be prohibited by this statute, may be found in other statutes contained in the New Jersey Code of Criminal Justice.

Commissioner Long questioned why kicking and shoving are included in the statute when such actions are already considered assault and addressed in other areas of the criminal code.

Commissioner Bell recounted that *Burkert* involved a corrections officer who created and disseminated lewd flyers that seriously annoyed the subject contained therein. In an attempt to address the issue presented by both *Burkert*, and the statute, Commissioner Bell suggested that Staff determine what statutes address this type of behavior. In addition, he recommended examining the subject of harassment as it is handled in other states to determine whether their statutes provide an adequate solution to this statutory problem.

Chairman Gagliardi questioned whether the statute would benefit from “new language” or whether it would benefit from the examination of the statutory treatment of the issue in other states. He continued that Staff may wish to consider modifying the statute, specifically subsection (a)(1), to incorporate the reasonable person standard. Under this standard the statute would consider whether a reasonable person would consider the behavior to which they were subjected to be distressing, intimidating or alarming. The Chairman noted that this would eliminate the necessity of proving “the purpose to harass.”

Commissioner Bunn inquired about the level of *mens rea* that would then be necessary to prove harassment. John Cannel stated that the current statute provides two levels of *mens rea*. Commissioner Long noted that if the *mens rea* element is removed from the statute, then the “gap filler” *mens rea* set forth in the general provisions of the Code would be implied in the statute. Chairman Gagliardi stated that if the purpose to harass is eliminated then an individual with a disability, such as Tourette’s Syndrome, should not be found guilty under the statute.

Commissioner Bell proposed a hypothetical in which a police officer warned an individual not to engage in certain behavior prohibited by the statute. The next evening, Commissioner Bell continued, the individual came back to the same location and engaged in the same behavior once again. He then questioned whether this individual would be free from prosecution if the intent to harass is removed from the statute. Commissioner Long observed that such behavior is not covered under the statute in its present form. The statute, she opined, should therefore be fixed.

It was the unanimous opinion of the Commission that Staff return to first principles and work to revise the proposed statutory language using the guidance provided by the Commissioners.

### **DeMinimis Quantity Exemption**

As a preliminary matter, Joseph Pistrutto advised the Commission that Staff would like to change the current title of the Report to better describe the Commission’s actions in this area. The title of the report, he continued, would be amended to reflect that it is a Report, “to clarify the standing requirements for obtaining a De Minimis Quantity Exemption.”

Mr. Pistrutto then discussed the Draft Tentative Report which analyzed the decision in *R & K Associates, LLC v. New Jersey Dep’t of Env’tl. Prot.* Mr. Pistrutto stated that upon finding groundwater contamination emanating from an industrial site, the Department of Environmental Protection (DEP) rescinded the “no further action letter” (NFA) previously issued to the site’s former owner. In response, the former owner applied to the DEP for a De Minimis Quantity Exemption (DQE). The Commissioner of the DEP ruled that the former owner lacked “standing” to obtain a DQE. The original owner of the property appealed the Commissioner’s decision.

The Appellate Division examined the legislative policies that are advanced through the Industrial Site Recovery Act (ISRA). The Court found that by enacting the ISRA the Legislature sought to streamline the regulatory process and promote certainty in the decisions issued by the DEP. The DQE provision, however, was specifically enacted in order to avoid strict enforcement of existing obligations upon owners and operators who handled or stored only *de minimis* quantities of hazardous substances. Although the Court understood that the DEP maintains the right to revoke a previously issued NFA letter, the Court said that both equity and logic dictate that the former owner should have standing under N.J.S. 13:1K-9.7 to seek a DQE.

Mr. Pistritto noted that the language set forth in the Appendix to the Draft Tentative Report reflects the holding of the Court in *R & K Associates, LLC v. New Jersey Dep't of Env'tl. Prot.* Commissioner Long questioned why the proposed language was not set forth in the NFA section of the ISRA. Commissioner Bunn concurred that the language would be better placed in the NFA section of the statute. Mr. Pistritto stated that consideration had been given to placing this language in the NFA section of the statutes; however, given the length of the NFA section Staff feared that the DQE exception would be obscured among the voluminous NFA provisions. Laura Tharney suggested that the location of the DQE language, in addition to consideration of the proposed language would be a question asked to stakeholders who practice in this area during outreach on this issue.

Commissioner Bunn observed that the pronouns in section b. of the Appendix were not parallel. In the initial portion of the sentence a reference is made to the “prior owner.” Subsequently, the proposed language uses the pronoun ‘they’ to refer to the prior owner. Commissioner Bunn asked Staff to change the word ‘they’ to a parallel pronoun such as ‘that person’ or ‘prior owner or operator.’ Finally, Commissioner Bunn requested that the phrase ‘previously issued’ be struck from the first sentence of the proposed modification.

Commissioner Bertone told Mr. Pistritto it would be helpful to include companies that conduct industrial site remediation in outreach to stakeholders regarding the tentative statutory revisions mentioned in this Report.

With the change in the title and the proposed language changes suggested by Commissioner Bunn, on the motion of Commissioner Bell, which was seconded by Commissioner Bunn, the Commission unanimously voted to release the Report as a Tentative Report.

### **Imputing Negligence to a Public Entity**

Jennifer Weitz explained to the Commission that the question of imputing negligence to a public entity arose in a 2017 Appellate Division case in which a municipal construction project promptly ran into trouble and contractors tried to expand their possible remedies. The Court considered whether an agent or independent contractor’s negligence could be imputed to a contracting unit, i.e., a public entity, when an exculpatory clause limited damages to an extension

of time for performance. Noting the Legislature's intent not to broaden a public entity's liability, and in the absence of negligence on the part of the public entity, the Court ruled that the exculpatory clause was enforceable.

Staff was initially authorized by the Commission to harmonize the LPCL with N.J.S. 2A:58B-3, on which it was modeled, and which contains explicit language disallowing imputed negligence. After conducting outreach, Ms. Weitz was informed by Edward Buzak, past Chairman of the Legislative Committee of the Association of Environmental Authorities, that the education law contracting statute (N.J.S. 18A:18A-41) should also be brought into conformity with N.J.S. 2A: 58B-3. During the February 21, 2019, meeting of the Commission, Ms. Weitz was authorized to expand the scope of the project

Ms. Weitz discussed with the Commission a Draft Tentative Report proposing the addition of language to N.J.S. 40A:11-19 and N.J.S. 18A:18A-41. The language contained in the Appendix to the Report was modeled on the language found in N.J.S. 2A:58B-3. In addition, the N.J.S. 40A:11-19 and N.J.S. 18A:18A-41 were restructured to bring clarity to each of these statutes.

Chairman Gagliardi observed that the model language found in N.J.S. 2A:58B-3 defines the term "public entity." The Chairman further noted that the definition of this term includes the "State." Based upon the proposed definition, he asked that the word "State" be removed from the proposed language found in N.J.S. 40A:11-19(b) and N.J.S. 18A:18A-41(b) and replaced with the phrase "public entity."

With the implementation of the modification requested by Chairman Gagliardi and on the motion of Commissioner Bell, which was seconded by Commissioner Long, the Commission unanimously voted to release the Report as a Tentative Report.

### **Definition of Actor**

Samuel Silver began by noting that, in New Jersey, the public has an interest in having each criminal offender changed, tried and sanctioned. The time within which to prosecute a criminal defendant, however, is not without its limitations. The statute of limitations found in the New Jersey Code of Criminal Justice protects the citizenry from the prejudice that is likely to result when the basic facts of a case are obscured by the passage of time.

As a general rule, the statute of limitations in criminal matters begins to run the day after an individual commits a criminal offense. The statute of limitations is tolled, however, when the prosecution is supported by physical evidence that identifies the actor by means of DNA testing or fingerprint analysis. In those instances, the statute of limitations does not start to run until the state is in possession of both the physical evidence and DNA or fingerprint evidence necessary to establish the identity of the "actor" by means of comparison to the physical evidence. The term "actor" however, is not defined in N.J.S. 2C:1-6(c). It is within this context that Samuel Silver



discussed with the Commission a Memorandum to define the term “Actor” in the context of the DNA tolling provision in this statute.

In *State v. Twiggs* the police recovered, from the scene of the crime, a mask worn by one of the perpetrators of a robbery. The DNA recovered from the mask was entered into the state’s computer and did not result in a match to any known criminal defendants. More than five years later, the DNA of a defendant who plead guilty to a drug offense came up as a match to the DNA from the unsolved robbery. During his confession, the defendant implicated Mr. Twiggs as a co-defendant in the robbery. Mr. Twiggs subsequently moved to dismiss the indictment based upon the statute of limitations. The State argued that the DNA matching one defendant can be used to support the prosecution of multiple defendants whose identity and involvement are not known until the DNA evidence is confirmed by the State. The trial court, and a divided appellate panel, disagreed with the State’s broad reading of the statute.

The companion case of *State v. Jones* involved the mysterious death of a young girl and her family’s 10-year agreement to conceal the circumstances surrounding the homicide. After more than a decade, one of the family members provided the police with information concerning the young girl’s death as well as a DNA sample that would ultimately be used to confirm the victim’s identity. The defendant’s motion to dismiss the indictment would be denied by the trial court whose decision would be reversed by the Appellate Division.

The issue before the New Jersey Supreme Court in both cases was whether the term “actor” referred to multiple defendants whose identity and involvement are not known until the DNA – or fingerprints – is matched by the police, or whether the term is limited to the object of prosecution by the State. After recognizing that the term “actor” is not defined in N.J.S. 2C:1-6, the Court considering the ramifications of both a broad and narrow definition of the term. Ultimately, the Court concluded that the Legislature intended that the word “actor”, as set forth in the statute, applied to a sole actor identified directly by the DNA evidence. The Court noted that the clearest way to discern the definition of a term – such as actor – is for the statute to define the term.

Commissioner Long sought confirmation that the project would not seek to substantively change the statute. Chairman Gagliardi replied that the project would follow the decision of the New Jersey Supreme Court on this subject matter, and would not attempt to alter the substance of the law. Commissioner Bell posed a hypothetical in which the police have the DNA evidence but elect not to test it until the statute of limitations has expired. Mr. Silver noted that the answer to the hypothetical lies in the language of the statute itself. The statute provides that the statute of limitations is tolled until the State is in possession of the physical evidence and the DNA evidence. Once the State is in possession of the information necessary to identify a defendant, the statute is no longer tolled and prosecutors who act unreasonably in testing this evidence could be barred from using it in a subsequent prosecution.

Commissioner Bunn suggested that the term actor be replaced, or supplemented, with a term that specifically identifies the individual who has been identified by the DNA evidence and is the subject of prosecution. Chairman Gagliardi suggested that Staff utilize specific language when attempting to clarify the statute.

Within the parameters set by the Commission, Staff was authorized to engage in additional research and outreach regarding the definition of the term “actor.”

### **Temporary Disability Benefits for Volunteer Firefighters**

Katherine DeMottie, a Legislative Intern, discussed a Memorandum proposing a project to clarify that volunteer firefighters injured in the line of duty qualify for temporary disability coverage even if they are not employed at the time of the accident causing the injury, as discussed in *Kocanowski v. Township of Bridgewater*.

Ms. DeMottie explained that, In *Kocanowski*, after the plaintiff was injured in the line of duty as a volunteer firefighter for Bridgewater Township, she filed a claim in the Division of Workers’ Compensation seeking temporary disability benefits under N.J.S. 34:15-75. The plaintiff was not otherwise employed at the time of the injury, but had previously been employed in various paid positions. The injury prevented the plaintiff from returning to both her volunteer work and any form of outside employment, thus rendering her without a source of income other than the \$125 in benefits per week for one year received from the fire department for which she worked.

The Division of Workers’ Compensation judge denied the plaintiff’s application on the grounds that temporary disability benefits were intended to be a wage-replacement and the plaintiff was not employed at the time of the accident; thus, there were no wages to be replaced. The Appellate Division affirmed the denial of benefits to the plaintiff.

The Supreme Court reversed the Appellate Division’s decision and remanded the matter to the Division of Workers’ Compensation for the award of benefits in conjunction with Supreme Court’s opinion. In the opinion, the Court found, as a matter of first impression, that the statutory language was unclear. It went on to find that legislative history indicates a strong intent to provide temporary disability coverage to volunteer firefighters at the maximum compensation provided for in the Act.

Ms. DeMottie stated that prior versions of the disability statute did not bar unemployed firefighters from coverage and that the legislative history did not indicate any intent to enact such a bar. She then cited a hypothetical posited by the court in which two volunteer firefighters are injured, one of whom has a part time job and the other of whom is unemployed. Although they both face the same risks in discharging their duties for the fire department, the illogical result

under the current statute is that the former firefighter received the maximum benefit and the other receives nothing.

Ms. DeMottie suggested to the Commission that the current form of 34:15-75 is not as clear as it could be, nor is it consistent with the Legislature's intent. While the Legislature may have intended to broaden the protections of volunteer workers under the Workers' Compensation Act, the wording of the statute impedes this objective.

Commissioner Long said that this sounds like a good project. Commissioner Bunn questioned whether any other first responders were covered under the statute. Ms. DeMottie observed that N.J.S. 34:15-75 contains a list of first responders who are affected by the statute. Chairman Gagliardi commented that the statute is universally applied to first responders. Commissioner Bell questioned how the benefit amount is determined under the statute. Commissioner Bertone answered that the benefit amount is not based on the individual's salary; rather, it is based upon the individual's injury. Further, she commented that this is a statute that must be revised.

Within the parameters set by the Commission, Staff was authorized to conduct additional research and outreach to determine whether it would be appropriate to clarify the language of N.J.S. 34:15-75(a) to more accurately represent the Legislature's intent in enacting the statute and eliminate unanticipated or unintended limitations to benefits for volunteer firefighters.

### **Overdose Prevention Act**

Abhishek Bose, a Legislative Intern, presented a Memorandum proposing a project to clarify the definition of a "drug overdose" as it is used in the Overdose Prevention Act (OPA) (N.J.S. 24:6J-1 et seq.). Presently, the OPA confers immunity upon certain individuals who seek medical assistance for themselves or others experiencing the effects of a drug overdose, and on those for whom the assistance is sought.

Mr. Bose explained that this project came to the Commission's attention after Staff reviewed the Appellate Division decision of *State v. W.S.B.* In *W.S.B.*, a police officer responded to a report of an individual who was allegedly described by an unidentified third party as "intoxicated" and lying on the floor of a train station. The defendant exhibited the classic symptoms of an individual who was experiencing a drug overdose. Emergency personnel transported the defendant from the train station to the hospital where he was diagnosed with an intentional drug overdose. Hospital staff subsequently found several bags of powdery substances which were confirmed to be heroin.

The trial court determined that defendant was immune from prosecution under the OPA. In addition, the trial court found that a good faith request for medical assistance had been made

under N.J.S. 2C:35-31 involving a person believed to be exhibiting an acute condition, which suggested that he was experiencing a drug overdose as defined in N.J.S. 24:6J-3.

On appeal of the trial court's dismissal, the State argued the Act did not cover "intoxication." The Appellate Division, however, affirmed the decision of the trial court and held that the definition of a "drug overdose" set forth in N.J.S. 24:6J-3 was broad and did not depend on the extent of someone's intoxication. The issue of whether someone was immune from prosecution under this statute depended upon whether specific elements enumerated within the definition of "overdose" had been met. While the Court found there was a "drug overdose," within the meaning of the statute, it noted the provision could nonetheless be made clearer.

Mr. Bose then discussed how a "drug overdose" is defined pursuant to the statute. In light of the statutory definition, the Court specified that one way the statute could be revised is to provide a more detailed explanation for what forms of physical illness qualify as an "acute condition." Finding no legislative materials that elaborated on the intended meaning of the term beyond the text of the statute, the Court declined to provide any guidance as to the definition of this term.

Commissioner Bunn observed that the purpose of this statute is to make sure overdose victims get help without worrying that they will face criminal prosecution. Commissioner Bell stated that the term "acute" has a different meaning in the lay and medical communities. In medical terms, he continued, the term means "a sudden onset" of an illness; and, in the lay community, it means "severe." The use of this term should, therefore, be clarified.

Laura Tharney stated that this statute does not benefit from any legislative history. Thus, she concluded, there is no guidance as to what the Legislature intended when it enacted this statute. Chairman Gagliardi stated that in circumstances such as this one, where there is a paucity of legislative history, the Commission may not be in a position to propose a revision to the statute. He noted that after some additional research and outreach, the Commission may be compelled to send the Legislature a report that outlines the statutory deficiencies and ask them to provide a remedy.

Commissioner Bunn asked Ms. Tharney whether the parties appealed the decision to the New Jersey Supreme Court. Ms. Tharney responded that Staff will confirm whether certification has been granted in this case and provide an update to the Commission.

Within the parameters set by the Commission, Staff was authorized to engage in additional research and outreach on this subject matter.

## **Guardianship - Update**

Samuel Silver discussed with the Commission a memorandum to expand the scope of the Tentative Report to modernize the New Jersey Guardianship Statutes. On December 20, 2018, the Commission authorized the release of a Tentative Report. In addition to posting the tentative report on the NJLRC website, on January 08, 2019, Staff provided a copy of the report and appendix to distinguished members of the Elder Law Bar; Legal Services of New Jersey; the New Jersey Department of Human Services; and, the New Jersey State Bar Association (Elder and Disability Law Section). In response to the initial round of outreach, Staff received very thoughtful recommendations to clarify various aspects of the Appendix to the Tentative Report.

On March 20, 2019, Staff circulated the revised Appendix to each of the stakeholders. Thereafter on April 2, 2019, it was suggested to Staff that a copy of the revised Appendix be provided to the Office of the Public Defender – Division of Mental Health Advocacy. The same day, a copy of the revised Appendix was sent to the Office of the Director of the Division of Mental Health Advocacy.

A statewide elder law meeting was scheduled to occur during the week of April 08, 2019. The Commission's Report on guardianship was scheduled to be discussed at this conference. Thereafter, the stakeholder's comments would be forwarded to Staff for consideration.

The services available to individuals who are developmentally disabled or incapacitated are set forth in Subtitle 1, Chapter 4, Article 12, G1 of Title 30. This subtitle contains a total of 18 statutes. Since the enactment of this subtitle, three of the statutes contained in Article 12, G1 have been repealed by the New Jersey Legislature. Currently, upon receipt of a guardianship complaint, a Court is required to determine the necessity of the appointment. For individuals who do not have an attorney and over whom guardianship is sought, the court shall appoint the Public Defender to serve as counsel.

Mr. Silver explained that during a recent telephone conversation with the Director of Mental Health Advocacy, Staff was advised that several of the issues raised during the Commission's review of Title 3B also appear in Subtitle 1, Chapter 4, Article 12, G1 of Title 30. Under this title the disposition of a guardianship matter must be in accordance with Title 3B of the New Jersey Statutes and the Rules Governing the Courts of the State of New Jersey. Given the overlap of the two titles, Director Herman observed that it may be worthwhile to harmonize the changes in Title 3B with the statutes in Title 30.

Given the intersection of Title 3B and Subtitle 1, Chapter 4, Article 12, G1 with Title 30, Staff requested, and the Commission authorized, the expansion of the existing guardianship project to include the statutory provisions raised by the Director of Mental Health Advocacy to be drafted in the spirit of those set forth in the original project.

### **Miscellaneous**

Laura Tharney was pleased to inform the Commission that her effort to recruit students continues on all three law school campuses and that, in an attempt to expand the Commission's outreach, Ms. Tharney will be attending the Greater Philadelphia Area Law School Job Fair later in the year.

In addition, she has recently been in contact with the Commission's 2019-2020 fellow to congratulate him on his pending graduation and wish him success on the bar examination.

### **Adjournment**

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

The next Commission meeting is scheduled to be held on May 16, 2019, at 4:30 p.m.