

## **MINUTES OF COMMISSION MEETING**

**June 17, 2021**

Present at the New Jersey Law Revision Commission meeting, held via video conference, were: Chairman Vito A. Gagliardi, Jr.; Commissioner Virginia Long; Commissioner Andrew O. Bunn; Commissioner Louis Rainone; Professor John K. Cornwell, of Seton Hall University School of Law, attending on behalf of Commissioner Kathleen M. Boozang; and Grace Bertone, of Bertone Piccini, LLP, attending on behalf of Commissioner Kimberly Mutcherson.

### **Minutes**

The Minutes of the May 20, 2021, meeting were unanimously approved by the Commission on the motion of Commissioner Long, seconded by Commissioner Bertone.

### **Preliminary Matters**

Laura Tharney advised the Commission that Jennifer Weitz had accepted employment with a New Jersey law firm and thanked her for her work as Counsel to the Commission. Ms. Weitz, thanked the Chairman, the Commissioners, and Commission Staff for the experience and the kindness that she received during her tenure with the Commission. Chairman Gagliardi, on behalf of the Commission, thanked Ms. Weitz for her time with the Commission and for the hard work that she did on numerous projects.

Ms. Tharney advised the Commission that bills S2261 and A4265, based on the work of the Commission regarding common interest communities, are board listed for June 21<sup>st</sup>, as are A4250 and S2508, also based largely on the work of the Commission regarding notaries and notarial acts.

### **Unemployment Benefits**

Samuel Silver discussed a Draft Final Report proposing modifications to N.J.S. 43:21-5(a) and N.J.S. 43:21-7(c)(1) based on the New Jersey Supreme Court's decision in *McClain v. Bd. of Review, Dep't of Labor*, 237 N.J. 445 (2019), and the recommendations of interested stakeholders.

The grounds upon which an employee is disqualified from receiving unemployment benefits are governed by the Unemployment Compensation Law. In 2015, subsection a. of N.J.S. 43:21-5 was amended to specify that an employee who voluntarily leaves employment and begins new employment within seven days is not disqualified from receiving benefits. The statute is silent, however, regarding whether an employee who was scheduled to start new employment but could not because the offer of new employment was rescinded is entitled to receive benefits.

This question was examined by the New Jersey Supreme Court in *McClain v. Bd. of Review, Dep't of Labor*. In that consolidated appeal, the Court determined that each Plaintiff was entitled to unemployment benefits because they qualified for unemployment insurance benefits at

their former employment at the time of their departure, they were scheduled to commence their new jobs within seven days of leaving their former employment, and because their new job offers were rescinded through no fault of their own before their start date.

Staff received authorization to conduct preliminary outreach on this project in October 2020, and a Tentative Report was released in February 2021. The proposed amendments to N.J.S. 43:21-5 in the Appendix to this Report adds a subsection to exempt from disqualification employees who leave their current job upon receipt of an offer of employment with a new employer, scheduled to begin within seven days, which is subsequently rescinded by the new employer through no fault of the employee. The proposed change to N.J.S. 43:21-7 clarifies that the employer's Unemployment Insurance account should not be charged when an employee voluntarily leaves employment. Mr. Silver noted that the appropriate internal reference in N.J.S. 43:21-7 is to subsection 3 of N.J.S. 43:21-5, and this change was reflected in the Tentative Report.

Mr. Silver advised the Commission that outreach was conducted, and that the Legislative Liaison for the National Employment Association supported virtually all of Commission's revisions. The NEA objected to limiting benefits to claimants whose scheduled employment was rescinded by the employer, suggesting that benefits should be provided in any circumstance in which an employee is scheduled to begin a new job but does not. The NEA also recommended an exception to extend to scheduled new employment that is rescinded or delayed by the employer through no fault of the employee. The New Jersey State Bar Association also commented on the project and a number of the modifications contained in the Report are based upon its recommendations. The NJBSA recommended that the comments be modified to reflect that "neither the 1st nor 2nd employer's account will be charged for the claim" under N.J.S. 43:21-27.

On the motion of Commissioner Bunn, seconded by Commissioner Long, the Commission unanimously voted to release the Final Report.

### **Inhabitants**

The New Jersey Legislature enacted the Law Against Discrimination (NJLAD) to protect the "inhabitants" of New Jersey from discrimination. The term "inhabitants," as used in the preamble of the NJLAD, is not defined in the Act. Moreover, the use of the term appears to be inconsistent with the language used in N.J.S. 10:5-5(a), which defines the term "person," and does not limit the definition to New Jersey residents or employees.

Samuel Silver explained that in the case of *Calabotta v. Phibro Animal Health Corp.*, 460 N.J. Super. 38 (App. Div. 2019), the Plaintiff brought a civil action against his former New Jersey based-employer for failure to promote and wrongful discharge in violation of the NJLAD. At the time of the suit, the Plaintiff resided in Illinois but his employment contract was governed by the laws of New Jersey. The trial court determined that the NJLAD does not apply to employees whose employment is based outside of New Jersey. The Appellate Division indicated that the NJLAD is remedial in nature, and should be liberally construed to advance its beneficial purposes, and that it extended protection from discrimination to nonresident workers who work for New Jersey based companies.

According to the NJLAD, “all persons have the opportunity to obtain employment... without discrimination.” The Definition of “person” does not limit the term to New Jersey residents or employees.

At the April 2021 meeting the Commission considered the distinction between a “preamble” and a “legislative finding” and the purposed modifications contained in the Appendix to the Draft Tentative Report would eliminate the three uses of the word “inhabitant” and replace them with the term “person.”

Commissioner Long asked if the word “person” is used in other sections of the Act and whether this is the only section that the word “inhabitant” is used. Mr. Silver said that the term “inhabitant” was limited to this section.

On motion by Commissioner Bertone, seconded by Commissioner Bunn, the Commission unanimously voted to release the Tentative Report.

### **Jessica Lunsford Act**

Generally, a defendant convicted of an aggravated sexual assault in which the victim is less than thirteen years old will be sentenced to life imprisonment and must serve a minimum of 25 years of the sentence. “[I]n consideration of the interests of the victim,” however, a prosecutor may offer the defendant a negotiated plea agreement of fifteen years, during which the defendant would not be eligible for parole.

Samuel Silver explained under the Jessica Lunsford Act (JLA) there is no requirement that the State present its reasons for a departure from the mandatory minimum sentence and no requirement that it present the reasons to the court for a review the Prosecutor’s exercise of discretion.

In *State v. A.T.C.*, 239 N.J. 450 (2019), during the course of a child pornography investigation, the defendant admitted to having sexually explicit video files of his girlfriend’s daughter, taken over a number of years. The defendant accepted a negotiated plea of 20 years imprisonment with 20 years of parole ineligibility. Before his sentencing date, the defendant moved to modify his sentence and argued that the JLA violated the separation of powers doctrine by vesting the prosecutor with sentencing authority constitutionally delegated to the judiciary. The trial court denied motion and indicated that sentencing courts retain the right to reject plea agreements under the JLA and that this did not violate the separation of powers doctrine.

The Prosecutor advised the Court that he had balanced the relevant factors pursuant to the Attorney General Guidelines but did not submit a statement of reasons justifying the decision to waive the statutory 25-year term of incarceration and parole ineligibility.

The Appellate Division rejected the defendant’s separation of powers argument and noted that the authority to decide the punishment of a defendant is strictly a judicial function and that the JLA reserves to the judiciary the power to approve or reject any agreement between the prosecutor and the defendant.

The Supreme Court accepted certification for the limited purpose of addressing the facial challenge to the constitutionality of the JLA. The Court determined that the JLA does not violate the Separation of Powers doctrine if the prosecutor provides the Court with a statement of reasons explaining its decision to depart from the 25-year mandatory minimum sentence and the Court has the opportunity to review the prosecutor's exercise of discretion to determine whether it was arbitrary or capricious.

Mr. Silver noted that the Appendix in the Draft Tentative Report contains proposed revisions designed to address the constitutional infirmities identified by the New Jersey Supreme Court in *State v. A.T.C.* Pursuant to the proposed modifications, a prosecutor must provide the sentencing court with a statement explaining why the defendant was offered a plea bargain that would result in a term of incarceration or parole ineligibility less than that prescribed by the statute. The modifications also permit the prosecutor to request an in-camera hearing when the prosecutor concludes that it is necessary to reveal, in the statement of reasons, sensitive information regarding the mental health records, physical health records, or other confidential information of either the victim or the victim's immediate family.

Commissioner Long indicated that subsection three and subsection four of the section that Staff is seeking to revise should be reversed. She explained that the language in subsection four that begins "in such event the court shall..." is a reference to paragraph two not paragraph three. She also noted that the Supreme Court said there had to be a statement of reason and that the court would review the exercise of discretion to determine whether it was arbitrary or capricious. To reflect the Supreme Court's decision, she suggested that paragraph three include language stating, "in such event, the court shall review the prosecutor's exercise of discretion under the arbitrary and capricious standard."

Commissioner Cornwell asked whether the Attorney General Guidelines address the reduction in sentence from the otherwise explicable mandatory minimum. Mr. Silver replied that Staff would be happy to examine that subsection adding that there is an opportunity for the Attorney General to review the matter and offer a downward departure but no mandate that compels the Attorney General to share with the court the reasons for such a determination. Commissioner Cornwell noted that the Attorney General does not have to provide a reason to justify the downward departure. Commissioner Bunn stated that he believed that the absence of these requirements allows the State and the Defendant to enter into plea negotiations. Commissioner Cornwell stated that he finds it strange that the Supreme Court found this language constitutionally deficient and that he has no objection to proceeding with this project. Commissioner Bunn stated with the revisions offered by Commissioner Long the modifications are faithful to the Court's decision.

With the addition of Justice Long's modification and on motion by Commissioner Bunn, seconded by Commissioner Rainone, the Commission unanimously voted to release the Tentative Report.

## Parentage

Commissioner Long recused herself from participation regarding this project, citing her position as a Board Member with Legal Services of New Jersey, a commentor.

John Cannel discussed with the Commission a Memorandum containing proposed changes to the draft statutory language made in response to comments submitted by stakeholders and sought Commission guidance regarding the proposed changes to the New Jersey Parentage Act, N.J.S. 9:17-38, et seq.

Mr. Cannel explained that although a Tentative Report had previously been released by the Commission, the comment period had been enlarged in order to receive comments from interested individuals and organizations. Mr. Cannel acknowledged that most commenters had very limited time to review the Tentative Report, which did not permit them to provide detailed responses, but noted that drafting done in response to comments received from Legal Services of New Jersey (LSNJ) were included in the Memorandum.

Commissioner Bunn requested that Mr. Cannel present his Report section by section prior to receiving comments from the public. Mr. Cannel thanked the members of the public for their interest and for their comments. He said that the comments received and any direction from the Commission would be reflected in a Revised Draft Tentative Report that would be circulated among the interested parties to allow them another opportunity to provide comments.

Mr. Cannel noted that Section Two seeks to define the parent and child relationship. He stated that concerns were raised regarding gestational carrier agreements in this section. He noted that the language in this section is based on existing law and does not cover “psychological parentage” and that those provisions are set forth separately.

Section Four of the Report is entitled “Spouse of Person who Gives Birth to Child” and sets forth the circumstances under which the spouse of the person who gives birth to a child is a parent. Mr. Cannel said that the proposed modifications enhanced the right of a spouse to be the parent of the child regardless of genetics or gender. Pursuant to this section, a person is not a parent if: (1) the person is not a genetic parent of the child; (2) the spouse did not acquiesce to sperm or egg donation; and (3) the spouse executes a Certificate of Denial of Parentage or denies parentage within five years of the child’s birth. This section requires compliance with all three subsections. If the person fails to meet these requirements, they become the parent. Mr. Cannel noted that the term “acquiesce” was used rather than “consent” because there may be circumstances where a judge would require a signed document to establish “consent”.

In Section Five, Mr. Cannel noted a typographical error in the last line which will be corrected in the next draft.

Section Seven pertains to the voluntary acknowledgement of genetic parentage. Mr. Cannel observed that this section presented a difficult issue and that Legal Services of New Jersey

expressed concern with it. He stated that Professor Maldonado provided an example in which a seventeen-year-old disavows his parentage by signing a Certificate of Denial of Parentage. Mr. Cannel stated that these scenarios usually happen at the hospital when the child is born and there is no way of providing that person with legal representation. Professor Maldonado suggested that the seventeen-year-old should have legal advice before signing such a certificate. Federal law provides that person signing a voluntary acknowledgement of parentage, for example, be advised of the consequences because the acknowledgement is binding. Subsection b. was added to assure that the certificate will not be binding until the minor has had the opportunity to consult with a guardian ad litem. Additionally, the term “child” in this subsection will be replaced with the term “minor” to reduce confusion.

Mr. Cannel stated that the language in Section Eight regarding the action to determine genetic parentage has undergone various changes with the help of Mary McManus-Smith’s suggestions on behalf of LSNJ.

In Section Nine, uses of “shall” were changed to “may” to reflect the realities of these situations, including the fact that “any person who would be affected by the determination of parentage” is very broad and would be difficult to ascertain. There is no way to include everyone who will be affected by a determination that a person is a parent.

In Section Ten, Mr. Cannel addressed the issue of Genetic Testing and said that this section could benefit from revisions and presently only concerns the genetic parent determination. The approach of this section is that if a party wants to know who the genetic parent is, focus on the science, do not follow older approaches like taking testimony of who had access, relying on old-fashion presumptions, or giving the judge discretion to do what is best for the child.

The determination of genetic parentage is set forth in Section Eleven and similarly relies on scientific methods.

The federal law served as the basis for Section Thirteen, which is entitled “Voiding finding of genetic parentage.” Pursuant to this section, the adjudication of genetic parentage would be set aside only upon a finding that there exists clear and convincing evidence of fraud, duress, or a material mistake of fact. The term “action to determine” was added by Staff.

Mr. Cannel said that the language of Section Fourteen, entitled “Termination or changing parentage,” was derived from current law and states that established parentage may be changed by adoption or an action to terminate parentage.

Laura Tharney presented a brief introduction to psychological parentage which is addressed in sections Eighteen and Nineteen. She explained that she had heard two general categories of comments regarding this project. The first is that the Act should not make reference to psychological parentage, because doing so would limit the scope of New Jersey’s current recognition of this issue. She explained that it has been suggested that there is a body of case law that has developed demonstrating that the courts recognize a number of issues around the concept

of psychological parentage and to try to include a provision in the statute would cause more harm than benefit in this area of law.

The second category relates to the suggestion that there is an overreliance on genetics in the draft, discounting intentionally formed relationships which have been recognized by New Jersey courts for decades. The reliance on genetics may impair the rights of same sex parents.

Ms. Tharney stated that details pertaining to these two concerns will be provided by the commenters so that the Commission will have the opportunity to hear from the experts in this area.

Chairman Gagliardi advised that the Commission held off on the release of Draft Final Report to get the benefit of the feedback. He added that it is his expectation that the Staff and the Commission will benefit from the points raised by the commenters. He advised the members of the public that the Commission will not take an action on this project this evening and expects the Staff to present a Revised Draft Tentative Report to the Commission at a later date that captures the comments and reaction of the stakeholders.

Cathy Sakimura, Deputy Director and Family Law Director for the National Center for Lesbian Rights thanked the Commission for the opportunity to provide written comments and to appear at the meeting. She said that it is time to review New Jersey's Parentage Act, and that it is very important to look at the gendered language of the Parentage Act, as well as issues concerning assisted reproduction and the manner in which non-genetic parents are treated under the law. Ms. Sakimura added that she would forward additional specific comments regarding some of the language and will forward them to the Commission.

Ms. Sakimura stated that her overarching concern is the manner in which the draft treats genetic parentage as the default because doing so does not adequately protect non-genetic parents. She noted that the proposed language would result in the exclusion of large number of LGBT parents from the protections of New Jersey law. She also noted the limitation of assisted reproduction to married couples, excluding unmarried couples who will not be recognized as parents if they are not genetic parents. She explained that there are presumptions under other New Jersey laws that protect non-genetic parents who do not necessarily use assisted reproduction and these are not reflected in the current draft. This group includes couples who have void or invalid marriages, people who have held themselves out as parents, as well as a set of presumptions based on appearing on a birth certificate or making a voluntary promise of support.

Ms. Sakimura concluded by noting that the "voluntary acknowledgement provision" is vital to the LGBTQ community because it is a free process used in hospitals that allows parents to secure their existing relationships.

Chairman Gagliardi thanked Ms. Sakimura for her input and stated that Parentage law should reflect where the world is now on such issues.

Courtney Joslin, a Professor of Law at the University of California's Davis Campus, also served as Reporter for the Uniform Parentage Act of 2017. She echoed Ms. Sakimura's concern that New Jersey Parentage law is very old and is in need of revisions. Professor Joslin also agreed with Ms. Sakimura that the Act as presented provides less protection to LGBT parents than the current New Jersey law because it is so genetically oriented.

She stated that, with regard to psychological parentage, there is a benefit in codifying the what has historically been an equitable doctrine to provide greater clarity to this area of the law and to make it clear that if someone meets the psychological parentage standard, they are a legal parent for all purposes, with all of the rights and obligations flowing from that determination. That clarity will ensure that that person not only has the right to seek custody and/or visitation but that they will have the obligation to support the child. It will further ensure that child is entitled to critical benefits and social services that flow through legal parents. She advised the Commission that there is a very strong trend to treat psychological parents as full legal parents.

Chairman Gagliardi asked Professor Joslin if she would identify states that have statutory provisions conferring on psychological parents the rights and obligations of genetic parents. Professor Joslin replied that these include: Delaware, Maine, Vermont, Rhode Island, Connecticut, and Washington. These states have statutory de facto parent provisions which are the equivalent of New Jersey's psychological parent provision. In addition to those states, an increasing number of states use equitable principles to find that people who meet those criteria are full legal parents for all purposes.

Douglas NeJaime, a Professor of Law at the Yale Law School advised the Commission that he works primarily in the area of parentage and non-biological parental recognition, and that he served as the principal drafter of legislation, based on the Uniform Parentage Act, that was recently enacted in Connecticut. The recent changes to Connecticut law updated its parentage statute to include important protection for non-genetic parents, including de facto parents, which are akin to psychological parents as discussed in the draft. The CT statute includes the requirements to be adjudicated a de facto parent that renders the individual a full legal parent. He explained that, during the process of revising the CT statute, worked was done with the Chief Administrator of the Probate Court to make sure that the intestate succession statutes were aligned with the definition of parents in the Parentage Act.

In codifying de facto parentage, CT looked to New Jersey's protections for psychological parents, and extended the voluntary acknowledgement of parentage (not just paternity), to same sex and different sex couples who conceive children through assisted reproduction. This protection is extended to married and unmarried couples. Professor NeJaime explained that the overall spirit of the CT law was to recognize psychological relationships and the understanding that non-biological relationships must be fully protected. From a child's perspective, a parent-child relationship is built on day-to-day experiences, not from a genetic connection. The CT law also recognized that to treat LGBT parents as true parents, there must be a move to more fully integrate and protect non-biological parent relationships.



Mr. Cannel responded that the draft offers protection to same sex couples if they are married, explaining that if the Commission wishes, he will be happy to extend the meaning of the word spouse to include non-ceremonial partners, which would provide protection to same sex couples beyond the current New Jersey law. Chairman Gagliardi asked Mr. Cannel to draft in the alternative. Mr. Cannel added that with regard to the rights of psychological parents to be treated as full parents, the Staff followed the lead of the New Jersey courts, and decisions that prohibited inheritance by a psychological parent of a deceased child.

Debra Guston, Esq., of Guston & Guston, L.L.P., thanked the Chair and Ms. Tharney for allowing her to appear and take part in this discussion. Ms. Guston said that she was very concerned about LGBTQ individuals and individuals in the assisted reproduction world, who may not be not genetic parents to their children. Ms. Guston explained that she is not speaking for the New Jersey State Bar Association but has been asked to report back to the Family Law Executive Committee and to the LGBTQ section.

On the issue of psychological parentage, she stated that she supports an inclusive and broad psychological parent statute but that her concern with the current draft is that it would roll back protections found in current New Jersey law that consistently focus on the best interests of the child. For more than 20 years, the courts have broadened the decision in *V.C. v. M.J.B.*, 163 N.J. 200 (2000) to and the issue has to be examined so that the work done by the Commission does not curtail the expansion of the law in this area.

Ms. Guston also expressed concern about relying on genetics or marriage/civil union to determine the relationship to a child. She explained that this is not the time to start refocusing on traditional relationships. Instead, the draft should recognize the wide variety of intentionally formed relationships. Ms. Guston noted that the draft defines a spouse as someone who is married, in a civil union, or someone in a domestic partnership and explained that domestic partnerships are not the equivalent of a spousal relationship, so any proposed changes to the law should be very intentional. She stressed the need to be more inclusive of intentionally formed relationships to protect the children in those relationships.

Jodi Argentino, managing partner at Argentino Fiore Law & Advocacy, LLC, said that her firm focuses on complex parentage issues and unusual cases, so her background is less academic, and more practical. She said that she was happy that the Commission is working in this area, and explained that most of the complex parentage cases that she has dealt with did not concern LGBTQ families. Ms. Argentino stated that draft's focus on genetics is harmful because it reinforces decisions that were incorrectly decided, and prioritizes genetics in the minds of practitioners and judges. She did not object to codifying psychological parentage if the content adequately embodies the existing law without limiting it.

Ms. Argentino noted that in a recent Appellate Division in *WM v. DG*, the Court provided clarification of the *V.C.* case, determining that there is no priority presumption between a legal and

psychological parent as to custody and parenting time if psychological parentage is established. From a child's perspective preservation of the entire relationship is crucial.

Mary McManus-Smith, Esq., Chief Counsel for Family Law and Director of Litigation for Legal Services of New Jersey thanked the prior speakers for their insight in this area of law and explained that her two primary concerns are donated eggs and sperm situations and the draft's reliance on genetics.

Regarding donated eggs and sperm, she suggested expanding the discussion beyond the marital scope and medical situations. Individuals with lower incomes try to develop families without medical help, and it would be useful to them to have legal recognition since the establishment of parentage is very important in securing benefits. Social Security, for example, will not recognize informal agreements and acknowledgements of parentage to distribute disability or retirement benefits. Additionally, the draft sets a five-year limit for anyone to make a claim for parentage. Ms. McManus-Smith explained that she was concerned about situations in which there is no identified second parent. This is something that she sees in the context of TANF (Temporary Assistance for Needy Families). A single unmarried mother with children, who has not listed a father on the birth certificate, may apply for TANF. When she receives TANF, the right to child support is assigned to the county welfare agency. The first step is to establish paternity. The County will establish paternity through consent or DNA but if paternity is not established within the first five years, families such as the one in the example will be barred from receiving TANF, which may conflict with federal law.

The Chair thanked the distinguished group of commenters and directed Staff to review the comments of both the Commission and the stakeholders and present a Revised Draft Tentative Report to the Commission at a future meeting.

### **Inmate Call Services**

Samuel Silver and Veronica Fernandes jointly presented an update to the Commission on the case law, the treatment of the subject by the Federal Communication Commission, and the use of emerging technologies in this area of the law. They sought the Commission's guidance regarding a potential modification of the language of N.J.S. 30:4-8.12 to address "infrastructure costs" as discussed in *Securus Tech., Inc. v. Murphy*, 2019 WL 1244802 (App. Div. Mar. 18, 2019).

Mr. Silver explained that the New Jersey inmate call services (ICS) provide the exclusive means for inmates to communicate with family and friends when incarcerated in State or county correctional facilities. Telecommunications companies frequently invest money in "infrastructure" improvements to provide these services. New Jersey's Rate Control Law (RCL) caps the rate that qualified vendor may charge and limits additional charges. *Securus Tech., Inc. v. Murphy*, involved a challenge to the RCL regarding "service charges" or "additional fees."

Ms. Fernandes explained that in *Securus Tech., Inc. v. Murphy*, the technology company was awarded contracts in 2010 and 2013 to provide ICS to inmates in the Passaic and Cape May

county correctional institutions. *Securus* invested in the infrastructure improvements necessary to provide this service. In 2016, the New Jersey Legislature enacted the Rate Control Laws NJS 30:4-8.11 to -8.14 that limited ICS contracts to qualified vendors and also limited the rate charged for these services to eleven cents per minute. The provisions of the RCL applied to “any new or renewal contract on or after the date of enactment.”

The Plaintiff argued that by capping the per-call charges to inmates, the RCL statute unconstitutionally restricts the ability of ICS providers to recoup costs already expended as well as their ability to bid in the future. It argued that the infrastructure costs were necessary costs that any telecommunications company would need to consider in bidding on future contracts.

The trial court dismissed *Securus*’s complaint with prejudice, stating that it had failed to “plead facts establishing an actual controversy.” On appeal, *Securus* maintained that it should have been permitted to file an amended complaint because the dismissal with prejudice was improper. The Court reversed and remanded for further proceedings. The matter was ultimately dismissed by the parties, leaving open the question of whether the statute could be clarified in order to avoid future litigation on this subject. The relevant statute prohibits a provider from charging enumerated fees, but does not expressly address charging for “predicate costs” or “infrastructure costs.”

Mr. Silver noted that the Commission, on the recommendation of Commissioner Bunn, asked Staff to monitor the federal class action suit in *James v. Global Tel\*Link Corp.* In that case, a group of Plaintiffs brought a class action suit in 2013 against Global Tel\*Link Corp. While interstate calling services are subject to regulation by the FCC, neither federal nor state regulators historically sought to impose rate limits on New Jersey correctional facilities. After seven years of litigation, multiple rounds of mediation and settlement conferences overseen by the Court, the parties reached a \$25 million dollar settlement. The District Court’s opinion, however, does not address the issue of “infrastructure” charges.

Ms. Fernandes explained that in September of 2013, the Federal Communications Commission (FCC) issued a Report regarding the social and economic impacts of ICS. The FCC determined that “excessive ICS rate impose an unreasonable burden on some of the most economically disadvantaged in our society...” Shortly after the FCC issued its Report and the *James* Plaintiffs filed their lawsuit, the New Jersey Legislature enacted N.J.S. 30:4-8.12, which limits “calling rates to 11 cents per minute... and outlaw[s] ‘any service charge or additional fee exceeding the per minute rate, including but not limited to, any call surcharge, account set up fee, bill statement fee, monthly account maintenance charge, or refund fee.’”

In October of 2020, the FCC continued its effort “to ensure that rates for interstate and international phone calls are just and reasonable for all Americans...” The FCC recognized that “telephone calling options for incarcerated individuals...are limited...because incarcerated persons typically cannot choose their own calling provider.” The absence of competition in this area, in addition to unrestricted rates, frequently results in “unreasonably high phone bills for incarcerated individuals and their families.” Rate caps, however, “apply only to interstate long-distance calls... not to in-state long distance, local or international calls.” To this time, the FCC has not addressed the issue of infrastructure charges.

Mr. Silver thanked Commissioner Bell for providing Staff with information from the FCC and its most recent decision. This included the FCC's action of April 29, 2021, that addressed inmate call services and calls for the adoption of the FCC's 2020 ICS notice referred to in Staff's Memorandum.

As enacted N.J.S. 30:4-8.12 provides that a qualified vendor is not permitted to exceed \$0.11 cents per minute charge and there is no specific reference to interstate versus intrastate calling.

Ms. Tharney provided Staff with an article that set forth information regarding Securus Technologies provision of free computer tablets for each Oklahoma prison inmate. Under the terms of the agreement, each inmate will be able to receive educational or vocational training. The tablets will give prisoners access to music, television, a law library, certain books, and the ability to send and receive messages to their family and friends. The article noted that while the tablets are free, access to these materials involves a charge to the inmate or the inmate's family. According to the article, each e-mail will cost \$0.25, each video message will cost \$0.75 and each music download will cost \$1.99. Securus will charge the inmates and will also tender \$3.5 million annually to the Department of corrections for five years. After five years the company will pay the Department of Corrections \$3.75 million annually for another five years.

Ms. Fernandes informed the Commission that video conferences are the "newest trend in revenue-generating communications in prisons and jails." Two of the leading corrections-focused tech companies, Securus and JPay, provide video services to 573 facilities nationwide according to their websites. In 2017, "at least five of New Jersey's twenty-one counties, had systems that allowed for video calls to an inmate from a cellphone or computer. To this time, nine counties use some form of video call service technology. In 2016, and 2018, Senate Bill 2896 and Senate Bill 1808, respectively, were introduced to imposed requirements on video visitation service contracts for inmates in certain correctional facilities. Neither was enacted.

Mr. Silver explained that on March 10, 2021, Staff contacted the New Jersey Department of Corrections to ask whether NJS 30:4-8.12a would benefit from modification to include "predicate costs" and "infrastructure costs" and the availability of video visitation and fees. No reply was received.

Mr. Silver asked for Commission guidance on this issue as to whether the Staff should proceed with work on this project, continue to monitor the area, or discontinue its work.

Commissioner Rainone requested clarification on the status of the case that challenged the constitutionality of the RCL. Mr. Silver explained that the case was resolved without any disposition by the court. Commissioner Rainone noted that the Legislature frequently regulates costs and or rates that can be charged under a state contract and these contracts are open to the public to bid or not bid on. He noted that though this may be an interesting project, he does not see it necessary for the Commission to continue its work on this matter because the Legislature has the right to regulate these costs. If the State does not receive bids, then the Legislature can then amend the statute.

Mr. Silver explained that there is a rate cap, and the rate cap deals primarily with the amount that can be charged to these particular inmates and the question that was raised here was whether infrastructure costs and predicate costs can be charged to the inmates. He added that since this is the sole means of communication for individuals who are incarcerated, the Staff wanted to ascertain whether the Legislature and the DOC will allow the additional fees to be billed to the inmates, their family members, or friends. He noted that *Securus Tech., v. Murphy* and *James v. Global Tel\*Link Corp.* were both resolved without having reached this issue. The question remains whether a company may charge additional fees, since the statute is silent on the issue of infrastructure and predicate costs.

Commissioner Bunn acknowledged Mr. Silver's observations and noted that the litigation on this issue had continued for numbers of years and neither the Court nor the parties to the litigation were able to ascertain the intent of the Legislature. Whether to include the extra fees within the fee cap or whether there is ability to surcharge on top of the fee cap is a policy decision best left to the New Jersey Legislature to decide.

Commissioner Long suggested that Staff could continue monitoring this issue, but not move forward with the project. Chairman Gagliardi noted that he had concerns regarding continuing work on this project and asked whether monitoring the issue would lead the Commission to work in this area of law in the future. Commissioner Rainone stated that he did not see the need to further monitor this issue because it is a policy decision and Commissioner Bunn agreed. Chairman Gagliardi noted that the case law and legislative research does not provide any direction as to how the Commission can provide clarity to the statute that will comport with the legislative intent or with the Appellate Division's decision.

The Commission unanimously agreed to discontinue work in this area.

### **Freeholder**

Amid a statewide and national movement to examine statutory terms rooted in systemic racism, Samuel Silver explained that, in August of 2020, Governor Murphy signed into law a bill that eliminates the title of Freeholder and Chosen Freeholder, from county government. These terms were replaced with a term that is used throughout the country, County Commissioner. This change required counties to update materials to reflect the title change and created a definition for "freeholder" and "chosen freeholder" to mean County Commissioner.

The replacement term appears only in N.J.S. 1:1-2, in which the definition of "freeholder" and "chosen freeholder" means "county commissioner. Since the change to the statutes pertained only to that single section, a preliminary review of the statutes showed that the word "freeholder" still appears in 1,235 statutes, so individuals accessing the State's statutes will encounter that term.

Mr. Silver explained that as part of the Commission's previous "workhouse" project the Bergen County Counsel suggested that the term Freeholder be removed from the statute and replaced with the term Commissioner.

Commissioner Bunn and Chairman Gagliardi both said that this is a good project for the Commission, and Staff was authorized to engage in additional research and outreach.

### **Miscellaneous**

Samuel Silver introduced the Commissioners to Lauren Haberstroh, Jasmin Rodriguez, and Angela Febres, Legislative Law Clerks from Seton Hall University School of Law who are working with the Commission for the summer.

### **Adjournment**

The meeting was adjourned on the motion of Commissioner Rainone, seconded by Commissioner Bertone.

The next Commission meeting is scheduled for July 15, 2021, at 4:30 p.m.