

To: New Jersey Law Revision Commission
From: Laura C. Tharney, Executive Director
Re: Projects Appropriate for Conclusion
Date: September 5, 2022

MEMORANDUM

In advance of the July meeting of the Commission, Staff examined the full slate of Commission projects and identified seventeen projects on which was begun in or before 2018 on which the Commission may want to conclude its work.

Staff was asked to prepare a Memorandum for the Commission's September meeting bringing a group of those projects to the attention of the Commission for consideration.

The following pages contain brief descriptions of nine projects, each of which is followed by a brief explanation of the reasons why concluding the project appears to be appropriate at this time.

As previously discussed in memoranda recommending the conclusion of a project, the fact that the Commission concludes work at this time does not preclude it from resuming work in the same or a related area in the future.

Projects Proposed for Conclusion

1. Collateral Consequences of Conviction (2011)

Begun in 2011 as a three-part project in response to *In re D.H.*, 204 N.J. 7 (2010), the Commission's work in the area of collateral consequences of conviction was broad in scope. The parts of the project as initially identified by Staff were: (1) update the Rehabilitated Convicted Offenders Act (RCOA), N.J.S. 2A:168A-1 et seq.; (2) coordinate treatment of the statutes dealing with forfeiture after conviction; and (3) address the impact of conviction on public office. Staff began with an effort to revise the RCOA, which was enacted in two sections, to synthesize its provisions so that they formed a more coherent whole. With the assistance of Legislative Law Clerks, progress was made on this aspect of the project in 2015 and 2015.

In addition to the work done concerning the RCOA, Staff (including the Legislative Law Clerks) also engaged in a review of the collateral consequences resulting from criminal convictions that are imposed by state law. The Criminal Justice Section of the American Bar Association, fulfilling the terms of a Congressional grant, identified 1,051 New Jersey statutes or regulations imposing ancillary sanctions¹—legal disabilities imposed or authorized that flow from, but are not part of, an individual's criminal sentence.

¹ Court Security Improvement Act of 2007, *Pub. L. No.* 110-177, 110th Cong. § 510(d) (2008); See <http://isrweb.isr.temple.edu/projects/accproject/pages/GetStateRecords.cfm?State=NJ>

Work was also done to identify statutes authorizing or imposing collateral consequences on the basis of “moral turpitude” or a lack of “good moral character” to assess whether it would be possible and useful to craft definitions for those phrases so that provisions concerning similar situations are interpreted and applied in a consistent manner.

The third part of this project focused on an analysis of the statutory language and cases that concerning the forfeiture of public office, and a determination about whether it would be useful to distinguish between different types of public employees and different types of offenses, and to treat them differently for purposes of forfeiture.

A considerable amount of work was done on this project by Staff over a period of years.

Bills substantially modifying the RCOA were introduced in the 2016-2017 legislative session. Consistent with Commission practice, Staff discontinued active work in this area in deference to the legislative activity. Ultimately, the bills were not enacted, but competing demands on Staff time made it difficult to devote resources to this large project, and the passage of time means that much of the earlier work would have to be duplicated in order to bring the research current.

Although this project focused on important issues, it does not appear that the Commission will have the resources to devote to a project of this scope in the near future. As a result, Staff seeks authorization to conclude work in this area at this time, with the possibility of resuming work in the future if time and staffing permit.

2. Communications Data Warrants and Electronic Communications (2018)

In In the Matter of the Application of the State of New Jersey for Communications Data Warrants to Obtain the Contents of Stored Communications from Twitter, Inc. 448 N.J. Super. 471 (App. Div. 2017), the Appellate Division was asked to consider whether the audio portions of a video camera, or video tape, fall within the “Wiretapping and Electronic Surveillance Control Act.”

Under the existing law, it is unclear whether communications sent via social media are to be considered communications for purposes of the Wiretapping and Electronic Surveillance Control Act. When this potential project was presented to the Commission, in January 2018, the law in this area did not appear to reflect relatively recent technological advances. Staff suggested that the Legislature might wish to consider whether the outcome of this case matches the intent behind the statute.

At the time that the Commission considered and authorized Staff to engage in additional research and outreach in January 2018, the Commission recognized that this was “an extremely

difficult and complex area of law due to frequent technological advancements and changes”² and that “before delving too deeply into this area, it would be important to consider” the “resources that the Commission wishes to devote to this task.”³ Staff was directed to include, in a future submission to the Commission, information about “the resources that would be necessary to complete the Commission’s analysis of this area.”⁴

The Commission’s concerns about resources were well-founded. Competing demands on Staff time made it challenging to devote resources necessary to even begin this large project.

Although this project focused on important issues, it does not appear that the Commission will have the resources to devote to it in the near future. As a result, Staff seeks authorization to conclude work in this area at this time, with the possibility of resuming work in the future if time and staffing permit.

3. Consumer Fraud Act (2014)

The Commission began work on a project relating to New Jersey’s Consumer Fraud Act (CFA) in January 2014. Although the basic intention of the CFA is to expand protections for New Jersey customers, it has been subject to hundreds of amendments in the fifty years since its enactment. It has also spawned extensive litigation in New Jersey courts. As a result, the CFA now constitutes over one hundred pages of statutory language, some of which contains ambiguities and redundancies.

In an effort to target its work effectively, Staff prepared a Memorandum identifying some of the more frequently litigated provisions of New Jersey’s CFA, including: (1) mandatory treble damages for violations; (2) attorney fees for technical violations; (3) overuse by out-of-state litigants; and (4) reliance as a component of a CFA claim. These challenging issues resulted in a number of bills pending in the legislature as the Commission began its work. During its early work on this project, Staff also proposed for Commission consideration an alternative organizational structure for the CFA.

Although the Commission does not generally work in areas that are a current focus of the Legislature, the legislative proposals under consideration during active Commission work on the CFA did not comprehensively address the issues that the NJLRC identified for possible revision.

Even with a limited focus on the sprawling CFA, Staff found it difficult to devote the resources to engage in the work necessary to meaningfully assess the changes to the law and the large number of relevant cases.

² New Jersey Law Revision Comm’n, Minutes, pp. 7-8, January 18, 2018, <https://www.njlrc.org/projects/2019/7/9/communications-data-warrants-and-electronic-communications?rq=communications>

³ *Id.*

⁴ *Id.*

Although this project focused on important issues, it does not appear that the Commission will have the resources to devote to it in the near future. As a result, Staff seeks authorization to conclude work in this area at this time, with the possibility of resuming work in the future if time and staffing permit.

4. Definition of “Under the Influence” (including Cannabis) (2018)

In October 2018, the Commission authorized a project pertaining to the statutory definition of “under the influence” in the New Jersey DWI statute as discussed in *State v. Siervo*, No. A-0989-16T2, 2018 WL 266734 (App. Div. 2018). The issues before the court were: (1) whether the Defendant’s motion to vacate his previous guilty pleas for driving under the influence and refusal to submit to a Breathalyzer test were time barred, and (2) whether there were adequate factual bases for these convictions.

The Appellate Division explained that the motion to vacate guilty pleas was not time barred since they could be vacated to correct a manifest injustice, but noted that no manifest injustice existed. The Court agreed that the pleas rested on adequate factual bases but noted that New Jersey’s DWI statute does not define the phrase “under the influence.” Case law has interpreted this term to mean a diminution of physical or mental faculties. The Appellate Division recognized that if the municipal judge had inquired about Defendant’s physical or mental condition while operating his vehicle, subsequent litigation on this issue might have been avoided and that a clear statutory definition of that term could potentially avoid similar litigation in the future.

At the time that work on this project was authorized, the Commission directed that Staff expand its research and outreach to address issues relating to cannabis.⁵

The Commission’s work in this area continued over a period of years and, during that time, there were significant changes in the law regarding the use of marijuana. Work in this area of the law was being done by the Legislature, the Executive Branch of the State government, and by the New Jersey Judiciary to address a host of issues as a result. In light of the work being done in this area across the State, and the experience and expertise of those working in the area, it did not appear that there was a meaningful role for the Commission to play, and active work was discontinued in 2021.

Staff seeks authorization to formally conclude its work in this area at this time.

5. Expungement (2015)

The Commission authorized work in the area of expungements in July 2015, in response to *In re D.J.B.*, 216 N.J. 433 (2014). in which the New Jersey Supreme Court considered the

⁵ New Jersey Law Revision Comm’n, Minutes, pp. 7-8, October 18, 2018, <https://www.njlrc.org/projects/2019/8/1/definition-of-under-the-influence?rq=influence>

interplay between the juvenile and adult expungement statutory schemes. After research and outreach, Staff prepared a Draft Tentative Report and then Revised Draft Tentative Reports in 2015 and 2016.⁶ Commenters on the project, including prosecutors, were generally supportive.

In 2017, expungements were the focus of considerable legislative activity as well as several appellate decisions in New Jersey.⁷ The Legislature, in a bipartisan effort led by the Governor to extend the “Opportunity to Compete” — also known as the “Ban the Box” measure — crafted a trio of bills aimed at easing the process for expunging juvenile adjudications and adult convictions.⁸ Staff efforts to engage with the Legislature did not result in interest in the work of the Commission in this area.

In response to the Legislature’s work in this area, Staff discontinued its active work, and has not resumed work to this time although it did begin a project regarding the meaning of “closely related circumstances” in the expungement context in 2021. Staff seeks authorization to formally conclude its work on its older expungement project at this time.

6. Franchise Practices Act (2014)

In April 2014, the Commission authorized work on the New Jersey Franchise Practices Act (NJFPA) as a result of the decision of the District Court in *Navraj Rest. Group, LLC v. Pancharo’s Franchise Corp.*, 2013 WL 440837 (D.N.J. Aug. 15, 2013).

Staff work in this area resulted in the preparation of a Draft Tentative Report in 2014, and Revised Tentative Reports in 2015, 2016, and 2017, during which time the scope of the project was narrowed to focus on the gross sales threshold and forum-selection issues.⁹

Legislative activity in this area, ultimately resulting in changes to the NJFPA, caused Staff to pause the Commission’s work, and competing demands on the Commission’s time meant that work did not thereafter resume. Staff seeks authorization to formally conclude its work on this project at this time.

7. Frivolous Litigation (2017)

In 2017, the Commission considered an editorial published in the New Jersey Law Journal entitled, “Clarify Frivolous Litigation Rule’s Applicability to Appeals.” The statute to which the article referred, New Jersey’s Frivolous Litigation Statute, N.J.S. 2A:15-59 et seq., was enacted to protect parties from baseless litigation.

⁶ New Jersey Law Revision Comm’n, <https://www.njlrc.org/projects/2019/8/8/provisions-governing-expungement-of-juvenile-adjudications-njs-2c52-41?rq=expungement>

⁷ *In re T.B.*, no. A-1518-16T1, A-1517-16T1, A-1516-16T1 (App. Div. Aug. 1, 2017); *In re Velazquez*, no. A-788-6T1 (App. Div. July 28, 2017).

⁸ New Jersey Law Revision Comm’n, Minutes, p. 6, September 19, 2017, <https://www.njlrc.org/projects/2019/8/1/definition-of-under-the-influence?rq=influence>

⁹ New Jersey Law Revision Comm’n, <https://www.njlrc.org/projects/2019/5/30/franchise-practices-act?rq=franchise>

The statute permits a court to award litigation costs and reasonable attorney fees to the prevailing party when they meet certain conditions precedent. The statute applies only to complaints, counterclaims, cross-claims, or defenses filed in an action that the court finds to be frivolous in nature. To be considered frivolous, one of the enumerated pleadings must have been filed in “bad faith, solely for the purpose of harassment, delay or malicious injury.” The New Jersey Supreme Court, which has exclusive jurisdiction to regulate attorneys, has declined to apply this statute to anyone other than non-lawyer parties.

There is presently no statute in New Jersey that addresses frivolous litigation in appellate matters.

Competing demands on Staff time meant that work on this project did not move beyond preliminary research.

As a result, Staff seeks authorization to conclude work in this area at this time.

8. Public Health and Safety – Seatbelt Usage (2015)

As a result of the New Jersey Supreme Court’s decision in *State v. Lenihan*, 219 N.J. 251 (2014), the Commission began a project concerning N.J.S. 2C:40-18 in July 2015. That statute establishes degrees of criminal responsibility for an individual who knowingly violates, or fails to perform a duty required by, a public health or safety law, and recklessly causes death or bodily injury as a result.

In *Lenihan*, the eighteen-year-old defendant was driving with her sixteen-year-old friend in the passenger seat and lost control of the vehicle, hitting a guardrail. Neither the defendant nor her passenger were wearing a seat belt as required by N.J.S. 39:3-76.2f. The passenger died as a result of the injuries she sustained, and defendant was charged and found guilty of a third-degree crime pursuant to N.J.S. 2C:40-18.

Defendant appealed and argued that: (1) her violation of the seat belt statute could not serve as a predicate offense for conviction pursuant to N.J.S. 2C:40-18 because violations of the seat belt statute do not threaten “the public health and safety”; (2) she lacked notice that such a “minor violation” would result in third degree criminal charges; and (3) N.J.S. 2C:40-18 is unconstitutionally vague and should be narrowly interpreted. The New Jersey Supreme Court affirmed the defendant’s conviction.

A preliminary examination of the legislative history and contemporaneous news articles indicated that the intent of N.J.S. 2C:40-18 focused on violations of New Jersey building codes by night clubs and similar establishments. Expansion of the scope of N.J.S. 2C:40-18 to include statutes such as N.J.S. 39:3-76.2f as predicate offenses may exceed the expectations of the Legislature.

Informal outreach to the Legislature at the direction of the Commission in September 2017¹⁰ did not result in any response, and competing demands on Staff time meant that work on this project did not move beyond the Memorandum stage. Staff seeks authorization to conclude work in this area at this time.

9. Theft of Immovable Property (2017)

In *State v. Kosch*, 444 N.J. Super. 368 (App. Div. 2016), the Appellate Division considered the definition of the word “transfer” in N.J.S. 2C: 20-3(b) and determined that the term, and the legislative intent regarding its meaning, are unclear. N.J.S. 2C:20-3(b) reads as follows: “A person is guilty of theft if he unlawfully transfers any interest in immovable property of another with purpose to benefit himself or another not entitled thereto.” The *Kosch* Court explained that “there is no question these three properties were owned by others and, although, as the ostensible contract purchaser, defendant may have possessed a partial interest... he never lawfully acquired the interest he was charged with taking. We, thus, turn to whether a ‘transfer’ occurred within the meaning of *N.J.S.A. 2C:20–3(b)*.”

New Jersey’s Criminal Code does not define the term “transfer” and the Court looked to a variety of sources to find an appropriate definition.

In January of 2018, the Commission authorized a project concerning the definition of the word “transfer” in N.J.S. 2C:20-3(b) as it pertains to the theft of immovable property. At the time of the initial presentation of this potential project to the Commission, it did not appear that any bills were pending that addressed the issue raised for Commission consideration. As a result of subsequent legislative initiatives, however, Staff held off substantive work in the area.

In light of the ongoing legislative attention to this issue, Staff recommended the conclusion of the open Commission project in this area in May 2022. Instead of concluding work, the Commission suspended its work in the area. Staff seeks authorization to formally conclude work on this project at this time.

¹⁰ New Jersey Law Revision Comm’n, Minutes, pp. 3-4, September 19, 2017, <https://www.njlrc.org/projects/2019/5/30/public-health-and-safety-seat-belt-usage?rq=safety>