

New Jersey Law Revision Commission

ANNUAL REPORT

2012



Report to the Legislature of the State of New Jersey
As provided by 1:12A-9.

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I. MEMBERS AND STAFF OF THE COMMISSION IN 2012

The members of the Commission are:

Vito A. Gagliardi, Jr., Chairman, Attorney-at-Law

Albert Burstein, Attorney-at-Law

Andrew O. Bunn, Attorney-at-Law

Virginia Long, Attorney-at-Law

Nicholas P. Scutari, Chairman, Senate Judiciary Committee, *Ex officio*

Peter J. Barnes III, Chairman, Assembly Judiciary Committee, *Ex officio*

Patrick Hobbs, Dean, Seton Hall Law School, *Ex officio*

Represented by Professor **Ahmed I. Bulbulia**

John J. Farmer, Jr., Dean, Rutgers School of Law – Newark, *Ex officio*

Represented by Professor **Bernard Bell**

Rayman Solomon, Dean, Rutgers School of Law - Camden, *Ex officio*,

Represented by **Grace Bertone**, Attorney-at-Law

The Staff of the Commission is:

John M. Cannel, Executive Director*

Laura C. Tharney, Deputy Director*

Marna L. Brown, Counsel

Jenene J. Hatchard, Administrative Assistant **

Uchechukwu Enwereuzor, Legislative Law Clerk

Benjamin Hochberg, Legislative Law Clerk***

David Liston, Legislative Law Clerk

Keith Ronan, Legislative Law Clerk***

* John M. Cannel retired from the position of Executive Director effective October 1, 2012 and Laura C. Tharney became the Executive Director on that date.

** Jenene Hatchard worked with the Commission until November 2011.

*** Benjamin Hochberg and Keith Ronan worked with the Commission until May 2011.

II. HISTORY AND PURPOSE OF THE COMMISSION

New Jersey has a tradition of law revision. The first Law Revision Commission was established in 1925 and produced the Revised Statutes of 1937. Since the Legislature intended that the work of revision and codification continue after the enactment of the Revised Statutes, the Law Revision Commission continued in operation until 1939. After that time, the functions of the Commission were transferred to a number of successor agencies, including Legislative Counsel.¹

In 1985, the Legislature enacted 1:12A-1 *et seq.*, effective January 21, 1986, to transfer the functions of statutory revision and codification to a newly created New Jersey Law Revision Commission.² The Commission began work in 1987 and has, since that time, filed 118 Reports with the Legislature, 42 of which have been enacted into law.

The Commission's statutory mandate is to simplify, clarify and modernize New Jersey statutes. To do so, the Commission conducts an ongoing review of

¹ N.J.S. 52:11-61.

² The Law Revision Commission was created by L.1985, c.498, and charged with the duty to:

- a. Conduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it for the purpose of discovering defects and anachronisms therein, and to prepare and submit to the Legislature, from time to time, legislative bills designed to
 - (1) Remedy the defects,
 - (2) Reconcile conflicting provisions found in the law, and
 - (3) Clarify confusing and excise redundant provisions found in the law.
- b. Carry on a continuous revision of the general and permanent statute law of the State, in a manner so as to maintain the general and permanent statute law in revised, consolidated and simplified form under the general plan and classification of the Revised Statutes and the New Jersey Statutes;
- c. Receive and consider suggestions and recommendations from the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and other learned bodies and from judges, public officials, bar associations, members of the bar and from the public generally, for the improvement and modification of the general and permanent statutory law of the State, and to bring the law of this State, civil and criminal, and the administration thereof, into harmony with modern conceptions and conditions; and
- d. Act in cooperation with the Legislative Counsel in the Office of Legislative Services, to effect improvements and modifications in the general and permanent statutory law pursuant to its duties set forth in this section, and submit to the Legislative Counsel and the Division for their examination such drafts of legislative bills as the commission shall deem necessary to effectuate the purposes of this section.

the statutes to identify areas of the law that require revision. The scope of the revision performed by the Commission varies by the project. It includes modest changes, like the correction or removal of inconsistent, obsolete or redundant language, as well as comprehensive changes to select areas of the law.

The Commission considers recommendations from the American Law Institute, the Uniform Law Commission (formerly the National Conference of Commissioners on Uniform State Laws) and other learned bodies and public officers.

Once a project begins, the Commission examines local law and practice, and, when appropriate, the law of other jurisdictions. The Commission also consults with experts in the field throughout the drafting process, seeking input from individuals and organizations familiar with the practical operation of the law and the impact of the existing statutes.

When the preliminary research and drafting is finished, the Commission issues a Tentative Report and makes it available to the public for formal comments. The Commission reviews all of the comments received, and incorporates them into the Tentative Report as appropriate. When a revision is completed, a Final Report and Recommendation is prepared and submitted to the New Jersey Legislature for consideration.

The Commission's work has been published in law journals, cited by the New Jersey Courts, and used by law revision commissions in other jurisdictions.

The meetings of the Commission are open to the public and the Commission actively solicits public comment on its projects, which are widely distributed to interested persons and groups. Since 1996, the Commission has maintained a website for the purpose of making its projects readily available to the public; which may be found at <http://www.njlrc.org>.

III. LEGISLATIVE SUMMARY

Since the New Jersey Law Revision Commission began work in 1987, the New Jersey Legislature has enacted 40 bills³ based upon 42 Final Reports and Recommendations of the Commission.

The Adult Guardianship and Protective Proceedings Jurisdiction Act and the Revised Limited Liability Company Act were enacted in 2012. The complete list of Commission projects enacted since the Commission began work is:

- Adult Guardianship and Protective Proceedings Jurisdiction Act (L. 2012, c.36)
- Anatomical Gift Act (L.2001, c.87)
- Cemeteries (L.2003, c.261)
- Civil Penalty Enforcement Act (L.1999, c.274)
- Construction Lien Law (L.2010, c119)
- Court Names (L.1991, c.119)
- Court Organization (L.1991, c.119)
- Criminal Law, Titles 2A and 24 (L.1999, c.90)
- Evidence (L.1999, c.319)
- Intestate Succession (L.2001, c.109)
- Juries (L.1995, c.44)
- Revised Limited Liability Company Act (L. 2012, c.50)
- Lost or Abandoned Property (L.1999, c.331)
- Married Women's Property (L.2011, c.115)
- Material Witness (L.1994, c.126)
- Municipal Courts (L.1993, c.293)
- New Jersey Trade Secrets Act (L. 2011,c. 161)
- Parentage Act (L.1991, c.22)
- Probate Code (L.2001, c.109)
- Recordation of Title Documents (L.1991, c.308)

³ The Repealers project, which resulted in four statutes enacted in 1991, was divided into three Reports.

- Repealers (L.1991, c.59, 93, 121, 148)
- Replevin (L.1995, c.263)
- School Background Checks (L.2007, c.82)
- Service of Process (L.1999, c.319)
- Statute of Frauds (L.1995, c.36)
- Surrogates (L.1999, c.70)
- Tax Court (L.1993, c.403)
- Title 45 –Professions (L.1999, c.403)
- Title Recordation (L.2011, c.217)
- Uniform Child Custody Jurisdiction and Enforcement Act (L.2004, c.147)
- Uniform Commercial Code 2A – Leases (L.1994, c.114)
- Uniform Commercial Code 3 – Negotiable Instruments (L.1995, c.28)
- Uniform Commercial Code 4 – Bank Deposits (L.1995, c.28)
- Uniform Commercial Code 4A – Funds Transfers (L.1994, c.114)
- Uniform Commercial Code 5 – Letters of Credit (L.1997, c.114)
- Uniform Commercial Code 8 – Investment Securities (L.1997, c.252)
- Uniform Commercial Code 9 – Secured Transactions (L.2001, c.117)
- Uniform Electronic Transactions Act (L.2001, c.116)
- Uniform Mediation Act (L.2004, c.157)
- Uniform Prudent Management of Institutional Funds Act (L.2009, c.64)

IV. FINAL REPORTS AND RECOMMENDATIONS

A Final Report and Recommendation contains the determination of the Commission regarding a particular area of the law. It includes an analysis of the area of law addressed by the project, proposed statutory language, and commentary. A Final Report is approved and adopted after the public has had an opportunity to comment on drafts of the Report, and is filed with the Legislature. After filing, Commission Staff work with the Legislature to facilitate its enactment.

In 2012, the New Jersey Law Revision Commission published 13 Final Reports and Recommendations to the Legislature.

A. Causes of Action (Title 2A)

As a part of a broader revision of Title 2A begun in 2009, Staff revised certain sections of Subtitle 6 of that Title and released a Final Report in early 2012. Subtitle 6 is a collection of widely varying causes of action, some of which were drafted relatively recently, while others were drafted over a century ago. The goal of this revision is to modernize the statutes by eliminating language that is no longer viable and updating the remaining language. The various changes proposed in the Report are briefly described below.

The language pertaining to alcohol servers' liability was not recommended for change but the Commission brought to the attention of the Legislature the fact that this statute does not cover a number of situations in which coverage may be appropriate. Significantly, the statute is not readily applicable to the service of alcohol at mass gatherings, like sporting events or concerts at stadiums. Since the statute specifically states that it is the exclusive civil remedy for personal injury or property damage resulting from the negligent service of alcoholic beverages, the Commission noted that Legislature may wish to revisit this area in light of the case law developments subsequent to its enactment.

The Commission likewise recommended no change to the section pertaining to liability for damage to a fire alarm system.

The seven sections of the law known as the “heart balm” statutes were eliminated with the exception of a single sentence. The section pertaining to a change of name application was likewise proposed for elimination except for a single sentence that refers to the procedures for a name change set forth in the Rules of Court.

The two sections pertaining to injury or losses resulting from mob violence or riots were recommended for repeal in their entirety as were the sections pertaining to the recovery of money or property from a municipality or school district and the four sections pertaining to naturalization.

The language pertaining to debts or obligations fraudulently incurred was modified in a conservative manner after a detailed review of the case law in an effort to clarify its provisions.

Finally, the section pertaining to the arrest or detention of persons with mental incapacity was modified to make it clear that its provisions did not apply to a commitment proceeding and the statutory language pertaining to proof of lost or destroyed instruments was modified slightly for clarity and to include the applicable standard of proof.

B. Driving While Intoxicated

In December 2012, the Commission released a Final Report regarding the provisions of Title 39 that pertain to driving while intoxicated, *N.J.S. 39:4-50 – 39:4-51b*. During the course of work on this project, Staff engaged in a comprehensive review of the laws of all 50 states, Washington D.C., Puerto Rico, and the U.S. Virgin Islands in order to determine where New Jersey stands in relation to other states and territories on DUI/DWI policies, particularly with regard to the use of ignition interlock devices and the criminalization of DUI/DWI offenses.

Presently, New Jersey is one of the states that mandates the installation of ignition interlock devices for “high-BAC” first offenders (those with a blood alcohol content greater than .15%). The New Jersey statute calls for the

installation of an ignition interlock device in the vehicle principally operated by the offender if a driver is convicted of a first DWI offense with a blood alcohol level of .15% or greater. *N.J.S. 39:4-50; N.J.S. 39:4-50.17.*

There has been considerable modification of DWI law and policies in almost every state since the time that New Jersey enacted Ricci's Law (effective in January of 2010). According to the National Conference of State Legislatures State Traffic Legislation Database, the National Highway Traffic Safety Association, and the Governors Highway Safety Association, each one of the 50 states has either enacted or proposed legislation that modifies current impaired driving legislation since January 2010.

Laws pertaining specifically to ignition interlock devices have recently been adopted in a number of states to mandate installation or to strengthen existing requirements for monitoring and installation practices.

Changes to the laws pertaining to ignition interlock devices (IIDs) vary considerably from state to state. Most recently-enacted legislation concerning IIDs deals with: increasing the length of time during which an IID must be installed; mandating installation for first-time or subsequent DUI offenders; modifying the reporting requirements for the IIDs, and "incentivizing" the installation of IIDs when their installation is not mandatory (for example, imposing a 90 day license suspension for a first-time DUI but offering the option of reducing the suspension to 30 days if the offender agrees to the installation of the IID for six months).

During the course of this project, the Commission was asked to consider whether the criminalization of DWI would be useful or appropriate in New Jersey. During the time that the Commission was working in this area, New Jersey was one of only five states in the United States that did not criminalize DWI offenses under any circumstances.

Ultimately, the Commission recommended changes to four areas of the law: (1) requiring IIDs for all DWI offenders, including first offenders; (2) providing incentives for pre-conviction installation of IIDs; (3) imposing alternative consequences on offenders who wish to avoid the installation of an IID by

claiming that they do not have a car, or access to a car; and (4) modifying the statutory language pertaining to underage drinking and driving to address repeat offenders. The Commission's recommendations also included a monitoring component to address that acknowledged shortcoming in New Jersey's law.

C. General Repealer

In March of 2012 the Commission approved a Final Report recommending the repeal of certain anachronistic statutes. The Commission is directed by statute to identify anachronistic and redundant provisions in the law (*N.J.S. 1:12A-8(a)*). It has been more than 20 years since the Commission published a Report identifying anachronistic or invalid statutes and recommending their repeal.

In 1991, the Legislature enacted four statutes of repeal, in response to the Commission's last Report identifying statutes for repeal. See L. 1991 c. 59, 93, 121 and 148. The new Report continues to recommend repeal of statutes on which the Legislature did not previously act, and adds others identified by the Commission, the Office of Legislative Services and interested groups.

The reasons that particular statutes should be repealed vary, but fall into several categories. Some statutes are invalid because they have been found unconstitutional or have been superseded. See, for instance, *N.J.S. 56:7-1 to 7-17*, declared unconstitutional in *Lane Distributors v. Tilton*, 7 N.J. 349 (1951) and *N.J.S. 2A:82-8*, one of a number of statutes superseded by the New Jersey Evidence Rules as provided by *N.J.S. 2A:84A-40* (Official footnote to *Evid. R. 70*).

A larger number of statutes recommended for repeal in this Report are those which have ceased to have any operative effect with the passage of time. Some are anachronistic because they relate to offices or institutions which no longer exist. See, *N.J.S. 46:27-1* and *46:27-2* relating to the Surveyors General. Others are anachronistic because they deal with problems which were important at one time but which have ceased to be relevant to modern society so that, in

the modern context, they amount to unnecessary regulation. See, *N.J.S.* 45:20-1 to 20-3 regulating millers of grain. Still others deal with problems which have continuing relevance, but do so in a way which has become totally unacceptable due to the passage of time. See, *N.J.S.* 8-14 which limits the amount to be spent on food for a prisoner to \$0.50 a day.

The particular sections proposed for repeal are not all of the anachronistic or superseded sections in the New Jersey statutes. The 2009 Commission Report on the Public Assistance Law recommends the repeal of many anachronistic sections in the context of a comprehensive revision of Title 44 of the Statutes. The recent Report on the Unconstitutional Flag Salute Statute recommends repeal of *N.J.S.* 18A:36-3. Those recommendations are not repeated in this Report. There are also some statutes that have been held unconstitutional but proposal for their repeal engenders political controversy. See, *N.J.S.* 9:17A-1.1 et seq. on Parental Notification for Abortion. This Report also does not discuss situations where only part of a statute is invalid.

D. Landlord and Tenant Law

The Commission issued its Final Report relating to Landlord and Tenant Law in February 2012, after nearly three years of work. The Report recommends total reorganization and revision of the statutes pertaining to landlord-tenant relationships. Current law consists of overlapping, contradictory and inaccessible provisions, some of which date back to the 1870's and earlier. Many, but not all, of the landlord-tenant provisions are contained in Title 2A, but they are not within the same chapter nor are they in sequence. Currently, different aspects of the same topic are discussed in more than one statutory section.

For example, both the Anti-Eviction Act and the Summary Dispossess Act are found in chapter 18 of Title 2A. Archaic provisions pertaining to distraint and landlord's liens are in chapters 33, 42, 19 and 44 of Title 2A. Provisions pertaining to receivership and regulation of multiple dwellings appear in chapter 42 of Title 2A. Provisions relating to the archaic concept of "waste" appear in

chapter 65 of Title 2A. Another large part of the law is found in chapter 8 of Title 46, which contains provisions pertaining to Leasehold Estates, the Truth-in-Renting Act, the Security Deposit Act and the New Jersey Safe Housing Act. Other miscellaneous provisions are scattered throughout the statutes, including Titles 38, 40, 52, and 54.

The lack of organization makes the law difficult to find. The conflicts, inconsistencies and anachronistic provisions make it difficult to determine what law applies. In this area, since parties frequently represent themselves, it is especially important that the statutes be consistent, understandable and easy to locate.

While preserving the current legal concepts and causes of action, the Report sought to: (1) consolidate, in a single place, all statutes pertaining to the legal relationship between the landlord and tenant; (2) update all statutory language and remove anachronistic provisions; and (3) make consistent the various statutory provisions, and cross reference them, as appropriate. Thus, all of the relevant law is placed in a proposed new Title 46A.

Archaic terms are eliminated or replaced. The term “removal”, for example, is replaced with the term “eviction” in every instance where the term refers to the removal of a tenant from rental premises. The Report also eliminates inconsistencies and confusing provisions. In some cases, current provisions are inconsistent because they pre-date the Anti-Eviction Act and the Summary Dispossess Act but have not been repealed or modified to reflect the changes made as a result of those Acts. In addition, where appropriate, the Report updates the law by incorporating the holdings of key New Jersey State court determinations. This was only done when the Commission concluded that the cases clarified an ambiguous issue, made a reasonable determination of legislative intent, or encouraged further legislative clarification.

In the view of many tenants and tenant representatives, the Anti-Eviction Act is the most comprehensive and progressive law regulating eviction in the nation. As a result, the Commission made every effort to update and consolidate the Anti-Eviction Act and the Summary Dispossess Act while preserving their

significance.

E. New Jersey Debt-Management Services Act

In March 2012, the Commission released a Final Report dealing with Debt-Management Services. A Uniform Debt-Management Services Act (UDMSA) was approved and recommended for enactment by the Uniform Law Commission in 2005, and was revised and amended in 2008, and then again in 2011. It provides the states with a comprehensive Act with the goal of national administration of debt counseling and management in a fair and effective way. The purpose of the Act is to “rein in the excesses while permitting credit-counseling agencies and debt-settlement companies to continue providing services that benefit consumers.” After the federal Bankruptcy Reform Act of 2005, in order to file for a Chapter 7 bankruptcy, an individual is generally required to show that consumer debt counseling/management has been sought and attempted. Greater transparency and accountability are needed to prevent excesses and abuses of the new powers of debt management services.

One of the most significant changes to New Jersey’s statutes if the NJDMSA project is enacted is the authorized participation of for-profit entities in the State. New Jersey does not currently allow for-profit entities to engage in debt relief activities within the State. The available information suggests, however, that for-profit entities are currently operating in New Jersey, or serving New Jersey consumers from other states, in violation of the law. For-profit entities are generally associated with a type of debt-management known as debt-settlement. Debt-settlement involves a reduction of the principal amount of the debt and a payoff of the reduced debt in a lump sum or over a period of up to three years. Traditional debt-management, on the other hand, involves creditor concessions such as reductions in the interest rate, finance charges, late fees, and the like, and a payoff of the full principal balance after concessions over a period of five years.

In an attempt to maximize the protections for New Jersey residents, the

Commission draft incorporates and expands upon the changes to the Federal Trade Commission Telemarketing Sales Rule effective in 2010. Staff incorporated the language of the FTC Rule pertaining to the fees that may be charged by certain for-profit entities but applied it more broadly than the FTC did. As a result, the draft applies the limitations imposed by FTC Rule to all entities that engage in debt settlement, not only those whose business model involves at least one interstate telephone call. This was done to address, among other things, Commission concerns about entities that operate solely via the internet.

While the NJDMSA project is based on the ULC's draft, it was tailored to reflect New Jersey practices, such as licensing, rather than registration. The ULC document was further modified by the Commission to incorporate additional statutory protections for New Jersey consumers. The additional protections were based on the statutes of other states and concern things like the prerequisites for entering into an agreement, mandatory agreement language, marketing and advertising requirements and remedies in the event of a violation of the Act.

In addition, the language of the ULC Act was modified to eliminate certain automatic exemptions from the law (for attorneys, CPAs and financial planners, for example) and to otherwise adjust the exemption language to afford more consumer protection. The Act was also modified to incorporate a partial indemnification provision, a Consumer Protection Fund, and a sunset provision.

F. Property

The Commission released a Final Report on Property in October of 2012 that revises the basic statutory law of property. The provisions included in that Report are now contained in Title 46, Chapters 3, 3A, 4, 5, 6 and 7. As the result of additions made over the years, the provisions in these chapters follow no particular order and have become a mixture of a variety of subjects. The Table of Dispositions includes a list of all of the current sections and indicates which of the new sections continues the substance of each current section. The new sections have been revised by modernization of language and approach. See, for

example, Chapters 4 and 5 regarding the form of deeds. The revised sections follow current practice and case law.

There are a great many provisions of the current law that have been deleted as unnecessary. Many are clearly anachronistic; some cover matters no longer relevant. For example, Chapter 3A concerns surveys by the Boards of Proprietors, the original owners of colonial New Jersey. Other adjacent chapters are recent and stand alone and have not been made part of this revision. See, for example Chapter 3B, the New Home Warranty and Builders' Registration Act.

G. Special Civil Part - Attorney's Fees

In October 2012, the Commission released a Final Report on a project which arose as a result of the decision in *Chase Bank USA, N.A. v. Staffenberg*, 419 N.J. Super. 386 (App. Div. 2011), addressing counsel fees in Special Civil actions. Specifically, *Staffenberg*, examined whether counsel fees are mandatory under N.J.S. 22A:2-42, and if so, whether in-house counsel is precluded from recovering fees under N.J.S. 22A:2-42 by application of N.J.S. 17:3B-40 and N.J.S. 17:16C-42(d).

In *Staffenberg*, Chase Bank filed a complaint in Special Civil Part, alleging that Staffenberg was indebted on her credit card, and sought recovery of the balance due in the sum of \$5,868.98. *Ibid.* The plaintiff sought \$133.14 in counsel fees under N.J.S. 22A:2-42 for work done by attorneys from its in-house legal department, "consisting of a \$25 portion (equaling five percent on the first \$500 due) plus an additional portion of \$108.14 (comprising two percent of the \$5,406.93 remainder)." *Id.* at 390. The Special Civil Part entered a default judgment against Staffenberg, and included the \$133.14 in counsel fees. *Id.* at 390. The defendant appealed, asserting that plaintiff was precluded from recovering counsel fees under N.J.S. 22A:2-42 because N.J.S. 17:3B-40 and N.J.S. 17:16C-42(d) preclude the recovery of counsel fees by creditors that use in-house counsel. *Id.* at 391.

The court first held that counsel fees are mandatory under N.J.S. 22A:2-

42 and are akin to a taxed cost of suit, meant to shift a portion of the cost incurred, not to reflect the actual cost of retaining counsel. *Id.* at 397. The court also held that *N.J.S. 17:16C-42(d)* and *N.J.S. 17:3B-40* do not preclude recovery of counsel fees under *N.J.S. 22A:2-42* when a plaintiff pursues its action using in-house counsel. *Id.* at 413. The court additionally relied on a prior Appellate Division case, *Bancredit, Inc. v. Bethea*, 65 *N.J. Super.* 538 (App. Div. 1961), which “recognized the qualitative distinction between statutory counsel fees awarded as taxed costs under *N.J.S. 22A:2-42* and counsel fees recoverable under contractual provisions.” *Id.* at 407.

The Commission’s Final Report recommends a change to the language of the statute to incorporate the determination of the Court in *Staffenberg*.

H. Uniform Commercial Code, Article 4A

In September of 2012, the Commission released a Final Report recommending an amendment to Article 4A of the UCC. UCC Section 4A-108 provides that Article 4A does not govern a fund transfer if any part of that transfer is governed by federal Electronic Funds Transfer Act (EFTA).

Among the changes brought about by the enactment of the Wall Street Reform and Consumer Protection Act, is an amendment to the EFTA so that that law will govern “remittance transfers” (the electronic transfer of funds requested by a consumer to a person located in a foreign country that is initiated by a person or financial institution that provides remittance transfers for consumers in the normal course of its business), whether or not those remittance transfers are also “electronic fund transfers” as defined in EFTA. Thus, when the amendment to the EFTA and its implementing rules go into effect in February of 2013, the result of UCC Section 4A-108 will be that a fund transfer initiated by a remittance transfer will be entirely outside the coverage of Article 4A, even if the remittance transfer is not an electronic fund transfer. In effect, these transfers will be covered by neither law.

Under current law, fund transfers that are not “electronic fund transfers” as

defined in the EFTA are excluded from EFTA and governed by Article 4A. As a result, providers of international fund transfers that would qualify as remittance transfers but not electronic fund transfers (as those terms are defined in the amended EFTA), and the receiving banks, are currently able to rely on Article 4A regarding the rights and responsibilities among parties to the transfer.

The federal government recognized that the new law and its regulations would create a problem, and suggested that states amend Article 4A before the February effective date of the regulations. The Uniform Law Commission and the Permanent Editorial Board of the Uniform Commercial Code approved an amendment to Code Section 4A-108 on an expedited basis on June 23, 2012.

I. Uniform Commercial Code, Article 9

The Commission approved a Final Report recommending revisions to Article 9 of the Uniform Commercial Code in March of 2012. The Report adopted revisions approved by the Uniform Law Commission and the American Law Institute in 2010. The ULC recommends a uniform effectiveness date of July 1, 2013, with the hope that legislatures in all states will have an opportunity to consider the revisions before that time.

Article 9 governs security agreements where the property is not real estate. These arrangements are the basis of an important part of commercial finance. Many of the commercial security arrangements under Article 9 are interstate transactions, and it is important that the state laws governing them are as nearly uniform as possible. In reviewing the proposed changes, the Commission was aware of the need for uniformity.

The most significant change proposed concerns specifying the name of debtors who are natural persons. The current Article 9 was found to be insufficiently specific as to the debtor's name as it was to be included in a security filing. The proposed amendments use the driver's license as the source for the "official" version of a person's name. The creditor uses the license to determine the debtor's surname and first personal name. Any other names on

the license would be inserted under “additional names.” If the debtor does not have a drivers license or non-driver state identification card, the situation is unchanged from that under current law, no rule for “official” name is provided.

The amendments also clarify that, for a financing statement to be sufficient, the name of the registered organization debtor on the financing statement is the name reflected on the “public organic record” of the registered organization. Accordingly, if a corporation has a name on its publicly available charter document that is different from the name on the state’s publicly searchable data base, the debtor’s name on the financing statement should be the one reflected on the charter document.

J. Uniform Interstate Depositions and Discovery Act

In December 2012, the Commission released a Final Report on the Uniform Interstate Depositions and Discovery Act (UIDDA). In this Report -- unlike most Commission Final Reports -- recommendations for revision are addressed to the Judiciary with proposed court rule amendments, rather than to the Legislature with proposed statutory changes. This is due to the effect of the New Jersey Supreme Court’s determination in *Winberry v. Salisbury*, 5 N.J. 240 (1950), that the rule-making power of the Court, consistent with our State Constitution, is confined to practice, procedure and administration and, when exercised in those areas, is not subject to conflicting legislation.

The UIDDA was recommended for adoption in all states by the Uniform Law Commission in 2007. The Act sets forth a uniform procedure for the subpoena of depositions of out-of-state individuals and the production of discoverable materials located outside of the trial state. The procedure is straightforward: a subpoena issued by a court in the trial state is then enforced by the clerk of a court in the discovery state and served in accordance with the discovery state’s procedures and fee structure. The discovery state clerk issues its subpoena for service on the person or entity to which the original subpoena is directed; the discovery state subpoena incorporates the terms of the original

subpoena. As a result, minimal judicial oversight is required. The Act eliminates the need to obtain a commission or letters rogatory, or to file a miscellaneous action before obtaining a subpoena in the discovery state, or to obtain local counsel in the discovery state in order to obtain an enforceable subpoena. Twenty-nine jurisdictions have adopted the Act, either by statute or court rule (or in some cases, a combination of both), including the surrounding states of New York, Pennsylvania, Maryland and Delaware. (A bill adopting the UIDDA is pending in Connecticut.)

The Commission is advised that its conclusions and recommendations are now under consideration by the judiciary.

K. Uniform Military and Overseas Voters Act

In March 2012, the Commission released a Final Report on the Uniform Military and Overseas Voters Act (UMOVA), which was approved by the Uniform Law Commission in 2010. UMOVA was promulgated to bring consistency and uniformity to state laws pertaining to military and overseas voting practices. In particular, UMOVA seeks to enhance current law by extending to state elections the assistance and protections for military and overseas voters currently found in federal law but now covering only federal elections. UMOVA focuses on giving voters adequate time to request, receive and return overseas ballots and voting materials. It also requires the availability of electronic transmission of unvoted ballots and voting materials in order to achieve this purpose.

The Commission examined the uniform law while giving great deference to New Jersey's existing Overseas Residents Absentee Voting Law, *N.J.S. 19:59-1 et seq.* (ORAVL). The Commission discovered that ORAVL already rectified some of the concerns addressed by UMOVA. For example, New Jersey law already fosters the use by overseas voters of electronic transmission methods to access election materials and apply for absentee ballots. Some additional UMOVA principles, however, were adopted in the Final Report. The Commission was mindful of federal laws that govern military and overseas voters

and considered the concerns expressed by military and of state voting officials.

The Commission's Final Report on UMOVA incorporates into current New Jersey overseas voting law key UMOVA concepts that are not already addressed in our statutes, thereby amending ORAVL to comply with current federal law and uniform state practice. These concepts include expanding the definition of "overseas voter" to include the spouses and civil union partners of military personnel as well as voters who are eligible to vote in New Jersey but were not born here, and permitting the use of the Federal Postcard Application Form in order to register to vote in state and federal elections. The Federal Voting Assistance Program of the Department of Defense support UMOVA principles as do non-governmental voting assistance organizations, such as the Alliance for Military and Overseas Voting Rights and the Overseas Vote Foundation. Both the American Bar Association and the Pew Center on the States also support UMOVA.

L. Uninsured Motorists

In April 2012, the Commission released a Final Report based on the New Jersey Supreme Court's decision in *Aronberg v. Tolbert*, 207 N.J. 587 (2011), addressing whether the heirs of an uninsured motorist, killed in a motor vehicle accident, have a claim under the Wrongful Death Act and the Survivorship Act. *Aronberg*, held that when an uninsured motorist has "no cause of action for recovery of economic or noneconomic loss sustained as a result of his accident while operating an uninsured automobile [under N.J.S. 39:6A-4.5(a),]" his heirs consequently have "no ground for filing a wrongful death action." *Id.* at 605. *Aronberg* reaffirms the application of N.J.S. 39:6A-4.5(a) as a powerful incentive for compliance with New Jersey's compulsory insurance laws. *Id.* at 601-02 (citing *Caviglia v. Royal Tours of Am.*, 178 N.J. 460, 471 (2004) (finding N.J.S. 39:6A-4.5(a) constitutional)).

In *Aronberg*, the plaintiff's son was driving an uninsured vehicle on the New Jersey Turnpike "when a tractor trailer careened into the rear of his car,

killing him.” *Id.* at 592. Plaintiff initiated a lawsuit against the driver of the tractor trailer, alleging negligence and demanding damages pursuant to the Survivor’s Act, *N.J.S.* 2A:15-3, and the Wrongful Death Act, *N.J.S.* 2A:31-1 to -6. *Ibid.* In answer, the defendant argued that both claims were barred under *N.J.S.* 39:6A-4.5(a) because the decedent “was operating an uninsured motor vehicle at the time of the accident.” *Id.* at 594.

Both the trial and appellate courts held that the Survivorship claim was barred under *N.J.S.* 39:6A-4.5(a). The Appellate Division, however, reversed the trial court’s decision that *N.J.S.* 39:6A-4.5(a) also barred the Wrongful Death claim. *Id.* at 594-95. The Appellate Division explained that because *N.J.S.* 39:6A-4.5(a) seeks to punish the uninsured driver where as a survivorship claim seeks to vindicate the driver’s claim, barring a survivorship claim was reasonable (*Id.* at 595) but barring a Wrongful Death Action was unreasonable because it targeted innocent family members who sought to recover for pecuniary loss (*Id.* at 595-96).

The Supreme Court held that *N.J.S.* 2A:31–1 provides a heir a cause of action “only if a claim could have been brought by the decedent had he lived.” *Id.* at 603. Because Aronberg lacked such a right, his heirs also lacked a cause of action under *N.J.S.* 2A:31–1. *Ibid.* The Court also held that because an heir’s survivorship claim is based on whether the decedent would have had a cause of action had he lived, and the decedent lacked such a cause of action under *N.J.S.* 39:6A-4.5(a), the heirs also lacked a cause of action under *N.J.S.* 2A:15-3. *Ibid.*

Staff proposed modifications to *N.J.S.* 39:6A-4.5(a) to reflect the Court’s decision and to additionally clarify that the heirs of an uninsured motorist, as well as any person acting on the motorist’s behalf, lack a cause of action.

M. Worker's Compensation

In May 2012, the Commission released a Final Report incorporating the Court's decision in *Quereshi v. Cintas Corp.*, 413 N.J. Super. 492 (App. Div. 2010), which addressed attorney's fees in the Worker's Compensation statute. *Quereshi* examined whether a judge of compensation must award reasonable attorney's fees when a self-insured or uninsured employer or employer's insurance carrier unreasonably delays payment of temporary disability compensation upon having actual knowledge of the occurrence of the injury or notice that compensation is due. *Id.* at 495. The court held that attorney's fees are mandatory and not limited by N.J.S. 34:15–64(a). *Id.* at 496.

In *Quereshi*, the plaintiff suffered a work-related injury, and on October 22, 2003, the court ordered the respondent employer to pay plaintiff's temporary disability benefits. *Ibid.* Subsequently, "[t]he employer failed to timely pay the temporary benefits as required by [the order,]" and the plaintiff sought a penalty under N.J.S. 34:15–28.1. *Ibid.* The judge found that the employer "had paid the benefits more than thirty days after entry of his order . . . and assessed a penalty of 25% of the temporary benefits owed." However, the judge refused to award attorney's fees because he awarded attorney's fees on his original 2003 order, and deemed the current 25% penalty sufficient. *Id.* at 497.

To determine whether attorney's fees are mandatory under N.J.S. 34:15–28.1, the *Quereshi* court looked at the plain language of the statute and its legislative history. *Quereshi, supra*, 412 N.J. Super. at 497-99. The court noted that the purpose of the statute was to ensure prompt payment to "ameliorate the economic disruption occasioned by a workplace injury and the loss of a regular paycheck." *Id.* at 499. The specific language in question was the use of "shall" and "plus" in the phrase, "it *shall* be liable to the petitioner for an additional amount of 25% of the amounts then due *plus* any reasonable legal fees." N.J.S. 34:15–28.1 (emphasis added). The court found that the word "shall" ordinarily denotes mandatory action and the preposition "plus" commonly means "increased by." *Quereshi, supra*, 412 N.J. Super. at 498. Thus, the court found

that “the judge must award both the statutory penalty and a reasonable legal fee.” *Ibid.*

Having found attorney’s fees mandatory, the court examined whether attorney’s fees granted under *N.J.S. 34:15–28.1* are limited by *N.J.S. 34:15–64(a)*. *Id.* at 499. The court found the lack of a cap in Subsection 28.1 dispositive. *Id.* at 501-02. The court reasoned that the reasonableness standard in Subsection 28.1 “should reflect the actual cost to obtain the previously ordered benefits” (*Id.* at 502) and are not subject to the 20% restriction found in Subsection 64(a).

V. TENTATIVE REPORTS

A Tentative Report represents the first settled attempt of the Commission to revise an area of law. It is the product of lengthy deliberations, but it is not final. A Tentative Report is distributed to the general public for comment. The Commission considers these comments and amends its Report.

In 2012, the Commission published six Tentative Reports.

A. Equine Activities Liability Act

A Tentative Report regarding the Equine Activities Liability Act (“Equine Act”) was released in December 2012. The Equine Act is a statutory tool designed to protect owners and operators of equine facilities from potential liability.

The Legislature determined that: equine animal activities are practiced by a large number of citizens in this State; equine animal activities attract large numbers of residents to the State; those activities significantly contribute to the economy of this state; and that horse farms are a major land use which preserves open space. *N.J.S.A. 5:15-1*. The Legislature also determined that equine animal activities involve risks that are essentially impractical or impossible for an operator to eliminate. See *Id.* In light of the considerable contributions to

New Jersey's economy attributed to the equine industry, the Legislature created the Equine Act to limit tort suits against equine operators and protect operators of equine activities from civil liability in order to preserve the economic viability of the industry in New Jersey.

The Act provides that participants assume the possible risk of injury that is associated with participating in equine activities, which creates a shield of liability protection for equine operators, barring civil suits. *N.J.S.A. 5:15-5*. However, the shield of protection created by the Equine Act does include exceptions to the limitation on liability for operators. *N.J.S.A. 5:15-9*.

The Commission's work in this area resulted from the New Jersey Supreme Court decision in *Hubner v. Spring Valley Equestrian Center*, 203 N.J. 184, 1 A.3d 618 (2010), addressing the "latent ambiguity" in the interpretation and application of the Equine Act, *N.J.S.A. 5:15-1 et. seq.* The goal of the Commission's work is to reconcile the ambiguity identified by the court in *Hubner* that is created by the broad language regarding the inherent risks, articulated in *N.J.S.A. 5:15-3*, and the broad language used to describe the acts on the part of the operator that can result in a piercing of the shield of protection outlined in *N.J.S.A. 5:15-9*.

The exceptions to the protections offered by the Equine Act allows the statute to function in a manner similar to the Ski Act (*N.J.S. 5:13-1 to -11*), or the Roller Skating Rink Safety and Fair Liability Act ("Roller Act") (*N.J.S. 5:14-1 to -7*), by separating the risks that are assumed from the statutorily defined duties of care that the facility's operator owes to the participants. Both the Roller Act and Ski Act impose specific affirmative obligations on the operator. Failure to adhere to those obligations results in the operator's exposure to civil liability.

While the Ski Act and the Roller Act address inherent risks and limitations on operator liability, both are structurally different from the Equine Act. All three statutes assign very specific duties to operators and provide specific exceptions to these duties, yet the Ski Act and Roller Act are easier to apply than the Equine Act since structural differences contribute to the ambiguity within the Equine Act. In an effort to address the latent ambiguity identified by the New Jersey Supreme

Court, Staff is revising the structure of the Act, rather than just changing the language. A Final Report is anticipated in 2013.

B. New Jersey Certificate of Titles for Vessels Act

A Tentative Report regarding the Uniform Certificate of Title for Vessels Act (UCOTVA) was released in September 2012. UCOTVA was approved and recommended for enactment in all the states by the Uniform Law Commission in July, 2011. It provides the states with a comprehensive system of ownership certification for watercraft. The major objectives of UCOTVA are to: (1) qualify as a state titling law that the Coast Guard will approve; (2) facilitate transfers of ownership of a vessel; (3) deter and impede the theft of vessels by making information about the ownership of vessels available to both government officials and those interested in acquiring an interest in a vessel; (4) accommodate existing financing arrangements for vessels; and (5) provide certain consumer protections when purchasing a vessel through the Act's branding initiative.

The Commission is advised that the patchwork of existing state vessel titling laws makes oversight and enforcement unnecessarily difficult for the U.S. Coast Guard, and that from a day-to-day operational standpoint, the Coast Guard favors uniformity among state laws as a general rule. UCOTVA is designed to address known problems posed by the patchwork nature and inconsistencies found in current laws and do so while imposing few or no new burdens or costs on state titling offices. The Act is supported by organizations of state administrators, boat financiers, and vessel insurers.

New Jersey is among the 33 states that already require a certificate of title for certain vessels. Vessel titling in New Jersey is administered by the state's Motor Vehicle Commission pursuant to the Boat Ownership Certificate Act ("BOCA"). *N.J.S. 12:7A-1 to -29*. This chapter was enacted in 1984 and amended shortly before taking effect in 1987. UCOTVA addresses a wider variety of vessel titling issues and generally covers similar topics in greater detail than does BOCA.

The Commission recommends revising the current New Jersey law regarding vessel titling by recommending to the Legislature the adoption of UCOTVA with appropriate changes and under the short title “New Jersey Certificate of Title for Vessels Act” (NJCOTVA). Repeal of select provisions of the Boat Ownership Certificate Act, *N.J.S. 12:7A-1 to -29* is also recommended. The receipt of information, comments, and suggestions from members of various public and private entities is ongoing in order to make sure that the proposed changes in the law adequately address all titling issues and adequately protect the interests of all members of the boating community. A Final Report is expected to be released in early 2013.

C. Sexual Offenses

In May of 2012, the Commission approved a Tentative Report revising the provisions of Title 2C that pertain to sexual offenses, *N.J.S. § 2C:14-1 – 2C:14-12*. The Report clarifies the meaning of “force” and the relevance of consent as used in these statutes in light of *State in Interest of M.T.S.*, 129 *N.J.* 422 (1992) and *State v. Triestman*, 416 *N.J. Super.* 195 (App. Div. 2010). It also clarifies the application of the sexual offense provisions to persons with intellectual and developmental disabilities in a way that will provide needed protection without infringing the rights of these citizens.

Originally, conviction of rape required a showing of force and penetration against a woman’s will. However, because force depended on the response of the victim, whether the victim consented to intercourse was integral to whether force was used against her will. The drafters of the sex offense statutes in Title 2C argued that the law should shift away from the behavior of the victim and concentrate on the defendant’s assaultive conduct. The goal of the reform was to eliminate the burden on victims to prove non-consent and give independent significance to the use of force instead of relying on the victim’s reaction. The Legislature did not define force, and therefore force did not necessarily rely on the old understanding of overcoming the will of the victim, or physically

overpowering the victim.

In *M.T.S.*, the Court found the words “physical force,” as used in *N.J.S.* 2C:14-2, ambiguous, and analyzed the legislative history of sexual assault to ascertain the intent of the Legislature. The *M.T.S.* Court concluded that “just as any unauthorized touching is a crime under traditional laws of assault and battery, so is any unauthorized sexual penetration a crime under the reformed law of sexual assault.” Because the *M.T.S.* Court held that the Legislature did not intend the crime of sexual assault to center on the victim’s state of mind or the amount of resistance offered, it also held “that any act of sexual penetration engaged in by the defendant without the affirmative and freely-given permission of the victim to the specific act of penetration constitutes the offense of sexual assault.” The court in *Triestman* extended the legislative interpretation in *M.T.S.*, to the crime of sexual contact. Additionally, the *Triestman* court reinforced the standard for force established in the *M.T.S.* decision - whether “a reasonable person would have believed the act unauthorized and offensive to the victim.”

The Commission recommends revision of the statutes in order to adopt the Court’s interpretation of the meaning of force, and to clarify when force (or the absence of consent) is, or is not, an element of sexual offenses.

The Commission also proposes revisions to address the application of sexual offense provisions to persons with intellectual and developmental disabilities. In recent years, disability rights legislation has worked to change societal perceptions of persons with disabilities. In contrast to earlier conduct that might be described as overprotective or repressive, there has been a shift in the law toward promoting and protecting the rights of individuals with disabilities. Part of this shift is an acknowledgment of the rights of persons with intellectual and developmental disabilities to live full lives, while protecting them from predators. Finding the right balance of expression and protection is the difficult part in drafting a sexual assault statute.

The current statute, as drafted, does not necessarily prevent individuals with intellectual and developmental disabilities from engaging in sexual relations. As interpreted by recent cases, however, the language of the statute causes

several difficulties. These cases acknowledge concerns about protecting persons with intellectual and developmental disabilities from predators, but they have the effect of stifling the ability of persons with intellectual and developmental disabilities to engage in consensual sexual activity.

Using language from the decisions, and the modern criteria for determining the capacity to consent, the Commission has drafted language in an effort to modernize New Jersey's sexual assault statutes in relation to persons with intellectual and developmental disabilities.

D. Uniform Collaborative Law Rules/Act

A Tentative Report on the New Jersey Family Collaborative Law Act was issued by the Commission in May of 2012. In 2009, the Uniform Law Commission approved for adoption in all states the Uniform Collaborative Law Act (UCLA). The UCLA was amended in 2010 and re-titled the Uniform Collaborative Law Rules/Act (UCLR/A). The UCLR/A is intended to create a uniform framework for the use of collaborative law that provides important consumer protections and enforceable privilege provisions, including explicit informed-consent requirements which will enable parties to commence the process with an understanding of the costs and benefits of participation.

Collaborative law is a voluntary, non-adversarial settlement process, in which parties, with the assistance of their lawyers, negotiate mutually acceptable resolutions of their disputes without court involvement. In order to commence the process, the parties and their attorneys must agree, in writing, that they will collaborate in good faith and in a non-adversarial manner to settle their dispute, and that neither party will use the threat of going to court or withdrawing from the process as a means of forcing settlement or achieving a desired outcome. Full and fair disclosure and exchange of relevant information is critical to the success of the collaborative law process. However, the hallmark of collaborative law is the lawyer disqualification clause whereby each party -- at the outset of the collaborative process -- agrees that his or her attorney will serve solely as an

advocate for that party in the collaborative process. In other words, each party agrees that if the process should fail or either party commence litigation, the collaborative law attorneys will not represent the parties going forward in court or in another tribunal.

Collaborative law practice appears to be growing in New Jersey, especially for family law disputes. In 2005, the New Jersey Supreme Court Advisory Committee on Professional Conduct determined that the limitations on the scope of the lawyer's representation (posed by the disqualification clause in collaborative law agreements) are not unethical so long as the steps for determining whether such limitations are "reasonable" are followed, consistent with New Jersey practice. However, because of *Winberry v. Salisbury*, 5 N.J. 240 (1950) concerns, not all of the uniform law is suitable for statutory enactment in New Jersey.

Staff continues to seek and receive comments from various collaborative law professionals as well as the Administrative Office of the Courts, and anticipates preparing a Revised Tentative Report for the Commission's consideration in early 2013.

E. Uniform Emergency Volunteer Health Practitioners Act

A Tentative Report regarding the Uniform Emergency Volunteer Health Practitioners Act was released in November 2009, after which additional revisions were made to the draft, including revisions in 2012.

UEVHPA was drafted by the Uniform Law Commission in an expedited manner after hurricanes Katrina and Rita which struck within weeks of each other in 2005. Prior to that time, a number of states had enacted emergency management laws that permitted the waiver or modification of licensure standards for health practitioners. The vast majority of the states had also enacted the Emergency Management Assistance Compact (EMAC). EMAC allows for the deployment of licensed health practitioners employed by state and local governments to jurisdictions in which they are not licensed and allows them

to provide emergency services there.

The federal government supplemented state law provisions with language allowing licensed health practitioners that it employs, on either a permanent or temporary basis, to respond to disasters and emergencies without complying with the state professional licensing requirements. Federal law also established two systems to facilitate the use of private sector health practitioners in response to emergencies. Unfortunately, neither of those federal programs necessarily results in interstate recognition of licenses issued to volunteer health practitioners. The response efforts associated with hurricanes Katrina and Rita demonstrated that, in the absence of national standards, the federal and state systems available were inadequate and complicated that use of volunteer health practitioners for both the receiving and the deploying states.

The goal of the Commission is a law that facilitates the use of out-of-state health practitioners in New Jersey when they are needed here while providing appropriate protection to all parties. It is anticipated that work on this project will conclude, and a Final Report will be issued, in early 2013.

F. Uniform Principal and Income Act

In July 2012, a Tentative Report regarding the Uniform Principal and Income Act was released by the Commission. Approximately a decade earlier, on January 1, 2002, the New Jersey Legislature enacted a modified version of the Uniform Principal and Income Act as revised in 1997 by the Uniform Law Commission (ULC). The 2002 Act replaced the Revised Uniform Principal and Income Act adopted in 1991. *See, Assembly Banking and Insurance Committee Statement, N.J.S. 3B:19B-1.* The Act, as adopted in New Jersey, was very similar to the ULC Act, but differed in some respects.

In 2009, the ULC recommended changes to the two different sections of the Act dealing with deferred compensation, annuities, and similar payments as well as income taxes and the adoption of a new section that includes transitional provisions. This project is a priority for the ULC. While the changes are small (in

comparison to the size of the Act as a whole), they are recommended as important since they are designed to address tax problems caused by the version of the law currently in effect.

The State Bar Association supports Commission work on the Act to incorporate the 2009 revisions and a Final Report is anticipated in mid-2013.

VI. WORK IN PROGRESS

The Commission concluded 2012 with nine works in progress.

A. Child Abuse and Neglect

Several years ago, the Commission began a project to revise large parts of Title 9, pertaining to Children. Final Reports regarding Parentage and Custody were filed in 2010. A report on the third part of this project, child abuse and neglect, has not yet been completed. Strong disagreements among persons with substantial knowledge and experience in this subject have made it difficult to achieve consensus. There is, however, substantial agreement that certain aspects of the court process concerning the determination of child abuse or neglect, and the termination of parental rights, are overly complicated and cumbersome. The current law is divided between Title 9 and Title 30, and parallel court proceedings may be necessary under each. It is anticipated that a proposed revision to modernize certain procedures and combine provisions from both titles can be concluded in 2013.

B. Collateral Consequences of Criminal Convictions

In September 2011, the Commission authorized a thorough review of New Jersey's statutes and administrative code in order to compile a list of the collateral consequences of criminal convictions. The project was prompted by *In re D.H.*, 204 N.J. 7 (2010), a case which struggled to harmonize the statute

delimiting the effect of an order of expungement, *N.J.S. 2C:52-27*, with the statute mandating the forfeiture of public office upon a conviction for certain crimes, *N.J.S. 2C:51-2*. The *D.H.* Court held that the former had no effect on the latter. Research continues on a project that now consists of three parts.

The first part involves proposed modifications to the language of the Rehabilitated Convicted Offenders Act to address the current “bifurcated” nature of the statute, which was enacted in 1968 and then modified in 2007. Although the result is a single statute, the component parts do not interact smoothly and additional revision appears to be warranted to consolidate them and make the interplay between the sections more coherent.

The second part of the project is the identification and classification of situations in which the issuance or denial of a license, employment, or other benefit is based on a determination of “moral turpitude” or “good moral character”. It appears that it would be useful to revise the statutory language so that provisions that concern similar situations are interpreted and applied in a consistent manner.

The third part of this project involves an analysis of the statutory language and the cases that concern the forfeiture of public office. That part of the project will require a determination about whether it is appropriate to distinguish between different types of public employees and different types of offenses, and to treat them differently for purposes of forfeiture.

Work on this project is ongoing but, in light of the scope of the project, it is not clear if a Tentative Report will be released in 2013.

C. Filial Responsibility Support Statutes

In September of 2012, the Commission authorized a project brought to its attention by the Office of the Ombudsman for the Institutionalized Elderly. A few state filial responsibility laws have been used in recent years to require adult children to pay hospitals, nursing homes and long-term care facilities for the medical care of indigent parents. A recent Pennsylvania court decision, in which

a long-term nursing care facility brought an action directly against an adult son to recover the costs of his mother's care before she relocated to Greece, raised concerns among attorneys practicing elder law in New Jersey regarding the effect of New Jersey's current filial responsibility statutes.

Current New Jersey law could be improved by revising the law to eliminate archaic concepts that are no longer applicable, and further research will be conducted to determine whether additional revisions are appropriate. A Tentative Report is anticipated in 2013.

D. Multiple Extended-Term Sentences

In September, 2012, Staff began a project based on the New Jersey Supreme Court case of *State v. Hudson*, 209 N.J. 513, 517 (2012). In *Hudson*, the Court held that under N.J.S. 2C:44-5(b)(1), a criminal defendant may not be sentenced to more than one extended term of imprisonment where sentencing is conducted in separate proceedings and where the second sentence is imposed for offenses committed prior to the imposition of the first sentence. The majority based its holding on the statute's plain language. The dissent, however, argued that key language in the statute is ambiguous and that the majority's interpretation "contravenes the statute's goals and legislative history, and unnecessarily constrains the discretion of sentencing courts." *Hudson*, 209 N.J. at 538.

Recognizing the *Hudson* decision as settled law but also acknowledging the interpretive issues raised in dissent, Staff initiated a project aimed at modifying N.J.S. 2C:44-5(b)(1) to clarify its language in accordance with the Court's decision. Staff prepared a draft revision of the statute with two possible versions of N.J.S. 2C:44-5(b)(1) and has solicited comments from various practitioners of criminal law. A Tentative Report is expected to be released in 2013.

E. Pejorative Terms – Physical Disabilities

At the request of attorneys involved with special education and as a follow-up to a prior project dealing with pejorative terms, the Commission reviewed the statutes for pejorative references to persons with physical disabilities. Research revealed, among other things, more than 400 references to “handicapped” in New Jersey’s statutes, but after consideration, it was determined that fewer than half of those references were used in a pejorative manner and, as a result, would be part of the project.

Unlike the earlier pejorative terms project (which is the basis for two identical bills, one of which is under consideration by the Senate and one was passed by the Assembly in 2012), this project may involve a larger number of provisions but will be more limited in scope, with a focus on making the language “person-first”.

Staff contacted representatives from the New Jersey Division of the Deaf and Hard of Hearing, the Commission for the Blind and Visually Impaired in the Department of Human Services, the Director of the Division of Disability Services, Disability Rights New Jersey, and other State agencies and organizations, all of whom expressed their willingness to be involved in the project. The Commission’s first pejorative terms project was clearly considered a worthy cause, and was given considerable attention in the media. It is anticipated that many groups will likely find this project helpful as well.

F. Recording of Mortgage Assignments

In 2011, the Commission began a project to examine the law regarding the recording of assignments of mortgages. The current law on mortgage recording provides a system for establishing the priority and enforceability of mortgages based on the recording of documents in the county land records. The system contemplates that each mortgage will be recorded shortly after it is executed and that if the mortgage is transferred, each assignment will be

recorded when it occurs.

Over the years, however, commercial practices with regard to mortgages have changed. Now, the entity that initiates the mortgage may well transfer it immediately and a typical mortgage will be transferred a number of times. Some mortgages become security for bonds and are held by a trustee for the bondholders. Others are held and traded through other investment vehicles. A mortgage is generally managed by a mortgage servicer that usually does not own the mortgage. There is no system in place to record the identity of the servicer.

When practices in the industry began to change some years ago, and transfers of mortgages became increasingly common, banks tried to create a record-keeping system that would obviate the need to prepare and file documents with each transfer. The system that developed works in many cases, but causes problems when it conflicts with traditional, chain of title expectations. The most common example of such a problem arises in regard to satisfaction of mortgages. A property owner who seeks to pay off a mortgage receives a statement of the balance, and, when the balance is paid, receives a satisfaction document signed by a servicer. The land title records then indicate a mortgage held by one party and a satisfaction signed by another. This discrepancy causes insecurity in the land title that is foreign to the expectations of those with an interest in the land. A more severe problem concerns the authority to foreclose a mortgage. Recent cases illustrate the difficulties associated with proving who holds the mortgage and who has the authority to foreclose it.

While the existence of a problem is clear, the solution to it is not. What is needed is a system that will serve the purposes of the real estate recording system but is simple enough that lenders are likely to use it to record assignments. Such a system must be acceptable to banks, title insurers, lawyers, and the county recording officers. The Commission is consulting with a variety of knowledgeable persons involved in mortgage lending in the hope that a legislative solution can be devised.

G. Traffic on Marked Lines

This project resulted from the New Jersey Supreme Court decision in *State v. Regis*, 208 N.J. 439, (2011), addressing the issue of whether the first and second clauses of N.J.S. 39:4-88(b) identify two separate, independent offenses or combine to describe a single offense. Although the words used in N.J.S. 39:4-88(b) appear plain, the manner in which the language is to be interpreted is not immediately apparent. The statute at issue, in subsection (b), presently reads as follows: “A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from that lane until the driver has first ascertained that the movement can be made with safety.” According to the Supreme Court, the consequence of this single sentence is that an individual is guilty of violating this provision if he or she fails to stay within a designated lane. *Regis*, 208 N.J. at 448. This single sentence also makes it a violation for a driver to switch lanes before determining that it is safe to do so. *Id.*

Since there was a difference of opinion among the courts that considered this issue, it is of concern to Staff that drivers responsible for following the law may not properly interpret the two independent offenses created by the one sentence in issue in N.J.S. 39:4-88(b). It is vital that the language used to regulate travel is clearly constructed and can easily be interpreted by laypersons. As a result, in light of the Supreme Court’s decision in *Regis*, Staff prepared draft modifications to the language of N.J.S. 39:4-88(b).

H. Uniform Determination of Death Act

This project was commenced in 2012 in order to evaluate whether to recommend adoption of this uniform law to the Legislature. New Jersey has already enacted the New Jersey Declaration of Death Act (NJDDA), effective in 1991, as N.J.S. 26:6A-1 *et seq.*, and all states, including New Jersey, recognize “brain death” as death. The NJDDA goes a step further than the UDDA by providing more protections and guidelines to those who make death

pronouncements.

Commenters, however, suggested that New Jersey's law could be improved by revising the sections of the NJDDA that give authority to the Board of Medical Examiners and the Department of Health to regulate standards for brain death determination. This recommendation became the focus of the project. The commenters proposed specific revisions to *N.J.S. 26:6A-4*, which were used as a basis for further drafting when preparing the Final Report, which is anticipated to be ready for Commission consideration in January of 2013.

I. Uniform Electronic Legal Materials Act

One of the projects approved and recommended for enactment in all states by the Uniform Law Commission (ULC) is the Uniform Electronic Legal Material Act (UELMA). The UELMA was released by the ULC in July 2011 and is being promoted by the American Association of Law Libraries, and discussed very seriously by the New Jersey Law Librarians Association.

Liaisons from the Seton Hall Law School library and the Rutgers School of Law library have asked that the Commission review the Act for possible introduction in New Jersey and enactment by the Legislature.

The ULC explains, in its summary of the Act, that the availability of government information online facilitates transparency and accountability, provides widespread access to essential information, and encourages citizen participation. The UELMA was designed to address the need to provide and manage electronic government information in a manner that guarantees trustworthiness and continued access.

The UELMA is designed to provide for the authentication, preservation, and accessibility of official electronic state legal material and to assist state governments in guaranteeing the free flow of trustworthy legal information. It gives states discretion in determining what categories of "legal material" will be covered. The Act does not affect any relationships between an official state

publisher and a commercial publisher, nor does it affect copyright laws or the rules of evidence.

The choice of technologies for authentication and preservation is left to the states, but adoption of the UELMA will harmonize standards for acceptance of electronic legal material across jurisdictional boundaries. The Act is intended to be complementary to the Uniform Commercial Code (UCC, which covers sales and many commercial transactions), the Uniform Real Property Electronic Recording Act (URPERA, which provides for electronic recording of real property instruments), and the Uniform Electronic Transactions Act (UETA, which deals with electronic commerce).

The UELMA, in the Prefatory Note, says that “[p]roviding information online is integral to the conduct of state government in the 21st century.” Staff continues to seek input and guidance from knowledgeable individuals and groups and anticipates the release of a Tentative Report in 2013.