

**ANNUAL REPORT OF THE  
NEW JERSEY LAW REVISION COMMISSION  
1992**

Report to the Legislature of  
the State of New Jersey as  
provided by C. 1:12A-9.  
March, 1993



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## **I. COMPOSITION OF THE COMMISSION**

The composition of the Commission in 1992 was:

**Albert Burstein, Chairman, Attorney-at-Law**

**Bernard Chazen, Attorney-at-Law**

**John J. Degnan, Attorney-at-Law (Resigned 11/92)**

**Roger Dennis, Dean, Rutgers Law School - Camden,  
Ex officio, Represented by  
Hope Cone, Attorney-at-Law (until 11/92)  
Grace Bertone, Attorney-at-Law (from 11/92)**

**William L. Gormley, Chairman, Senate Judiciary Committee  
Ex officio**

**Thomas N. Lyons, Attorney-at-Law (Appointed 11/92)**

**Hugo M. Pfaltz, Jr., Attorney-at-Law**

**Ronald J. Riccio, Dean, Seton Hall Law School  
Ex officio, Represented by  
Ahmed Bulbulia, Professor of Law**

**Peter Simmons, Dean, Rutgers Law School - Newark,  
Ex officio**

**Gary W. Stuhltrager, Chairman, Assembly Judiciary, Law  
and Public Safety Committee  
Ex officio**

**John M. Cannel, Executive Director  
Maureen E. Garde, Counsel  
John J. Burke, Staff Attorney  
Judith Ungar, Staff Attorney**

## II. HISTORY AND WORK OF THE COMMISSION

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 Commission began operation in 1986; however, the concept of permanent, institutionalized statutory revision and codification is not new in New Jersey. The first Law Revision Commission was established in 1925. That commission produced the Revised Statutes of 1937. The intent of the Legislature was that the work of revision and codification continue after the Revised Statutes, so the Law Revision Commission continued in operation. After 1939, its functions passed to a number of successor agencies. Most recently, statutory revision and codification were among the duties of



Legislative Counsel (N.J.S. 52:11-61). By L.1985, c.498, the Legislature transferred the functions of statutory revision and codification to the New Jersey Law Revision Commission.

### **III. PROJECTS AND RECOMMENDATIONS**

In 1992, the New Jersey Law Revision Commission filed five final reports on the subjects of Material Witnesses, Aviation, Replevin, Juries and Articles 3 and 4 of the Uniform Commercial Code.

#### **A. Material Witnesses**

The Commission filed a Final Report and Recommendations Relating to Material Witnesses (see Appendix A).

The report contains a comprehensive proposed statute to regulate judicial orders directing the appearance or detention of a material witness. A material witness is "a witness whose testimony is crucial to either the defense or prosecution." The proposed statute has three objectives: (1) to strike a balance between the need of the law enforcement community to prosecute crime and the right of the citizen not charged with a crime to remain free from arrest, (2) to resolve the inconsistencies in the common law, and (3) to establish the payment of a reasonable fee for confined witnesses and to create other procedural rules to effectuate the interests of the law enforcement community and material witnesses.

The statute affords both the State and the defendant the right to apply for a material witness order if three threshold requirements are met: (1) an indictment, accusation or complaint concerning a crime is pending, or a criminal investigation before a grand jury is pending; (2) the alleged witness has information material to the pending criminal action; and (3) the alleged witness is unlikely to respond to a subpoena. The proposed statute specifies

the content of the application for a material witness order, and lists the rights that must be afforded to a witness during a material witness hearing. In addition, the proposed statute establishes standards of review for the issuance of material witness orders, and sets the conditions of release and of confinement. The statute permits police officers to arrest an alleged material witness without a warrant in emergencies, but requires them to bring the witness before a judge immediately after arrest. Finally, the proposed statute increases to \$40 per day the fee paid to detained witnesses, and gives material witnesses additional rights such as the right to appeal and to modify the material witness order.

#### B. Aviation

The Commission filed a Final Report and Recommendations Relating to Aviation (see Appendix B).

In 1989, in conjunction with the Department of Transportation, the Commission began a project to revise the laws of New Jersey relating to the subject of transportation. The project is large, involving consideration of Titles 27 (Highways) and 6 (Aviation), as well as parts of other titles; it includes statutes on subjects as diverse as the construction and operation of state highways, and the regulation of billboards, railroads, buses, and aviation. The result of the project will be a new Title 27A containing a revision of the law on transportation.

The Commission's report on Aviation is the first part of the project. The three chapters in the report, which will comprise chapters 41 through 43 of new Title 27A, replace all of current Title 6, Aviation. The first chapter contains the general state law regulating aeronautics. It is substantially rewritten and replaces an accumulation of overlapping and inconsistent statutes on aviation dating back to the 1920's and 1930's. The second and

third chapters are substantial re-enactments of the New Jersey Air Safety and Hazardous Zoning Act of 1983 (as amended) and the New Jersey Airport Safety Act of 1983.

#### C. Replevin

The Commission filed a Final Report and Recommendations Relating to Replevin (see Appendix C).

Current New Jersey replevin statutes consist of 19 sections derived from the 1877 revision of the statutes. While some of the sections were amended between 1890 and 1963, the statutory replevin procedure for repossessing property has not changed significantly for more than a century.

In 1974 the New Jersey Supreme Court held that the statutes were violative of due process because they do not require notice and hearing prior to divestment of property. The Singer Co. v. Gardner, 65 N.J. 403, 415 (1974). The Commission proposal provides constitutionally required pre-judgment notice and hearing and simplifies and modernizes the law.

#### D. Juries

The Commission filed a Final Report and Recommendations Relating of Juries (see Appendix D).

This project continues the work of the Law Revision Commission in revising the statutes relating to the New Jersey court system; it constitutes a complete revision of the text and organization of the statutes relating to petit jury and grand jury selection and impaneling.

In 1982 the Supreme Court Task Force on Jury Utilization and Management completed an extensive study of the jury system and issued a report recommending a wide variety of improvements and modifications in the system of jury selection. Since the issuance of the Task Force Report many improvements have been made in the management of the jury system

through changes in court rules and administrative practices. However, some of the broader, policy-based recommendations of the Task Force were contained in legislation which was vetoed because it would also have increased juror fees. Many of the specific changes recommended in the Commission's Report were adopted from the recommendations of the Supreme Court Task Force which were not previously implemented.

The Law Revision Commission Report endorses the position taken by the Supreme Court Task Force on the importance of the civic obligation of all citizens to participate in the jury system. In the words of the Task Force Report, at 10:

The basic position taken by the Task Force throughout its term was that jury service is an obligation of citizenship in which all citizens are obligated to participate and that no one is too busy or too important to serve. This philosophy is gaining strength throughout the country as part of the many jury reforms being introduced nationwide. The basis for it is fundamental fairness. For years, jury service has been laid on the backs of many of the same people who serve over and over again, while others exercise exemptions or find excuses for not serving. If every citizen did his civic duty and served for one day or one week, serving as a juror once in a lifetime would not be unrealistic. At present, some citizens are serving every few years; this is unfair and should be remedied.

A number of specific statutory changes have been recommended by the Commission to broaden the jury pool: elimination of all class and occupational exemptions and disqualifications from jury service; elimination of the disqualification of persons over age 70; and expansion of the lists used to obtain jurors to include state income tax filers.

#### E. Articles 3 and 4 of the Uniform Commercial Code

The Commission filed a Final Report and Recommendations Relating to Articles 3 and 4 of the Uniform Commercial Code (see Appendix E).

In 1991, the National Conference of Commissioners on Uniform State Laws and the American Law Institute approved Revised Article 3 and Amended Article 4 of the Uniform Commercial Code. The existing Articles

3 and 4 are part of the Uniform Commercial Code adopted by New Jersey in 1961. N.J.S. 12A:3-101 to 12A:4-506. Article 3 governs negotiable instruments and Article 4 governs bank collections. The Law Revision Commission studied the revised articles and has recommended that the Legislature adopt them with two non-uniform amendments. The non-uniform amendments modify the loss allocation rules of the revised articles.

The Commission recommends an amendment to Section 3-406 of the Code to limit the customer's obligation to pay an unauthorized check even though the customer's negligence contributed to the forgery. Second, the Commission recommends an amendment to Section 4-401 of the Code to allow a bank to pay an item bearing a facsimile signature, whether authorized or not, provided the customer authorizes the bank to pay checks bearing the facsimile signature. The non-uniform amendments do not change the basic structure or concepts of the Code, nor do they upset balances struck by various parties who participated in the drafting process of the revised articles.

#### **IV. PROJECTS AWAITING FINAL RECOMMENDATION**

##### **A. Title 45**

In 1992, the Commission completed a Tentative Report and Recommendations Relating to Title 45 and distributed it for public comment (see Appendix F).

Title 45 of the Revised Statutes contains provisions regulating the practice of certain professions and occupations. These provisions have accreted over the years beginning in the nineteenth century. Chapter 1 of the title contains general provisions; each of the other chapters is devoted to the

regulation of a particular profession or occupation. The chapters regulating particular professions each contain varying combinations of provisions concerning the establishment of a regulatory board, licensing provisions, professional standards, and, traditionally, enforcement provisions concerning license revocations, suspensions and other disciplinary actions. These provisions vary greatly from profession to profession, both in substance and in their procedural aspects.

An effort to standardize these provisions was made in 1978 with the adoption of the Uniform Enforcement Act, N.J.S. 45:1-14 to 26, but questions remain as to the effect of the repeal provisions of that Act. The Act was intended to establish uniform standards for disciplinary actions and for licensee conduct in dealing with the public. The Act superseded prior law to the extent that it is inconsistent with its terms.

A year later, the Legislature enacted L.1979, c.432, which repealed specifically most of the sections generally repealed by the Uniform Enforcement Act. However, a few sections concerning license revocation which seem to have been affected by the general repealer were nevertheless left in place, creating uncertainty in the law on this subject. Conflicting arguments can be made that the grounds for the revocation of a professional license are those in the Uniform Enforcement Act, N.J.S. 45:1-21, in the applicable unrepealed section, or in both.

It is the goal of this project to recommend statutory amendments to make the Uniform Enforcement Act provisions apply comprehensively to all professional boards within the Division of Consumer Affairs, by repealing the sections which conflict with the Uniform Enforcement Act, and to deal with the issues of substance abuse and advertising. Amendments are recommended that are more specific than current provisions of the Uniform

Enforcement Act but provide a uniform approach to these issues. In addition, examination of the statutes establishing the various professional boards reveals that some boards are not specifically granted the authority to make regulations. Amendments are recommended to cure this defect.

Last, since the enactment of the Uniform Enforcement Act, a number of boards regulating professions or occupations have been created, but some were left outside its ambit. It appears that failure to apply the Uniform Enforcement Act to these regulatory bodies was inadvertent. This report recommends statutory Amendments to remedy this situation.

#### B. Contempt

In 1992, the Commission completed a Tentative Report and Recommendations Relating to Contempt and distributed it for public comment (see Appendix G).

This project entailed the revision of Chapter 10 of Title 2A, which contains the current statutory provisions on contempt of court, other than those in Title 2C. The entire law governing contempts of court is a mixture of statutory law, judicial decisions and court rules. As is the case with many of the chapter in Title 2A, the overlap between statutes and court rules, and the necessity of consulting judicial opinions, makes this a confusing area of the law. In this project the Commission is attempting to simplify the statutory law governing criminal contempts which are not dealt with as indictable offenses under Title 2C. The subject of civil contempts, i.e., relief in aid of litigants' rights, has been left to court rule.

The New Jersey Supreme Court decision in In Re Daniels, 118 N.J. 51, 60 (1990), addressed many of the outstanding issues in the law of non-indictable, criminal contempt. The Commission used that opinion as a guide in fashioning a proposed statute which balances the need of the courts to

control the conduct of those who appear before it, with the constitutional principles of due process and the right to counsel and trial by jury. The Commission has taken the view that the criminal contempt power should be used only sparingly, in cases in which other remedies, such as imposition sanctions pursuant to court rules or invocation of the attorney disciplinary process, are inadequate.

### C. Transportation

#### 1. Traffic Regulation

In 1992, the Commission completed a Tentative Report Relating to Traffic Control Devices and Traffic Regulation and distributed it for public comment (see Appendix H).

This report, a part of the project to revise the laws relating to transportation, concerns the authority to make traffic regulations applicable to particular highways to place traffic control devices, signs, traffic lights and the like, to notify the public of the regulations. At present, the law on this subject is intermixed with traffic laws of general application and scattered through chapter 4 of Title 39 - Motor Vehicles. The report proposes a chapter of the new title 27A to deal with these subjects.

This chapter follows the substance of the current law closely on the issue of authority to regulate. In general, the Department of Transportation may make regulations for state highways; local governments may make regulations for local highways. In most cases, approval of the department is required for local regulation but, as in current law, local governments may make certain regulations for local highways that do not connect directly with highways in other localities without department approval. The one important innovation in this area is the provision of clear authority for the



owner of a private road to make traffic regulation those roads with the approval of the municipality. This authority is now absent.

This proposed chapter simplifies the law greatly as to the kinds of traffic control devices that may be placed and the meaning of those devices. The Transportation Department is given the authority to regulate the kinds of devices that may be placed and the way those devices may be placed in accordance with national standards. The authority of the department to regulate placement of devices by local governments is continued from the current law but the process is simplified. Under this chapter, individual approval of the placing of each sign is eliminated where the local government provides certification that the placement is in accord with regulations.

## 2. Public Transportation

In 1992, the Commission completed a Tentative Report Relating to Public Transportation and distributed it for public comment (see Appendix I).

This report, a part of the project to revise the laws relating to transportation, concerns the authority to regulate public transportation companies. That authority is now given to the department by a 1978 executive reorganization plan which transferred the authority from the Public Utility Commission. The statutes on public transportation are now found in Title 48 Public Utilities, and concern autobusses, ferries and steamboats, railroads, street railways, taxicabs, autocabs and jitneys, and horsedrawn vehicles operated for hire. These chapters are intermixed with others on kinds of public utility unrelated to transportation. The report proposes a subtitle composed of chapters 31 through 34 of the new title 27A to deal with these subjects.

The first chapter contains a few provisions that apply to all kinds of regulated public transportation. The second chapter concerns public highway transportation. The third chapter provides for regulation of railroads, and the last chapter allows the Department of Transportation to regulate waterborne transportation. At present, the only regulation of this transportation is the few, anachronistic, provisions on ferries and steamboats.

### 3. Highways

In 1992, the Commission completed a Tentative Report and Recommendations Relating to Highways and distributed it for public comment (see Appendix J).

This report is the largest part of the project to revise the laws relating to transportation. It includes all of subject matter now covered by Title 27 Highways. The nature of the revision by the commission varies with the nature of the material revised. In some cases, entirely new statutes have been written. Where the source material is relatively new, it has been merely edited to make it consistent in form with the other parts of the proposed new Title 27A Transportation.

### D. Distraint

In 1992, the Commission completed a Tentative Report Relating to Distress and distributed it for public comment (see Appendix K).

Distress, the act of seizing a tenant's goods to satisfy an arrears of rent, is a common law right of the landlord exercised in a nonjudicial fashion. New Jersey statutes have regulated distress since 1795. The current statutes, with one exception, derive from the 1877 statutory compilation. In 1983, The New Jersey Supreme Court held that the failure to provide notice and a hearing before distraint occurred rendered the statutes unconstitutional. Callen v. Sherman's Inc., 92 N.J. 114, 132-133 (1983).

The Commission proposal provides constitutionally required pre-judgment notice and hearing and a procedure for self-help in extraordinary circumstances. The proposal also encompasses three additional statutes regarding hotels, lofts and self-service facilities in order that all distraint will be governed by a single set of rules.

## **V. PROJECTS UNDER CONSIDERATION**

### **A. Environmental Protection Statutes**

New Jersey is a leading state in the enactment of laws for the protection of the environment. In addition to the statutory provisions which were included in the 1937 Revised Statutes, extensive regulatory provisions have been added since, at an increasing pace since the early 1970's. The law relating to environmental issues is now scattered over many titles, and is in need of comprehensive reorganization and revision.

In 1992, at the request of Senator Robert E. Littell, the Commission staff began discussions with the staff of the Department of Environmental Protection and Energy, for the purpose of drafting a working agreement for cooperation between the Commission and the Department in a revision project. The revision project would involve identification of all environmental statutes, reorganization of the statutes into a single title, and revision of those statutory provisions in need of clarification. It is expected that a working agreement will be reached early in 1993, the project to commence immediately thereafter.

### **B. Uniform Commercial Code Article 9 Filing System**

Uniform Commercial Code Article 9 requires that a secured party file a financing statement to perfect its security interest in collateral unless

possession of the collateral perfects the security interest. "In a deliberate choice for nonuniformity, the Code drafters provided alternative filing schemes and invited the states to select from among them." Tabac, The Courts and Section 9-401(2): When Does A Searcher Acquire Knowledge of A Misfiled Financing Statement? 25 U.C.C.L.J. 68, 71 (1992). New Jersey adopted the alternative providing for a system of local and state filing. The system of local and state filing makes searches costly to conduct and results in duplicate filing due to the difficulty of classifying collateral and therefore determining the correct place to file.

The Commission is preparing amendments to Article 9 to establish a central filing system for financing statements. In New Jersey, the Secretary of State should serve as the repository of all UCC financing statements. Even financing statements covering fixtures should be filed in the central office. The historical reasons for local fixture filings -- that an interest in property attached to land should be filed where the mortgage is recorded -- does not make sense, given the notice function of financing statements.

A central filing system for UCC financing statements obviates the legal question of where to file, reduces costs of filing by eliminating duplicate filing at the county and state level and makes searches easier to conduct.

### C. Liens and Pre-judgment Remedies

The Commission's project to review lien statutes continues the effort begun in 1989 to revise Title 2A provisions concerning the courts and the administration of civil justice. Six current New Jersey statutes establish liens for work done on goods which one person (the owner) entrusts to another (the lienor) who performs some service upon them. The statutes deal with diverse enterprises including dry cleaning, tailoring, automotive repair, livery stables, cloth processing, motion picture film processing and jewelry repair.

Four of the statutes allow the lienor to sell goods if the owner does not pay the fee for the service performed; two statutes require sale, and have been held unconstitutional because neither notice nor hearing are required prior to the state mandated sales. The six statutes embody inconsistent provisions about notice and type of sale, when sales take place, and distribution of proceeds.

The purpose of the Commission project is to revise all six lien statutes, combining them into a single statute which will establish procedures applicable to all situations in which liens arise from the performance of services on personal property.

#### D. Statute of Limitations

The expiration and tolling of statutory periods of limitation has always been a source of confusion, resulting in litigation. New Jersey's general statutory periods of limitation are contained in chapter 14 of Title 2A, but many more periods of limitation are scattered throughout the statutes. Late in 1992, the Commission staff embarked upon a project to revise the law concerning statutes of limitation and, perhaps, to codify as many as possible in a single chapter. The staff has begun to identify as many statutory periods of limitation as possible, as a means of determining the feasibility of a project to simplify and generalize the many different provisions. Thus far, the project has resulted in the identification of hundreds of statutes.

In addition, staff has begun to determine the historical basis for the different periods of limitation imposed in the current statutes. Research on that subject has thus far concentrated on the general statutes of limitation in chapter 14 of Title 2A.



**REPORT AND RECOMMENDATIONS  
RELATING TO MATERIAL WITNESSES**

**NEW JERSEY LAW REVISION COMMISSION  
15 Washington Street  
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(201)648-4575  
June, 1992**





## INTRODUCTION

The New Jersey material witness statute authorizes a judge to detain a person believed to be a material witness to a crime.<sup>1</sup> The statute, enacted in 1898, is not written in plain English and does not address the problems posed by the arrest and confinement of material witnesses who are often innocent witnesses to crimes. The material witness statute implicates the right of citizens to remain free from unreasonable arrest, and the state's need to prosecute crime. The present material witness statute does not protect either the citizen's or the state's interest as the decision in State v. Misik discussed below makes clear. The right of innocent citizens to remain free, as well as the need to prosecute crime, are serious matters requiring fair and well-balanced legislation. The New Jersey Law Revision Commission recommends the repeal of the present material witness statute and the adoption of its proposed statute.

In State v. Misik, 238 N.J. Super. 367 (Law Div. 1989), the court found that a warrant issued under the material witness statute violated the Fourth and Fourteenth Amendments of the United States Constitution, and article 1, paragraph 1 of the New Jersey Constitution, because the statute failed to require a pre-deprivation hearing and to prescribe other procedural safeguards to enforce due process requirements.<sup>2</sup> The court prescribed guidelines to implement the statute consistent with the federal and New Jersey constitutions. The court recommended that the Supreme Court promulgate rules or that "the legislature enact additional statutory provisions in order to carry out the mandate of the Due Process Clause of both the federal and state constitutions." Id. at 385.

The Supreme Court Committee on Criminal Practice is considering the issue, but has not yet recommended a rule.<sup>3</sup> Because the guidelines that would make the material witness statute meet constitutional concerns raise issues of substantive law, the legislature, not the Supreme Court, is the proper forum to establish the guidelines. The rule-making power of the Supreme Court is limited to procedural issues. N. J. Const. art. IV, § II, ¶ 3. Even if the court rule deals with some matters of substance, it cannot treat the range of substantive issues or employ the range of remedies available to legislation. Moreover, to rely on the Supreme Court Committee on Criminal Practice to amend the existing court rule on material

1 The term "material witness statute" refers to N.J.S. 2A:162-2, N.J.S. 2A:162-3 and N.J.S. 2A:162-4. The key provision, N.J.S. 2A:162-2, provides: "Every judge and magistrate shall, when in his judgment the ends of justice so require, bind by recognizance with sufficient surety, any person who shall declare against another person for any crime punishable by death or imprisonment in state prison, or any person who can give testimony against any person so accused of any such crime, whether the offender be arrested, imprisoned, bailed or not." N.J.S. 2A:162-3 mainly concerns the conditions of confinement; N.J.S. 2A:162-4 requires the county to pay the witness a fee of \$3 per day of confinement.

2 The fourth amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

The fourteenth amendment provides in pertinent part that "nor shall any State deprive any person of life, liberty, or property, without due process of law ...." U.S. Const. amend. XIV.

Article 1, paragraph 1 of the New Jersey Constitution provides: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N. J. Const. art. 1, ¶ 1.

3 The existing court rule, R. 3:26-3, merely reiterates the broad language of N.J.S. 2A:162-2.

witnesses to rectify the constitutional defects of a statute is an abdication of legislative responsibility.

The Commission identified several procedural and substantive problems in the material witness statute: N.J.S. 2A:162-2 through N.J.S. 2A:162-4. First, N.J.S. 2A:162-2 does not specify whether a criminal action must be pending before the state may apply for a warrant to arrest a person alleged to be a material witness. The failure of the statute to specify the preconditions for a warrant have engendered uncertainty as to when the statute is applicable. Second, the statute does not contain procedural safeguards to make certain that the arrest and detention of the witness comply with federal and state constitutional due process requirements. Third, while 2A:162-3 forbids lodging the material witness in an ordinary jail, it does not require the court to impose the least restrictive constraint to detain the witness. Fourth, 2A:162-4 sets the payment of an unreasonably low fee of \$3 per day for detained witnesses. The material witness statutes do not deal with other issues such as warrantless arrests, finality of the order for purposes of appeal and the effects of taking the witness's deposition.

The Commission examined the material witness statutes of other states, the case law in New Jersey and the scholarly literature. None of the foreign material witness statutes addressed all important issues. The Commission thus drafted a comprehensive statute to regulate judicial orders directing the appearance or detention of a material witness. The proposed statute has three objectives: (1) to strike a balance between the need of the law enforcement community to prosecute crime and the right of the citizen not charged with a crime to remain free from arrest, (2) to resolve the inconsistencies in the common law, and (3) to establish the payment of a reasonable fee for confined witnesses and create other procedural rules to effectuate the interests of the law enforcement community and material witnesses.

The statute affords both the state and the defendant the right to apply for material witness orders if three threshold requirements are met: (1) an indictment, accusation or complaint for a crime is pending, or a criminal investigation before a grand jury is pending (2) the alleged witness has information material to the pending criminal action and (3) the alleged witness is unlikely to respond to a subpoena. The proposed statute specifies the content of the application for a material witness order, and lists the rights that must be afforded to a witness during a material witness hearing. In addition, the proposed statute establishes standards of review for the issuance of material witness orders, and sets the conditions of release and of confinement. The statute permits police officers to arrest an alleged material witness without a warrant in emergencies, but requires them to bring the witness before a judge immediately after arrest. Finally, the proposed statute increases to \$40 per day the fee paid to detained witnesses, and gives material witnesses additional rights such as the right to appeal and to modify the material witness order.

### Background

#### a. Material witness: definition and foreign law.

A material witness is "a witness whose testimony is crucial to either the defense or prosecution." Black's Law Dictionary 826 (5th ed. abridged 1983). "In most states, he may be required to furnish bond for his appearance and, for want of surety he may be confined until he testifies." Id. A material witness often is an

innocent observer of a crime who happens to be in the wrong place at the wrong time. For example, a tourist from California who witnesses a crime in Newark by chance and gives a report to the police is a potential material witness in New Jersey. One court has observed that a material witness is "an innocent citizen whose right to the full enjoyment of liberty is threatened solely because of his potential usefulness as a witness for the government ... the deprivation of liberty, although temporary by definition, can be measured in weeks or even months." Application of Cochran, 434 F. Supp. 1207, 1213 (D. Neb. 1977).

Material witness statutes authorize the arrest and detention of alleged material witnesses. Carlson, Jailing the Innocent: The Plight of the Material Witness, 55 Iowa L. Rev. 1 (1969). "Nearly all states and the federal government have enacted provisions dealing with pretrial confinement of material witnesses." Carlson and Voelpel, Material Witness and Material Injustice, 58 Wash. U. L. Q. 1, 21 (1980). Witness laws are justified under the concept that every citizen has a duty to testify. Hurtado v. United States, 410 U.S. 578, 589 (1973). Most material witness statutes are old. For example, the New Jersey material witness statutes derive from 1898. "[W]hen dusted off and put into operation, these archaic statutes result in innocent citizens spending weeks -- even months -- in custody." Carlson and Voelpel, Material Witness and Material Injustice, 58 Wash. L. Q. 1 (1980).

Several states have developed modern legislation in the area of material witness detention. E.g. Ariz. Rev. Stat. Ann. sec. 13-4083(b) (1989) (deposition of detained witness requires discharge); Hawaii Rev. Stat. sec 835-2 (1988) (detention system based on material witness order); and N.Y. Crim. Pro. Law sec. 620.20 (McKinney 1984) (detention system based on material witness order). However, notwithstanding this legislative activity, most state statutes contain little or no procedural or substantive protection for detained witnesses. Carlson and Voelpel, supra at 27. None of the newer state statutes address the constitutional concerns raised in State v. Misik, or resolve the procedural and substantive problems identified by the Commission. Thus none of the material witness laws of foreign states provides a model to follow.

The federal material witness law also does not constitute a model law. The federal law is not a single comprehensive statute. Rather, the federal material witness law consists of a matrix of statutes and rules. 18 U.S.C. 3144 (1989)(release or detention of a material witness); 18 U.S.C. 3142 (1989)(release or detention of a defendant pending trial); 28 U.S.C. 1821 (1989)(witness fees); 18 U.S.C. 3006(a) (1989) (assignment of counsel rule); Fed. R. Crim. P. 46 (release from custody); and Fed. R. Crim. P. 15 (deposition of detained witness). In addition to being unduly complicated, the federal statutes and rules fail to authorize the arrest of material witnesses. The judiciary had to infer the power to arrest from the federal material witness statute. Bacon v. United States, 449 F. 2d 933, 937 (9th Cir. 1971).

#### b. New Jersey law and State v. Misik

In Misik, a Superior Court judge issued a warrant for the arrest of Janos Misik as a material witness pursuant to N.J.S. 2A:162-2 based on the ex parte application of a detective of the New Jersey State Police. State v. Misik, 238 N. J. Super. at 371. The application alleged that Misik had information concerning the commission of environmental crimes and that his arrest was necessary because he would not be available for service by subpoena. Id.

The affidavit in support of the application contained the following allegations: (1) Misik had knowledge that his employer, Petro King Terminal Corporation, released petroleum products into the Hackensack River, (2) Misik, though initially cooperative with the police, had missed an appointment, (3) Misik was a foreigner suspected of being an illegal alien because he once failed to produce his "green card" to the police, (4) Misik lived on a boat displaying a "for sale" sign, (5) Misik did not give the police the exact location of his boat in the marina and (6) Misik had a criminal record for drug offenses. State v. Misik, 238 N. J. Super. at 371. No criminal action or proceeding against Petro King Terminal Corporation was pending when the State applied for the arrest warrant.

The court held an in camera discussion with an assistant prosecutor concerning the State's authority to obtain an ex parte arrest warrant of Misik. The assistant prosecutor maintained that the State had authority to arrest Misik without a warrant. State v. Hand, 101 N. J. Super. 43, 55-56 (Law Div. 1968) holds that a peace officer may arrest without a warrant when he has a reasonable basis or probable cause to believe a person is a material witness. The court then issued the warrant which authorized the police to arrest Misik. The warrant required the police to bring Misik before the court immediately after his arrest so that the court could inform Misik of his rights and the nature of the proceedings.

The police arrested Misik the day the arrest warrant was issued and, contrary to the court's order, brought Misik to the prosecutor's office, not the court. State v. Misik, 238 N. J. Super. at 372. The police subjected Misik to a lengthy custodial interrogation and detained him overnight in jail where he was treated like a prisoner contrary to N.J.S. 2A:162-3. The next morning Misik was brought to court handcuffed and in prison garb. State v. Misik, 238 N. J. Super. at 372. Misik's attorney objected to the procedures adopted by the court to issue the arrest warrant and requested leave to file a brief challenging the constitutionality of the material witness statutes. The court released Misik on his own recognizance, subject to the condition that he report weekly to the prosecutor's office for one month. Id. The court informed the prosecutor that if the State did not convene a grand jury investigation of Petro King Terminal Corporation within one month, the court would vacate the reporting requirement. Id. The court further granted leave to Misik's attorney to file a brief challenging the constitutionality of the material witness statute. Id. at 373.

At the hearing, the court held that the federal and New Jersey constitutions require that an alleged material witness be provided with notice and an opportunity to be heard before being detained under the New Jersey material witness statute. State v. Misik, 238 N. J. Super. at 388. The court also held that a criminal action must be pending against an accused before a person may be apprehended or detained as an alleged material witness. Id. In support of its holding, the court found that the "express language of the statute compels the conclusion that a criminal action must be pending against an accused before a court may sanction the detention of a person believed to be a material witness." Id. at 375. The court also noted that "it is well-established that our Rules do not give a prosecutor any pre-trial subpoena power independent of the grand jury." Id. at 376. Consequently, Misik was free to refuse to cooperate with the police. Because the prosecutor could not compel Misik's appearance by subpoena absent a grand jury investigation, the court found that the prosecutor had misused the material witness statute to detain and arrest Misik. Id. at 377.

The court also found that Misik was deprived of his constitutional rights under both the federal and New Jersey constitutions. The judge stated that "Misik was arrested without prior notice and an opportunity to be heard before he was arrested and committed to jail", and thus found that the arrest and detention violated the due process requirements of the Fourteenth Amendment of the United States Constitution and article 1, paragraph 1 of the New Jersey Constitution. State v. Misik, 238 N. J. Super. at 377. The court also stated that "it was patently unreasonable under the Fourth Amendment of the United States Constitution to have arrested and detained Misik because of his refusal to cooperate with the police." Id. While the court found that the procedures followed to arrest Misik violated the federal and New Jersey constitutions, the court did not hold that the New Jersey material witness statute (N.J.S. 2A:162-2) was unconstitutional. Id. at 384.

Because the statute is silent as to constitutional safeguards, the court looked to federal and foreign state legislation for guidance. E.g. 18 U.S.C. § 3142 (e) and (f) and § 3144 (detention subject to clear and convincing evidence standard); N.Y. Crim. Pro. Law, § 620.30 (McKinney 1984) (order directs alleged material witness to appear at pre-deprivation hearing); Neb. Rev. Stat. § 29-507 (1989) (specifies the conditions of release for material witnesses). The court, deciding the New Jersey statute could be rehabilitated if procedural safeguards were established, then set forth a list of guidelines to fill the gap. State v. Misik, 238 N. J. Super. at 385-86.

Most important, the court held that a person could not be arrested or detained as a material witness unless the justification for the arrest or detention was based on probable cause. The judge stated, "This court believes that at the very least a heavy burden of proof should be imposed upon the State whenever it decides it is necessary to seek detention of an innocent person, not even a suspect, much less an accused." Id. at 383. The court cited Addington v. Texas, 441 U.S. 418 (1979) in support of its position. In Addington, the United States Supreme Court established the "clear and convincing" standard of proof to commit a person for mental care on an involuntary basis. The United States Supreme Court stated, "The function of a standard of proof, as that concept is embodied in the Due Process and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." Addington v. Texas, 441 U.S. at 423 (citation omitted). The court in Misik found that the interests at stake in material witness proceedings are the liberty interests of an innocent citizen and the State's need to gather evidence of crimes. The clear and convincing standard allocates the risk of error to the state and thus minimizes the risk of erroneous decisions. It also "reflects the value society places on individual liberty." Id. at 426 [quoting Tippett v. Maryland, 436 F. 2d 1153, 1166 (4th Cir. 1971)]. The court in Misik thus held that the "clear and convincing" standard is constitutionally compelled for the arrest and detention of material witnesses.

Prior to Misik, the two principal decisions on New Jersey material witness law were State v. Price, 108 N. J. Super. 272 (Law Div. 1970) and State v. Hand, 101 N. J. Super. 43 (Law Div. 1968). When read together, Price, Hand and Misik do not constitute a coherent statement of law on material witnesses, and therefore do not provide clear guidelines to the court, prosecutor or defendant. The inconsistencies concern primarily the right of the police to arrest a material witness without a warrant, and the necessity of a pending criminal action to detain a material witness.

For example, the court in Price indicated that the police may not hold a potential witness unless there is a pending criminal action against an accused. State v. Price, 108 N. J. Super. at 280-281. To the contrary, the court in Hand sanctions the detention of a person believed to be a material witness despite the absence of any formal charges against an accused. State v. Hand, 101 N. J. Super. at 56. The court in Misik held that a pending criminal action is necessary to obtain a material witness order. State v. Misik, 238 N. J. Super. at 385. In addition, the court in Hand authorizes the warrantless arrest of potential material witnesses. State v. Hand, 101 N. J. Super. at 56. The court in Misik prohibits the warrantless arrest of potential material witnesses. State v. Misik, 238 N. J. Super. at 388. The court in Misik stated that "under no circumstances may a person be arrested or detained without court process ...." Id. The decisions in Misik and Hand thus directly contradict one another on this issue. Because Price, Hand and Misik are law division opinions, each decision has equivalent legal weight and thus the inconsistencies generated by them unsettle the law on material witnesses.

## PROPOSED STATUTE

### **2C:104-1. Definitions**

a. A material witness is a person who has information material to the prosecution or defense of a crime.

b. A material witness order is a court order fixing conditions necessary to secure the appearance of a person who is unlikely to respond to a subpoena and who has information material to the prosecution or defense of a pending indictment, accusation or complaint for a crime, or a criminal investigation before a grand jury.

**Source: New**

#### Comment

This section defines a material witness and a material witness order. A material witness is a person who has information crucial to the prosecution or defense. A material witness order is a court order finding that a person is a material witness, and commanding the person to appear before the court. A material witness order may not issue unless the court finds that: (1) a person is a material witness, (2) the person is unlikely to respond to a subpoena and (3) there is a pending indictment, accusation or complaint for a crime, or a criminal investigation before a grand jury. The material witness statute therefore does not apply to offenses that are not crimes. See, N.J.S. 2C:1-4(a) and 1-14(k). The inclusion of definitions cures the defect noted by State v. Misik that the former statute did not define a material witness or material witness order. State v. Misik, 238 N. J. Super. 367, 374 (Law Div. 1989)

### **2C:104-2. Application for material witness order**

a. The Attorney General, county prosecutor or defendant in a criminal action may apply to a judge of the Superior Court for an order compelling a person to appear at a material witness hearing, if there is probable cause to believe that (1) the person has information material to the prosecution or defense of a pending indictment, accusation or complaint for a crime, or a criminal investigation before a grand jury, and (2) the person is unlikely to respond to a subpoena. The application may be accompanied by an application for an arrest warrant when

there is probable cause to believe that the person will not appear at the material witness hearing unless arrested.

b. The application shall include a copy of any pending indictment, complaint or accusation and an affidavit containing: (1) the name and address of the person alleged to be a material witness, (2) a summary of the facts believed to be known by the alleged material witness and their relevance to the pending criminal action or investigation, (3) a summary of the facts supporting the belief that the person possesses information material to the pending criminal action or investigation, and (4) a summary of the facts supporting the claim that the alleged material witness is unlikely to respond to a subpoena.

c. If the application requests an arrest warrant, the affidavit shall set forth why immediate arrest is necessary.

Source: 2A:162-2

#### COMMENT

Subsection (a) substantially changes the source section, which merely established the power to bind material witnesses. Subsection (a) allows the Attorney General, county prosecutor or defendant to apply to the Superior Court for a material witness order. The present statute does not give defendants the right to apply for material witness orders. Subsection (a) gives defendants the right to secure the testimony of witnesses to balance the powers of the State and defendants in criminal proceedings. The federal statute and the laws of several foreign jurisdictions provide defendants the right to obtain material witness orders. 18 U.S.C. 3144 (1989); Hawaii Rev. Stat. sec. 835-2(a)(1988); N.Y. Crim Pro. Law sec. 620.20 (1) (McKinney 1984); and N.C. Gen. Stat. sec. 15A-803(a)(1990).

The Superior Court may issue a material witness order when there is probable cause to believe that: (1) there is a pending indictment, accusation, or complaint for a crime, or a criminal investigation before a grand jury, (2) a person possesses information material to the pending criminal action and (3) the person is unlikely to respond to a subpoena. These requirements derive from the guidelines prescribed by State v. Misik, 238 N. J. Super. at 385-386.

However, the requirements of this subsection differ in one important respect from the Misik guidelines. Misik limits applications for material witness orders to situations where a complaint, indictment or accusation is pending. Subsection (a), in addition, allows applications where a grand jury is conducting an investigation. The addition recognizes that a witness's testimony may be necessary to determine the identity of the person to be indicted. To the extent that the present statute may not allow the use of material witness orders in aid of grand jury investigations this section represents a change in the law. See, State v. Price, 108 N. J. Super. 272, 280-281 (Law Div. 1970).

Subsection (b) requires the party making an application for a material witness order to provide facts to the court establishing the need for the material witness order. The affidavit must contain a summary of the facts believed to be known by the alleged material witness and their relevance to the pending investigation. The affidavit also must contain a summary of facts showing that the person is unlikely to respond to a subpoena, and a summary of facts supporting the affiant's belief that the person is a material witness. The requirements of subsection (b) are intended to provide a court with information needed to make an independent judgment on the application. Mere conclusory allegations do not satisfy these requirements. When applicable, subsection (b) requires the application to include a copy of the pending indictment, accusation or complaint.

Subsection (c) governs the special situation where the applicant seeks the arrest of the alleged material witness. In this event, the application must establish that, without the arrest, the material witness will not be available as a witness.

### **2C:104-3. Order to appear**

**a. If there is probable cause to believe that a material witness order may issue against the person named in the application, the judge may order the person to appear at a hearing to determine whether the person should be adjudged a material witness.**

**b. The order and a copy of the application shall be served personally upon the alleged material witness at least 48 hours before the hearing, unless the judge adjusts the time period for good cause, and shall advise the person of: (1) the time and place of the hearing and (2) the right to be represented by an attorney and to have an attorney appointed if the person cannot afford one.**

**Source: New**

#### **COMMENT**

Subsection (a) identifies the standard of review governing an application for a material witness order. The standard of review is the probable cause standard. To issue a material witness order, the judge must find that it is more probable than not that the facts set forth in the application are true.

Subsection (b) requires the party who obtains a material witness order to serve a copy of the order and application upon the person named in the application. Service must take place at least 48 hours before the hearing unless the judge enlarges or contracts the prescribed time period. The judge may alter the prescribed time period if the party making the application for a material witness order demonstrates that exigent circumstances justify a deviation from the prescribed time period. The order to appear informs the alleged material witness of the time and place of the hearing and of the right to counsel.

### **2C:104-4. Arrest With Warrant**

**a. If there is clear and convincing evidence that the person named in the application will not be available as a witness unless immediately arrested, the judge may issue an arrest warrant. The arrest warrant shall require that the person be brought before the court immediately after arrest. If the arrest does not take place during regular court hours, the person shall be brought to the emergency-duty Superior Court judge.**

**b. The judge shall inform the person of: (1) the reason for arrest, (2) the time and place of the hearing to determine whether the person is a material witness, and (3) the right to an attorney and to have an attorney appointed if the person cannot afford one.**

**c. The judge shall set conditions for release, or if there is clear and convincing evidence that the person will not be available as a witness unless confined, the judge may order the person confined until the material witness hearing which shall take place within 48 hours of the arrest.**

**Source: 2A:162-2**

#### **COMMENT**

Subsection (a) establishes the standard of review that the judge applies to an application for an arrest warrant. The standard of review is the "clear and convincing" evidence standard. State v. Misik, 238 N. J. Super. at 386. The "clear and convincing" standard is the intermediate standard of proof located between the preponderance of the evidence and reasonable doubt standards. Addington v.



Texas, 441 U.S. 418, 423 (1979). While it is difficult to define the term "clear and convincing" evidence precisely, it denotes a rigorous level of proof. The "clear and convincing" standard of proof minimizes the risk of erroneous decisions and reflects the value society places on individual liberty. Id. at 425 [quoting Tippett v. Maryland, 436 F. 2d 1153, 1166 (4th Cir. 1971)].

Subsection (a) also directs that the person be brought before the court immediately after arrest. If the arrest takes place outside of regular court hours, the person must be brought before the emergency-duty Superior Court judge. The purpose of this requirement is to make certain that the arrested person has an immediate judicial review of the arrest. The statute does not specify a penalty for noncompliance with the requirement to bring the arrested person before the court immediately after arrest, since a violation of a court order is a contempt of court.

Subsection (b) requires the judge at this first appearance to inform the arrested person of the time and place of the material witness hearing and the right to counsel.

Subsection (c) requires the judge to release the arrested person with appropriate conditions unless confinement is the only method to secure the appearance of the witness. When the judge orders the person confined, the judge must hold the material witness hearing within 48 hours of the person's arrest.

## **2C:104-5. Arrest Without Warrant**

**a. A law enforcement officer may arrest an alleged material witness without a warrant only if the arrest occurs prior to the filing of an indictment, accusation or complaint for a crime, or the initiation of a criminal investigation before a grand jury, and if the officer has probable cause to believe that:**

- (1) a crime has been committed,**
- (2) the alleged material witness has information material to the prosecution of that crime,**
- (3) the alleged material witness will refuse to cooperate with the officer in the investigation of that crime, and**
- (4) the delay necessary to obtain an arrest warrant or order to appear would result in the unavailability of the alleged material witness.**

**b. Following the warrantless arrest of an alleged material witness, the law enforcement officer shall bring the person immediately before a judge. If court is not in session, the officer shall immediately bring the person before the emergency-duty Superior Court judge. The judge shall determine whether there is probable cause to believe that the person is a material witness of a crime and, if an indictment, accusation or complaint for that crime has not issued or if a grand jury has not commenced a criminal investigation of that crime, the judge shall determine whether there is probable cause to believe that, within 48 hours of the arrest, an indictment, accusation or complaint will issue or a grand jury investigation will commence. The judge then shall proceed as if an application for a warrant has been made under 2C:104-4.**

### **COMMENT**

This subsection settles the law regarding the right to arrest material witnesses without a warrant. Compare State v. Hand, 101 N. J. Super. at 56 (allowing warrantless arrests) with State v. Misik, 238 N. J. Super. at 388 (forbidding warrantless arrests). Subsection (a) allows the warrantless arrest of alleged material witnesses under precisely defined circumstances. The warrantless arrest

power applies in exigent circumstances such as the encounter between a law enforcement officer and a witness at the scene of a crime. As a result, the power to arrest without a warrant ceases to exist subsequent to the filing of an indictment, accusation or complaint for a crime or the initiation of a criminal investigation before a grand jury.

Subsection (b) follows the procedure set forth in 2C:104-4 regarding arrests upon warrant. The law enforcement officer must bring the arrested person before a judge immediately after arrest so that the judge may review the propriety of the arrest and set appropriate conditions of release. The failure of the law enforcement officer to comply with the requirement to bring the arrested person before a judge immediately after arrest makes the arrest unlawful thereby providing the wrongfully arrested person with remedies for an unlawful arrest.

#### **2C:104-6. Material witness hearing**

**a. At the material witness hearing, the following rights shall be afforded to the person: (1) the right to be represented by an attorney and to have an attorney appointed if the person cannot afford one, (2) the right to be heard and to present witnesses and evidence, (3) the right to have all of the evidence considered by the court in support of the application, and (4) the right to confront and cross-examine witnesses.**

**b. If the judge finds that there is probable cause to believe that the person is unlikely to respond to a subpoena and has information material to the prosecution or defense of a pending indictment, accusation or complaint for a crime, or a criminal investigation before a grand jury, the judge shall determine that the person is a material witness and may set the conditions of release of the material witness.**

**c. If the judge finds by clear and convincing evidence that confinement is the only method that will secure the appearance of the material witness, the judge may order the confinement of the material witness.**

**d. The judge shall set forth the facts and reasons in support of the material witness order on the record.**

**Source: 2A:162-2**

#### **COMMENT**

Subsection (a) establishes the rights afforded to the alleged material witness at the hearing. The alleged material witness has the full panoply of rights afforded to a person at an adversarial hearing. Among the rights granted is the right to know the evidence used by the court as the basis for grant of the application. If disclosure of particular evidence would obstruct the ongoing criminal investigation, the court may exclude that evidence from consideration in deciding whether to grant the application. Cf. State v. Kunz, 55 N. J. 128 (1969) and R. 3:21-2(a).

Subsections (b) and (c) distinguish conceptually between the finding that a person is a material witness and the decision to impose restraints to assure the appearance of the witness. Subsection (b) identifies the standard of review for determining that a person is a material witness and to impose non-custodial restraints on the witness. The standard of review is the probable cause standard. Subsection (c) identifies the standard of review for ordering the confinement of the witness. The judge may order the confinement of the material witness only when the judge finds by clear and convincing evidence that no other form of restraint will assure the appearance of the material witness. The clear and convincing standard is used to indicate that confinement is a last resort. The clear and convincing standard

protects the constitutional right of the person to be free from arbitrary seizure. State v. Misik, 238 N. J. Super. at 387.

Subsection (d) requires that the judge set forth facts and reasons in support of the order. The requirement to set forth facts and reasons furnishes a record for appeal.

## **2C:104-7. Conditions of release; confinement**

**a. A confined person shall not be held in jail or prison, but shall be lodged in comfortable quarters and served ordinary food.**

**b. The conditions of release for a material witness or for a person held on an application for a material witness order shall be the least restrictive to effectuate the appearance of the material witness. A judge may: (1) place the witness in the custody of a designated person or organization agreeing to supervise the person, (2) restrict the travel of the person, (3) require the person to report (4) set bail or (5) impose other reasonable restrictions on the material witness.**

**c. A person confined shall be paid \$40 per day, and when the interests of justice require it, the judge may order additional payment not exceeding the actual financial loss resulting from the confinement. The party obtaining the material witness order bears the cost of confinement and payment unless the party is indigent.**

**Source: 2A:162-3, 2A:162-4**

### **COMMENT**

Subsection (a) identifies the conditions of detention, and is substantially identical to the requirements of N.J.S. 2A:162-3. A material witness, if confined, cannot be treated like a prisoner because the material witness has not committed a crime. Rather, the state or defendant must provide comfortable lodging and ordinary food to a confined material witness.

Subsection (b) requires the judge to impose the least restrictive restraint upon a non-confined material witness to secure the appearance of the material witness. The list of alternatives is designed to guide the judge in the decision making process, but is not meant to exhaust the range of possible and appropriate alternatives. Subsection (b) permits the judge to exercise discretion in setting the appropriate restraints.

Subsection (c) substantially departs from present law which provides for payment of \$3 for each day the person is "committed or detained in jail." N.J.S. 2A:162-4. Subsection (c) requires the payment of \$40 for each day the material witness is confined. The amount of payment is the same as that provided by federal law. 28 U.S.C.A. § 1821(b). In addition, this subsection allows a court to order additional payment not to exceed actual financial losses, if the additional payment would serve the interests of justice.

N.J.S. 2A:164-2 required the board of chosen freeholders of the county where the confinement occurs to pay the costs of confinement regardless of the entity seeking the confinement. Subsection (c) reflects the fact that the county is not always responsible for the costs of prosecution when the prosecution is brought by the State. Cf. 2A:73A-9. The effect of subsection (c) is that the prosecution, whether county or State, bears the cost of a material witness confined on its behalf. Likewise, a defendant obtaining the material witness order requiring confinement is obligated to pay the cost of confinement, plus additional payment if ordered, unless the party is indigent.

## **2C:104-8. Deposition**

**A material witness may apply to the Superior Court for an order directing that a deposition be taken to preserve the witness's testimony. After the deposition is taken, the judge shall vacate the terms of confinement contained in the material witness order and impose the least restrictive conditions to secure the appearance of the material witness.**

**Source: New**

### **COMMENT**

This section gives a material witness a statutory right to apply to the Superior Court for an order requiring the taking of a deposition pursuant to court rules to preserve the testimony of the witness. Deposition as an alternative to continued confinement is now allowed by court rule. R. 3:13-2. The federal rules and other state laws take a similar approach. E.g. Fed. R. Crim. P. 15; Ariz. Rev. Stat. Ann. § 13-4083(b) (1989). The taking of a deposition to preserve testimony vacates the confinement terms of the material witness order and requires the judge to modify the material witness order to assure that the least restrictive conditions of release remain imposed on the material witness.

## **2C:104-9. Orders appealable**

**A material witness order shall constitute a final order for purposes of appeal, but, on motion of the material witness, may be reconsidered at any time by the court which entered the order.**

**Source: New**

### **COMMENT**

This section makes a material witness order a final order for purposes of appeal entitling the material witness to file an appeal without leave of the Appellate Division. In the absence of the statute it would be unclear whether a material witness order is interlocutory or final. The Superior Court which entered the order retains jurisdiction when an appeal is taken to enable the witness to apply to the court for a modification of the original order.

## TABLE OF DISPOSITIONS

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**REPORT AND RECOMMENDATIONS  
RELATING TO AVIATION**

**NEW JERSEY LAW REVISION COMMISSION  
15 Washington Street  
Newark, New Jersey 07102  
(201)648-4575  
June, 1992**





**CHAPTERS 41, 42 AND 43  
AERONAUTICS, AIRPORT SAFETY FUND AND AIRPORT HAZARDS**

**INTRODUCTION**

In 1989, in conjunction with the Department of Transportation, the Commission began a project to revise the laws of New Jersey relating to the subject of transportation. The project is large, involving consideration of Titles 27 (Highways) and 6 (Aviation), as well as parts of other titles; it includes statutes on subjects as diverse as the construction and operation of state highways, and the regulation of billboards, railroads, buses, and aviation. The result of the project will be a new Title 27A containing a revision of the law on transportation.

This Report on Aviation is the first completed part of the project. The three chapters in the report, chapters 41 through 43 of Title 27A, replace all of Title 6, Aviation. The first contains the general state law regulating aeronautics. It replaces an accumulation of statutes on aviation dating back to the 1920's and 1930's. The second and third chapters are substantial re-enactments of the New Jersey Air Safety and Hazardous Zoning Act of 1983 (as amended) and the New Jersey Airport Safety Act of 1983.

**27A:41-1. Definitions**

**When used in chapters 41, 42 and 43:**

a. "Aeronautics" means aviation; air instruction; the operation, repair or maintenance of aircraft, aircraft power plants and accessories; and the design, construction, repair, maintenance, operation or management of airports, and other aviation facilities.

b. "Aviation" means the operation, directing, or managing of aircraft in or through the air and on the ground or water.

c. "Aircraft" means any contrivance now known or hereafter invented, used or designed for flight in the air. However, a seaplane, while at rest on water and while being operated on or immediately above water, shall be governed by rules regarding water navigation, but while being operated through the air otherwise than immediately above water shall be treated as an aircraft.

d. "Public aircraft" means an aircraft used exclusively in the service of any government or of any political subdivision thereof, including the government of the United States, or of its states, territories, possessions or districts, but not including any government-owned aircraft engaged in carrying for hire persons or goods.

e. "Civil aircraft" means any aircraft other than a public aircraft.

f. "Airport" means any area of land, water, or both, which is used or made available for the landing and take-off of aircraft.

g. "Fixed base operator" means a person engaged in giving, or holding himself out as giving, instruction in aviation to the public, or a person operating a flying club; sport parachute center; aircraft maintenance or repair shop; intrastate air carrier; air taxi, scheduled or charter; or engaging in aerial advertising, aerial photography, pipe or power line patrol, fish spotting, dusting, spraying and seeding by aircraft, or parachute repair and rigging; but, the term "fixed base operator" shall not include air carriers operating under a certificate of public convenience and necessity issued by an agency of the federal government.

Source: 6:1-21.

**Comment**

These definitions are substantially identical to its source. Other definitions in the source sections, 6:1-2, 6:2-1 and 6:5-1 were duplicative or unnecessary.

**27A:41-2. Purpose**

The purpose of this chapter is to provide in the interest of public safety and of aeronautic progress for the regulation of aviation in this State; to require that aviation facilities and persons engaged in aviation in this State, conform to standards of safety and sound practice as prescribed by the laws and rules of this State, and for uniformity with the laws and rules of the United States Government.

Source: 6:1-1; 6:1-20.

**Comment**

This section is substantially identical to its sources.

**27A:41-3. Powers and duties of the commissioner; adoption of rules**

Except as otherwise specifically provided by law, the Commissioner shall promote progress and education in and shall have supervision over aeronautics within this State, including, but not limited to, aviation, the establishment, maintenance, and use of airports, sport parachuting centers, air markings and other aeronautical facilities, and the establishment, operation, management and equipment of fixed base operators. The commissioner may adopt rules for air traffic and establishing minimum standards for aircraft, pilots, fixed base operators, airports, sport parachuting centers, air markings and aeronautical facilities within the State, establish standards to protect the safety of persons operating or using aircraft and of persons and property on the ground, and to develop and promote aeronautics within this State. The commissioner may adopt rules to effectuate the purposes of this chapter in the interest of public safety and the development of aeronautics in this State.

The rules of the commissioner shall be in conformity with the laws and rules of the United States Government concerning aeronautics. The commissioner, the administrators of any divisions or bureaus assigned duties under this chapter, the supervisory inspector and other designated members of those divisions and bureaus

shall be peace officers and have authority to make arrests and file complaints for violations of the provisions of this chapter, or of any rules established under it.

Source: 6:1-9; 6:1-29.

Comment

This section is substantially identical to its sources.

**27A:41-4. Hearings; information; investigations**

The commissioner may hold public hearings on matters affecting aeronautics; conduct investigations, inquiries and hearings concerning matters covered by the provisions of this chapter; advise the Legislature upon legislation and recommend legislation for the improvement of aeronautical safety and the promotion of aeronautical progress; co-operate with the Federal authorities and the authorities of other States; collect and disseminate information concerning aeronautics and the safeguarding of the interests of the general public and of those engaged in all phases of aeronautics; advise communities and groups in preparing and prosecuting projects for the development of aviation, airports and all other facilities for the promotion of aeronautics within this State; advise law enforcement agencies in the enforcement of aeronautical laws and rules; investigate accidents or injuries arising out of the operation of aircraft within this State; and keep a record of proceedings and official acts.

Source: 6:1-31.

Comment

This section is similar to its source, but is phrased in permissive rather than mandatory terms.

**27A:41-5. Periodic inspections**

The commissioner may adopt rules providing for the periodic inspection of aircraft, airports, fixed base operators and other aeronautical facilities, aircraft power plants, accessories and other equipment. The rules may require disclosure concerning the design and the calculations upon which the design is based and of the materials and methods used in the construction and operation of such aircraft, airports, fixed base operators or other aeronautical facilities, aircraft power plants, accessories and other equipment.

Source: 6:1-48.

Comment

This section is substantially identical to its source.

**27A:41-6. Aircraft exempt from taxation**

All aircraft, whether or not required to be registered under State or federal law, shall be exempt from taxation under chapters 4 and 11A of Title 54 of the

**Revised Statutes or any other law of this State which imposes a personal property tax.**

**Source: 6:1-97.**

**Comment**

This section is substantially identical to its source.

**27A:41-11. Licenses; aeronautic facilities and temporary landing areas**

**The commissioner shall provide for the licensing of airports, temporary landing areas and or other aeronautical facilities by rules adequate to protect the public health and safety and the safety of those participating in aviation activities; provided, however, that the continued use and of airports, and other aeronautical facilities, in use for which an application for a license has been filed within the time fixed by the commissioner, shall be permitted, pending the granting or rejection of the applications; and provided further, that the application for a license for any airport, or other aeronautical facility in use shall be granted, unless the commissioner finds that the airports, or other aeronautical facilities are not constructed, equipped and operated in accordance with the standards and requirements fixed by rules. Whenever the commissioner rejects any application for license under the provisions of this section, the commissioner shall state in writing the reasons for rejection.**

**Source: 6:1-44.**

**Comment**

This section is substantially identical to its source.

**27A:41-12. Licenses; aeronautical activities**

**The commissioner may provide for the licensing of specific aeronautical activities or persons engaged in specific types of aeronautical activities, or operations by rules adequate to protect the public health, safety and welfare and the safety of those participating in aeronautics. Licenses or certificates (except those issued on a temporary basis) required by rule for the operation of aeronautical facilities and fixed base operations are issued for a period of one year. Licenses shall be annually renewed, upon satisfaction of requirements set by the rules appropriate to the license or certificate sought. Licenses or certificates issued on a temporary basis shall be valid for a period of less than one year and continue in effect until a specified expiration date or until terminated by order of the commissioner.**

**Source: 6:1-44.1.**

**Comment**

This section is substantially identical to its source.

#### **27A:41-13. Aircraft licenses**

**The commissioner may provide for the licensing of civil aircraft by reasonable rules adequate to protect the public safety and the safety of those participating in aviation and to ensure the satisfactory and safe performance of aircraft in accordance with their design or contemplated use.**

**Source: 6:1-35.**

#### **Comment**

This section is substantially identical to its source.

#### **27A:41-14. Licenses; aerial exhibitions**

**It shall be unlawful to conduct an air meet, air race or aerial exhibition or to operate a civil aircraft in an air meet, air race or aerial exhibition in this State without a license or permit for the air meet, air race or aerial exhibition issued by the commissioner.**

**Source: 6:1-17; 6:1-42.**

#### **Comment**

This section is substantially identical to its sources.

#### **27A:41-15. Fees and procedure for licenses and certificates**

**Procedures, application fees, and fees for licenses and certificates shall be established by the commissioner by rule. All fees shall be paid to the State Treasurer by the department for deposit in the Airport Safety Fund established by chapter 42 of this title.**

**Source: 6:1-44.1.**

#### **Comment**

This section is substantially identical to the relevant portions of its source.

#### **27A:41-16. Licenses; modification; suspension; revocation**

**Any license issued pursuant to the provisions of this chapter may be modified, suspended or revoked in the interest of public safety or the safety of those participating in aeronautical activities, or for violation of any provision of this chapter or any rule issued under it.**

**Source: 6:1-45.**

#### **Comment**

This section is substantially identical to its source.

**27A:41-17. Licenses of operators of aircraft; aircraft**

**a. No person may operate a civil aircraft in this state without all licenses or permits required by this chapter, by rules issued under it, or by applicable federal law. A certificate of the license shall be kept in the personal possession of the licensee while operating aircraft in this state, and must be presented for inspection upon demand of the Commissioner, the Commissioner's representative, any police officer of this state, or any official, manager or person in charge of any airport used by the aircraft.**

**b. No person shall operate a civil aircraft in this State unless the aircraft has all licenses or permits required by this chapter, by rules issued under it, or by applicable federal law, and unless the aircraft properly displays its appropriate identification, license, or registration numbers.**

**Source: 6:1-12; 6:1-13; 6:1-34; 6:1-37; 6:1-38; 6:1-40.**

**Comment**

Subsection (a) amalgamates the requirements of 6:1-12, 6:1-38 and 6:1-40. Subsection (b) amalgamates the requirements of 6:1-13, 6:1-34 and 6:1-37.

**27:41-21. Aerobatic stunts; low flying; dropping objects.**

**a. It shall be unlawful for any person to operate an aircraft to engage in aerobatic flying, or in any acrobatic feat while in flight over an inhabited area or over a gathering of persons.**

**b. It shall be unlawful for any person to operate an aircraft at such a low level as to endanger the persons on the surface beneath except while landing or taking off.**

**c. It shall be unlawful for any person to drop any object from an aircraft except loose sand or water ballast.**

**Source: 6:2-11.**

**Comment**

This section is substantially similar to its source but penalizes only the operator of the aircraft, not passengers.

**27A:41-22. Use of emergency or government or unlicensed facility**

**a. Except as provided for in this chapter or in the rules issued pursuant to it, it shall be unlawful for any person operating an aircraft to use any airport or other aviation facility intended for use only in the case of emergency or intended for the exclusive use of public aircraft of the Government of the United States.**

**b. Except as provided for in department rules or in the case of an emergency, it shall be unlawful for any person operating an aircraft to land or take off from any area of land or water, unless that area is licensed or approved for that activity.**

**Source: 6:1-43.**

Comment

This section is substantially identical to the relevant portions of 6:1-43.

**27A:41-23. Safety devices and facilities; markings; hazards to aviation**

To protect the public safety and the safety of those participating in aeronautical activities, the commissioner may adopt reasonable rules requiring safety devices and other aviation facilities for aircraft and airports; and require obstructions which may be hazardous to aviation to be suitably marked by lights, signs or otherwise as the commissioner may provide. The commissioner may proceed by appropriate legal action to cause any obstruction to flight in and about any airport or other aeronautical facility to be removed or abated.

Source: 6:1-32.

Comment

This section is substantially identical to its source.

**27A:41-24. Interference with aviation facilities**

It shall be unlawful for any person purposely to interfere or tamper with any aircraft, airport or any other aviation facility, or its equipment.

Source: 6:1-49.

Comment

This section continues the prohibition of 6:1-49 as an administrative violation under the jurisdiction of the Department of Transportation. The forbidden activity is made criminal by 2C:17-3.

**27A:41-25. Killing of birds and animals from aircraft**

It shall be unlawful for a person, while on an aircraft in flight in this state, purposely to kill or to attempt to kill any birds or animals. This section should not be construed to forbid the aerial application of pesticides.

Source: 6:2-12.

Comment

This section continues the prohibition of 6:2-12.

**27A:41-26. Operating aircraft while under influence of alcohol or controlled substance**

No person shall operate an aircraft while under the influence of or using intoxicating liquor or controlled dangerous substance as defined by L.1970, c.226, §2 (C. 24:21-2)

Source: 6:1-18.

Comment

This section is broader than its source in that it includes all controlled dangerous substances, and narrower in that it does not apply to passengers.

**27A:41-31. Investigations and hearings**

**The Department may conduct investigations, and hearings concerning the safety of aeronautical facilities and accidents or injuries incident to the operation of aircraft occurring within this State, and for this purpose the department may take possession of any wreckage or aircraft damaged in accidents and hold it until it releases possession or unless any properly authorized paramount Federal agency requests possession. In investigations and hearings, the commissioner shall have the power to administer oaths, compel the attendance and testimony of witnesses and the production of papers, books, and documents. If any person fails to comply with an order issued under authority of this section, the commissioner may suspend any license issued to that person by the department, bar the person from the use of any airport licensed by the department, or bring an action, ex parte, in the Superior Court to compel compliance.**

Source: 6:1-51; 6:1-62.

Comment

This section is similar in substance to its source sections, but it has been focused on matters concerning safety and accidents. Hearing as to other matters are covered by 27A:41-4.

**27A:41-32. Evidence regarding safety of methods of operation of aircraft and airports**

**Any person who operates an aircraft or causes an aircraft to be operated or otherwise engages in aeronautics in this State thereby submits himself to the authority of the State to investigate the safety of the methods of operation of aircraft and airports within the State and agrees to appear and testify at any investigation or hearing held by the commissioner in connection with the safety of the operation of any aircraft or airport within this State and further agrees to produce any books and records, which may be relevant to the subject matter of the investigation, after reasonable notice given in person or by registered mail, which notice shall designate the person or persons required to appear and testify and the books and records required to be produced.**

Source: 6:1-61.

Comment

This section is substantially identical to its source.

**27A:41-33. Examination and inspection; pilots and aircraft**

**The commissioner may examine and inspect any pilot, aircraft, airport, fixed base operator or other aeronautical facility, and upon finding a violation of any of the provisions of this chapter or of the rules issued pursuant to it, may prevent aviation or operation of an aeronautical facility by any person until the violation is removed. Within twenty-four hours after the taking of action the commissioner**



shall file a written report setting forth the reasons for it. Any person aggrieved by the action may demand a hearing before the commissioner. The hearing shall be held within five days from the receipt of a demand for it.

Source: 6:1-46.

Comment

This section is substantially identical to its source.

**27A:41-34. Police and departmental co-operation**

It shall be the duty of all departments of state or local government and all officers charged with the enforcement of State and municipal laws to assist in the enforcement of the provisions of this chapter and the rules issued pursuant to it. Airport regulations adopted by any local subdivisions operating an airport shall be inoperative in so far as the regulations are inconsistent with the provisions of this chapter or with the Department rules issued pursuant to it.

Source: 6:1-33.

Comment

This section is substantially identical to its sources.

**27A:41-35. Penalties**

Any person violating any provisions of this chapter or any rule issued pursuant to it shall be liable to a penalty of up to \$1,000.00, which may be enforced in an action by the Commissioner in the name of the State in the Superior Court or in any municipal court in accordance with the procedure prescribed in the "penalty enforcement law" (N.J.S. 2A:58-1 et seq.). All penalties and costs collected shall be credited to the Airport Safety Fund established by chapter 42 of this title.

Source: 6:1-59, 6:1-59.1.

Comment

This section is similar in substance to its sources.

**27A:41-41. Liability for injuries to person or property; lien on aircraft**

The owner of an aircraft which is operated in this State is absolutely liable for injuries to persons or property on the land or water beneath, caused by the take off, landing or flight of the aircraft, or the dropping or falling of any object from it, whether the owner was negligent or not, unless the injury is caused by the negligence of the person injured, or of the owner or bailee of the property injured. If the aircraft is leased at the time of the injury to person or property, both owner and lessee shall be liable, and they may be sued jointly or separately. The operator of an aircraft who is not the owner or lessee shall be liable only for the consequences of his own negligence. The injured person, or owner or bailee of the injured property, shall have a lien on the aircraft causing the injury to the extent of the damage caused by the aircraft or object falling from it. A chattel mortgagee, conditional vendor or trustee under an equipment trust, of any aircraft, not in

possession of the aircraft, shall not be deemed an owner within the provisions of this section.

Source: 6:2-7.

Comment

This section is substantially identical to its source.

**27A:41-42. Service of process on nonresidents extended**

This chapter shall be construed as providing for additional methods of service of process upon nonresidents, and not as limiting any other lawful manner for service.

Source: 6:5-2.

Comment

This section is substantially identical to its source.

**27A:41-43. Secretary of State as agent for acceptance of process**

Any person or corporation, not a resident of this State, not incorporated under the laws of this State and not duly authorized to transact business in this State, who operates or causes to be operated in this State, an aircraft, which is not registered in this State, constitutes the Secretary of State as agent for the acceptance of process in any civil action against the person arising out of any accident occurring in this State in which the aircraft is involved.

Source: 6:5-3.

Comment

This section is similar in substance to its sources.

**27A:41-44. Manner of service upon Secretary of State; notice**

Service of process upon the Secretary of State shall be made by leaving the original and a copy of the summons and 2 copies of the complaint, with a fee of \$20.00 with the Secretary of State. That service shall be sufficient on the nonresident, if:

a. notice of service and a copy of the summons, with a copy of the complaint, are forthwith sent by registered or certified mail to the defendant by the Secretary of State, and defendant's return receipt and the affidavit of the Secretary of State, or a person acting for the Secretary of State, of the compliance with the requirements of this section, including a statement of the date of mailing and of the receipt of the return card, are appended to the original of the summons and filed with the complaint in the office of the clerk of the court where the action is pending; or

b. two copies of notice of service, the summons, and the complaint, are forthwith sent by registered mail by the Secretary of State, or a person acting for the Secretary of State, to the sheriff or other process server in the jurisdiction in

which the defendant resides, with directions that the sheriff or process server cause them to be served on the defendant in the same manner as that in which service is legally effected in that jurisdiction, and the return of the sheriff or process server, or the person acting for the sheriff or process server is appended to or endorsed on a copy of the summons and complaint, and returned to the Secretary of State, and thereafter filed with the clerk of the court where the action is pending in this State; or

c. notice of service and a copy of the summons and complaint are served on the defendant, personally, by an official or private individual, wherever service may be made, and an affidavit of the person effecting service, showing the person served and the time and place of service, is appended to the summons and complaint, and returned to the Secretary of State, and be thereafter filed with the clerk of the court where the action is pending in this State; or

d. notice of service and a copy of the summons and complaint are served on the defendant in any other manner which the court where the case is pending finds sufficient and expedient.

If, by direction of plaintiff, notice of service is given as provided by subsection (b) of this section, plaintiff shall, in addition to the fee of \$20.00 required by this section, deposit with the Secretary of State sufficient money to effectuate service. If notice of service is given as provided by subsection d) of this section, plaintiff shall pay the cost that service.

Source: 6:5-4.

Comment

This section is substantially identical to its sources, but has been reorganized in the interest of clarity.

**27A:41-45. Fee**

The fee of \$20.00 paid by the plaintiff to the Secretary of State at the time of service and the cost of giving notice shall be taxed as costs if the plaintiff prevails in the action.

Source: 6:5-6.

Comment

This section is substantially identical to its source.

**27A:41-46. Record of processes served**

The Secretary of State shall keep a record of processes served pursuant to the provisions of this act showing the day and hour of service.

Source: 6:5-7.

Comment

This section is substantially identical to its source.

#### **27A:41-47. Continuances**

**If process is served on a nonresident by any of the methods provided in this chapter, the court in which the action is pending may order continuances necessary to afford the defendant reasonable opportunity to defend the action.**

**Source: 6:5-5.**

#### **Comment**

This section is substantially identical to its sources.

#### **27A:41-48. Service of process upon nonresident owner of aircraft involved in accident**

**Civil process in any civil action arising out of an accident involving an aircraft owned by a nonresident may be served upon the nonresident owner by service in this State on an operator of any aircraft owned by that nonresident owner. Process may be also lawfully served on a nonresident owner by posting a copy of process in a conspicuous place on the aircraft and serving it on any person, over the age of fourteen years, who has custody of the aircraft, whether the person is operating the aircraft or holding it as security.**

**Source: 6:5-9.**

#### **Comment**

This section is substantially identical to its source, but it has been reorganized in the interest of clarity.

#### **27A:42-1. Definitions**

##### **When used in this chapter:**

**a. "Unrestricted public use airport" means any facility for the take-off and landing of aircraft, either publicly or privately owned, that does not have restrictive covenants on operational use by the general public for reasons other than safety.**

**b. "General aviation airport" means any area of land or water, or both, used or made available for the landing and take-off of civil aircraft, licensed for that purpose, and which has further been determined by the Commissioner not to be an international airport either by classification or service characteristics.**

**c. "Turbine fuel" means any liquid or gaseous fuels used for the propulsion of jet or turbo-shaft aircraft through the air, as determined by the Commissioner.**

**Source: 6:1-91.**

#### **Comment**

These definitions are substantively identical to definitions in the source section. Other definitions in the source section were duplicative or unnecessary.

**27A:42-2. Legislative findings and declarations**

**a. The Legislature finds and declares that:**

(1) New Jersey's public use, general aviation airports are an the State's transportation network and promote mobility and economic activities of common public benefit. These public use, general aviation transportation facilities are deteriorating and must be improved as to safety in order to realize their full public benefit.

(1) Ne

(2) There is a growing need to upgrade the safety of general aviation airports, which require such improvements and equipment as radar, instrument landing aids and weather-reporting equipment to enable them to safety handle modern general aviation aircraft.

(3) Many publicly owned, general aviation airports are unable to obtain all of the federal funds available to them for airport development because they are unable to raise money for their local matching requirements.

(4) Many privately owned, public use, general aviation airports which are essential to the State's economic development are in danger of conversion to nonaviation uses, and it is in the public interest to provide State assistance to county and municipal efforts to preserve these airports, through acquisition or other means.

(5) Users of general aviation airports have contributed substantial amounts to the State treasury through fees and fuel taxes, and this money should henceforth be used to establish an airport assistance program.

**b. The Legislature therefore finds and declares that it is in the public interest to establish an Airport Safety Fund, impose a two cent per gallon tax on fuel distributed to general aviation airports, and authorize the Commissioner of Transportation to establish assistance programs to improve the safety of general aviation airports.**

Source: 6:1-90.

Comment

This section is substantially identical to its source.

**27A:42-3. Airport safety fund**

**a. There is established in the general fund a separate special account to be known as the "Airport Safety Fund." Notwithstanding any provisions of law to the contrary and except as otherwise provided in this act, revenues from the taxes imposed on the sale of fuel used in aircraft, pursuant to chapter 39 of Title 54 of the Revised Statutes, revenues from the taxes imposed on the sale of aircraft fuels sold for distribution to general aviation airports, pursuant to this chapter, and fees related to aviation imposed under this title shall be credited to the fund.**

**b. Money shall be appropriated from the fund, notwithstanding the provisions of P.L.1976, c. 67 (C. 52:9H-5 et seq.).**

**c. Money in the fund shall be appropriated to the department and shall be used only for authorized activities related to aeronautics.**

d. All revenue generated by the taxes imposed on the sale of aircraft fuels, pursuant to chapter 39 of Title 54 of the Revised Statutes; the taxes imposed on the sale of aircraft fuels sold for distribution to general aviation airports, pursuant to this chapter, and fees related to aviation imposed under the provisions of this title shall be collected and invested by the Treasurer. Earnings received from the investment or deposit of revenues in the fund shall become part of the fund.

e. Any revenue credited to the fund but not appropriated to the department shall remain in the fund exclusively for the purposes set forth in this chapter.

f. The Director of the Division of Budget and Accounting may transfer funds from the fund necessary to compensate the Division of Taxation for the cost incurred in administering the tax provisions in this chapter.

Source: 6:1-92.

Comment

This section is substantially identical to its source.

**27A:42-4. Assistance to general aviation airports from airport safety fund**

The commissioner may provide assistance to general aviation airports from the Airport Safety Fund established by this chapter, for the following purposes:

a. To provide grants to publicly and privately owned, unrestricted, public use airports to obtain federal funds for airport assistance. The commissioner is authorized to provide up to 50% of the required local match; except that the commissioner is authorized to provide up to 100% of the required local match, when an emergency situation exists.

b. To provide grants or loans, or both, to publicly owned and private, unrestricted, public use airports for safety projects, including but not limited to engineering, planning, construction and rehabilitation of lighting, runways, aprons, airport approach aids and obstruction removals.

c. To provide grants or loans, or both, to publicly owned airports or counties or municipalities to acquire airports or lands, rights in land and easements, including aviation easements necessary for clear zones or clear areas, which are owned, controlled or operated, or to be owned, controlled or operated by municipalities, counties or other political subdivisions of this State.

d. To acquire lands or rights in lands adjacent to privately owned, public use airports, which are found necessary for airport or air safety purposes, and while retaining title to that land or rights in land, the commissioner may lease those lands or rights to airports or airport authorities for use in the furtherance of airport, air safety, or air transportation purposes. The commissioner shall establish terms in any lease to protect the State's interest in the promotion of aviation and the State's investment in lands and property.

Source: 6:1-93.

Comment

This section is substantially identical to its source.

#### **27A:42-5. Qualifications for assistance from airport safety fund**

Any airport, to qualify for assistance under this chapter, shall not be an international airport, either by classification or service characteristics, as determined by the Commissioner of Transportation, and shall be included in the New Jersey State Airport System Plan, as prepared or revised from time to time by the department.

In considering an application for financial assistance, the commissioner shall consider, in addition to the requirements of eligibility under the provisions of this chapter and other eligibility criteria that the commissioner may promulgate by rule to effectuate the purposes this chapter, the scope and cost of the improvement required, availability of local funds for airport development, the capture of federal funds, the relative value of that improvement to the other needs of the particular airport, the present and future public service levels in regard to operations, based aircraft, passenger service, freight service, Statewide distribution of services, and local and State economic development, the impact on the area surrounding the airport, the extent to which the improvement will contribute to the welfare of the citizens of the State and the local area, and the relative value to the State airport system as a whole.

The commissioner shall also establish certification requirements to ensure that:

a. The airport will be publicly owned or will be effectively controlled, operated, repaired and maintained adequately during the improvement's full useful life, for the benefit of the public;

b. In connection with the operation of the airport, during the improvement's full useful life, the public will not be deprived of its rightful, fair, equal and uniform use of the airport;

c. The airport will adhere to State and federal laws and rules. If an airport received financial assistance under this chapter and ceases operations or fails to continue to comply with the provisions of this section before the predetermined life of the financially assisted improvements, as the life is determined by the commissioner at the time the financial assistance is granted, the State shall be reimbursed for the unused portion of the predetermined life and, if not fully reimbursed, the claim shall be a first lien on the airport property to the extent of the unpaid balance; and

d. If a county or municipality or other public body received financial assistance under this chapter for acquisition of real property, that property shall not be sold or used for any nonaviation purpose without the approval of the commissioner.

Source: 6:1-94.

#### **Comment**

This section is substantially identical to its source.

#### **27A:42-6. Department of Transportation approval**

No county, municipality, public agency, authority or private airport owner in this State, whether acting alone or jointly with another shall submit to the Administrator of the Federal Aviation Administration of the United States any

project application for federal funding under the provisions of section 501 of the Act of Congress approved September 3, 1982, being Public Law 248, 97th Congress, known as the " Airport and Airway Improvement Act of 1982," or any amendment thereof and supplement thereto, or under any other federal law, unless the project and the project application have been first approved by the Commissioner. No grant offer or amended grant offer shall be accepted by an airport sponsor without approval by the Commissioner.

Source: 6:3-1.

Comment

This section is substantially identical to its source.

**27A:42-7. Powers of commissioner**

The commissioner may acquire airports or lands or rights therein, including aviation easements necessary for clear zones or clear areas when it is deemed to be necessary for the safe operation of the airport and the general public safety or necessary for the continued operations of an airport which is deemed to be necessary for a safe and efficient air transportation system in the State. The commissioner may contract for the operation of these facilities on a temporary basis or retain ownership of the facilities without operating them. The commissioner may also sell any airport or airport land so acquired to a county, municipality or other public body on the condition that it operate the facility as an airport and that it not sell the land without the commissioner's approval.

Source: 6:1-95.

Comment

This section is substantially identical to its source.

**27A:42-8. Rules**

The commissioner may make rules necessary to effectuate the purposes of this chapter.

Source: 6:1-96.

Comment

This section is substantially identical to its source.

**27A:43-1. Definitions**

When used in this chapter:

a. "Airport hazard" means (1) any use of land or water, or both, which creates a dangerous condition for persons or property in or about an airport or aircraft during landing or taking-off at an airport, or (2) any structure or tree which obstructs the air space required for the flight of aircraft in landing or taking-off at an airport.



b. "Airport safety zone" means any area of land or water, or both, upon which an airport hazard might be created or established, if not prevented as provided in this chapter.

c. "Structure" means any object constructed or installed by man, including, but not limited to, a building, tower, smokestack, chimney, and overhead transmission line.

Source: 6:1-82.

#### Comment

These definitions are substantially identical to their sources. Other definitions in the source section were duplicative or unnecessary.

### 27A:43-2. Legislative findings and declarations

It is found and declared by the Legislature that an airport hazard endangers the lives and property of the users of the airport and of occupants of land in its vicinity, and also, if the hazard is an obstruction, it reduces the size of the area available for landing, taking-off and maneuvering of aircraft, thus tending to destroy or impair the utility of the airport and the public benefit therein. Accordingly, it is declared:

a. That the creation or establishment of an airport hazard is a public nuisance and an injury to the community served by the airport in question; therefore, it is necessary in the interest of the public health, public safety, and general welfare that the creation or establishment of airport hazards be prevented; and

b. That the prevention of the creation or establishment of airport hazards should be accomplished, to the extent legally possible, by the exercise of the police power of the State, without compensation.

Source: 6:1-80.

#### Comment

This section is substantially identical to its source.

### 27A:43-3. Airports subject to this chapter

a. The airports subject to this chapter are those, whether publicly or privately owned, which are:

(1) used by the public for the landing and taking-off of fixed wing aircraft, and

(2) licensed by the commissioner as a public use airport or landing strip, or the subject of a complete license application and designated by the commissioner as likely to be licensed as a public use airport or landing strip within one year of this designation.

b. Notwithstanding subsection (a), an airport shall not be subject to this chapter if it is owned and operated by a federal or military authority, or by the Port

**Authority of New York and New Jersey, or if it is located within the Port of New York District as defined in R.S. 32:1-3.**

**Source: 6:1-82.**

**Comment**

This section is substantially identical to its source.

#### **27A:43-4. Rules**

**After public hearing upon notice, including notice to each affected municipality, and pursuant to the "Administrative Procedure Act," P.L.1968, c. 410 (C. 52:14B-1 et seq.), the commissioner shall adopt rules which delineate airport safety zones for all airports subject to this chapter. The rules shall describe the method used to make the delineation and may delineate subzones.**

**Source: 6:1-83.**

**Comment**

This section is substantially identical to its source.

#### **27A:43-5. Standards**

**The commissioner shall adopt rules, pursuant to the "Administrative Procedure Act," P.L.1968, c. 410 (C. 52:14B-1 et seq.), promulgating standards which specify permitted and prohibited land uses, including the specification of the height to which structures may be erected and trees allowed to grow, within airport safety zones. These standards shall be uniform for all airport safety zones, except that, where the commissioner determines that local conditions require it, the commissioner may adopt an amended or special standard. No standard adopted under this chapter shall be construed to require the removal, lowering or other change or alteration of any structure or tree not conforming to the standard when adopted or amended, or otherwise interfere with the continuance of any nonconforming use, except by acquisition of an interest of property rights as provided in this chapter.**

**Source: 6:1-84.**

**Comment**

This section is substantially identical to its source.

#### **27A:43-6. Notice of zones; Ordinance incorporating standards**

**a. Each municipality which contains within its boundaries any part of a delineated airport safety zone shall notify, in writing, each owner of record of property within the zone of the boundaries of the zone. The municipality shall file a copy of this notification with the county recording officer for recordation in the same manner as a deed or other instrument of conveyance. No cause of action against the States, a county or a municipality shall arise out of a failure to give the notice required by this subsection.**

b. A metes and bounds description of airport safety zones shall be incorporated into the municipal maps used for tax purposes and prepared pursuant to R.S. 54:1-15 and P.L.1939 c.167 (C.40:146-27 et seq.).

c. Each municipality which contains within its boundaries any part of a delineated airport safety zone shall enact an ordinance or ordinances incorporating the standards promulgated by the commissioner pursuant to this chapter and providing for their enforcement. A copy of this ordinance or ordinances, and any amendments, shall be transmitted to the commissioner.

Source: 6:1-85; 6:1-85.1.

Comment

This section is substantially identical to its sources.

**27A:43-7. Notice to buyers of property**

Any person who sells or transfers a property in an airport safety zone delineated and appearing in a municipal tax map as provided by this chapter, shall notify a prospective buyer that the property is located in an airport safety zone prior to the signing of a contract of sale. Failure to provide notice required by this section by a person subject to the jurisdiction of the New Jersey Real Estate Commission may result in the suspension or revocation of the person's license to engage in real estate sales or in other appropriate disciplinary action by that Commission.

Source: 6:1-85.2

Comment

This section is substantially identical to its source.

**27A:43-8. Nonconforming use**

On request by a municipality and submission of required information, if it is in the public interest, the commissioner may issue permits allowing the establishment of a nonconforming use which would be prohibited under the standards promulgated pursuant to this chapter. The commissioner shall adopt rules, providing for the issuing of these permits and setting appropriate fees for their issuance.

Source: 6:1-86.

Comment

This section is substantially identical to its source.

**27A:43-9. Injunctions**

The commissioner may institute an action in the name of the State, in any court of competent jurisdiction, to prevent or correct any violation of any provision of this act. The court shall grant relief, by way of injunction or otherwise, as is

**proper in all the circumstances of the case, to effectuate the purposes of this chapter.**

**Source: 6:1-87.**

**Comment**

**This section is substantially identical to its source.**

**27A:43-10. Acquisition of interest in property or nonconforming structure**

**In any case in which it is desired to remove, lower, or otherwise terminate a nonconforming use; or in which the necessary protection from an airport hazard cannot, because of constitutional limitations, be provided by zoning regulations; or if it appears advisable that the necessary protection from an airport hazard be provided by acquisition of property rights rather than by zoning regulations, the commissioner may acquire air rights, easements, or any other estate or interest in the property, including a fee simple estate, as may be necessary to effectuate the purposes of this chapter.**

**Source: 6:1-88.**

**Comment**

**This section is substantially identical to its source.**

6:1-1	27A:41-2	
6:1-2	deleted	see 27A:41-1
6:1-9	deleted	see 27A:41-3
6:1-11	deleted	see 27A:41-31
6:1-12	27A:41-17	
6:1-13	27A:41-17	
6:1-14	deleted	unnecessary
6:1-15	deleted	see 27A:41-11, 27A:41-22(b)
6:1-16	deleted	see 27A:41-3; 27A:41-23
6:1-17	27A:41-14	
6:1-18	27A:41-26	
6:1-19	deleted	see 27A:41-35
6:1-20	27A:41-2	
6:1-21	27A:41-1	
6:1-29	27A:41-3	
6:1-30	deleted	unnecessary
6:1-31	27A:41-4	
6:1-32	27A:41-23	
6:1-33	27A:41-34	
6:1-34	27A:41-17	
6:1-35	27A:41-13	
6:1-37	27A:41-17	
6:1-38	27A:41-17	
6:1-40	27A:41-1	
6:1-42	27A:41-14	
6:1-43	27A:41-22	see also 27A:41-7
6:1-44	27A:41-11	
6:1-44.1	27A:41-12; 27A:41-15	
6:1-44.2	deleted	unnecessary
6:1-45	27A:41-16	
6:1-46	27A:41-33	
6:1-47	deleted	unnecessary
6:1-48	27A:41-5	
6:1-49	27A:41-24	
6:1-50	deleted	unnecessary
6:1-51	27A:41-31	
6:1-52	deleted	unnecessary
6:1-53	deleted	unnecessary
6:1-59	27A:41-35	
6:1-59.1	27A:41-35	
6:1-60	deleted	unnecessary
6:1-61	27A:41-32	
6:1-62	27A:41-31	
6:1-80	27A:43-2	
6:1-81	deleted	unnecessary
6:1-82	27A:43-1; 27A:43-3	
6:1-83	27A:43-4	
6:1-84	27A:43-5	
6:1-85	27A:43-6	
6:1-85.1	27A:43-6	
6:1-85.2	27A:43-7	
6:1-86	27A:43-8	
6:1-87	27A:43-9	
6:1-88	27A:43-10	

6:1-89	deleted	unnecessary
6:1-90	27A:42-2	
6:1-91	27A:42-1	
6:1-92	27A:42-3	
6:1-93	27A:42-4	
6:1-94	27A:42-5	
6:1-95	27A:42-7	
6:1-96	27A:42-8	
6:1-97	27A:41-7	
6:2-1	deleted	see 27A:41-1
6:2-2	deleted	unnecessary
6:2-3	deleted	unnecessary
6:2-4	deleted	unnecessary
6:2-5	deleted	unnecessary
6:2-6	deleted	unnecessary
6:2-7	27A:41-41	
6:2-8	deleted	unnecessary
6:2-9	deleted	unnecessary
6:2-10	deleted	unnecessary
6:2-11	27A:41-21	
6:2-12	27A:41-25	
6:3-1	27A:42-6	
6:5-1	deleted	see 27A:41-1
6:5-2	27A:41-42	
6:5-3	27A:41-43	
6:5-4	27A:41-44	
6:5-5	27A:41-47	
6:5-6	27A:41-45	
6:5-7	27A:41-46	
6:5-8	deleted	see 27A:41-43
6:5-9	27A:41-48	

**REPORT AND RECOMMENDATIONS  
RELATING TO REPLEVIN**

**NEW JERSEY LAW REVISION COMMISSION  
15 Washington Street  
Newark, New Jersey 07102  
(201)648-4575  
November, 1992**





## INTRODUCTION

New Jersey replevin statutes consist of 19 sections derived from the 1877 Revision. While some of the sections were amended between 1890 and 1963, the replevin procedure, "originally designed to test the true title to property," has not changed significantly for more than a century. To a seller-creditor, the availability of this procedure for repossessing property has made certain sales possible and has become "part of the fabric of our modern financing...." Almor Furniture & Appliances v. MacMillan, 116 N.J. Super. 65, 67 (Essex Cty. Dist. Ct. 1971).

N.J.S. 2A:59-1 states:

If the goods or chattels of any person be wrongfully taken and detained, or wrongfully detained, the sheriff, or other officer authorized by law, of the county where the goods or chattels may be, shall cause such goods and chattels to be replevied and delivered.

Following the United States Supreme Court decision, Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed. 2d 349 (1969), courts began declaring constitutionally infirm those replevin laws which allowed taking of property or property rights without a prior hearing. Sniadach involved a Wisconsin statute allowing garnishment of one-half salary without notice.

The first case challenging the constitutionality of New Jersey's replevin statutes, Almor Furniture & Appliances v. MacMillan, 116 N.J. Super. 65 (Essex Cty. Dist. Ct. 1971), raised three issues: 1) denial of due process by taking property without requiring prior notice or hearing; 2) violation of the fourth amendment prohibition against unreasonable searches and seizures; and 3) denial of the fourteenth amendment guarantee of equal protection. The court declined to decide the constitutional issues raised lest "the security permitted and approved by the relatively recently enacted Uniform Commercial Code should be jeopardized by a sudden declaration of unconstitutionality of one of the remedies relied upon by sellers in security transactions." Almor, *supra* at 69.

The next year, the United States Supreme Court found Florida and Pennsylvania replevin statutes (which were similar to New Jersey replevin statutes) violative of fourteenth amendment due process because they did not require prior notice and hearing. Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556, *reh'g denied*, 409 U.S. 902, 93 S.Ct. 177, 34 L.Ed. 2d 165 (1972). The following year, 1973, in response to Fuentes v. Shevin, New Jersey Court Rules 4:61-1 and 4:61-2 were amended to comply with that decision's requirements of prior notice and hearing.

In The Singer Co. v. Gardner, 65 N.J. 403 (1974), the court agreed with defendant's argument that plaintiff's seizure under a writ of replevin was unconstitutional because there had been neither notice nor hearing beforehand. The court pointed to Fuentes v. Shevin as the impetus for the 1973 Rule changes.

New Jersey replevin statutes have never been amended to cure the constitutional defects. It is inappropriate to rely on court rules to make the statutes constitutional as applied. The proposed provisions provide constitutionally required pre-judgment hearing and notice. They also simplify and modernize the law. The court rules on replevin, R. 4:61-1 through -5, can then serve their appropriate function, providing greatly detailed procedural guidance.

#### **2B:X-1. Action for replevin**

**A person seeking recovery of goods wrongly held by another may bring an action for replevin in the Superior Court. If the person establishes the cause of action, the court shall enter an order granting possession.**

**Source: 2A:59-3.**

#### **COMMENT**

This section eliminates references to the former county court and the county district court and substitutes "an action for replevin" for the archaic "writ of replevin."

#### **2B:X-2. Temporary relief; On Notice**

**If the court, after notice and hearing, and based upon filed papers and testimony, if any, finds a probability of final judgment for the plaintiff, it may, prior to final judgment:**

- a. grant possession of the goods to the plaintiff; or**
- b. order other just relief.**

**Source: New.**

#### **COMMENT**

This section is based upon paragraph (a) of R. 4:61-1. The Rule was amended in 1973 to require pre-judgment notice and hearing.

#### **2B:X-3. Temporary Relief; Without Notice**

**In an extraordinary case if, before notice and hearing, the court finds from specific facts in an affidavit or verified complaint that the plaintiff is entitled to possession and that an immediate order is necessary to prevent removal of, or irreparable damage to, the goods, the court without notice, may:**

- a. direct a person authorized by the court to remove the goods from the party in possession and hold them pending a hearing; or**
- b. order necessary temporary restraints to preserve the goods pending a hearing.**

**Source: New.**

#### COMMENT

This section, which is based on paragraph (b) of R. 4:61-1, allows pre-judgment replevin without notice only when action is necessary to prevent irreparable damage. The Comment to R. 4:61-1 states that the standard is defined as including the imminent destruction, secretion or disposition of the chattels by the defendant.

#### **2B:X-4. Security**

**As part of an order that determines who shall hold the goods pending judgment, the court may further order the holder to give security.**

**Source: 2A:59-5, 2A:59-6**

#### COMMENT

This section is a general security provision that replaces the source bonding statutes, gives the court authority regarding security requirements and is compatible with the relevant rule, R. 4:61-1(c).

#### **2B:X-5. Unrelinquished property**

**If the court orders a person to relinquish goods and the person does not relinquish them, the court shall enter an order in aid of execution, or if the plaintiff so requests, assess damages.**

**Source: 2A:59-4, R. 4:59-1(e)**

#### COMMENT

This provision eliminates the source statute's blanket right for the sheriff to break into a building or to trespass on private property in order to seize property and substitutes the discretion of the court in determining how concealed and other unrelinquished property shall be retaken. The phrase, "enter an order in aid of execution," derives from similar language in R. 4:59-1(e), supplementary proceedings to enforce judgments.

## TABLE OF DISPOSITIONS

<b>Section</b>	<b>Disposition</b>	<b>Comment</b>
2A:59-1	Deleted	Unconstitutional
2A:59-2	Deleted	Unnecessary
2A:59-3	2B:X-1	
2A:59-4	2B:X-5	
2A:59-5	2B:X-4	
2A:59-6	2B:X-4	
2A:59-7	Deleted	Unnecessary
2A:59-8	Deleted	Unnecessary
2A:59-9	Deleted	Unnecessary
2A:59-10	Deleted	Unnecessary
2A:59-11	Deleted	Unnecessary
2A:59-12	Deleted	Unnecessary
2A:59-13	Deleted	Unnecessary
2A:59-14	Deleted	Unnecessary
2A:59-15	Deleted	Unnecessary
2A:59-16	Deleted	Unnecessary
2A:59-17	Deleted	Unnecessary
2A:59-18	Deleted	Unnecessary
2A:59-19	Deleted	Unnecessary

**REPORT AND RECOMMENDATIONS  
RELATING TO JURIES**

**NEW JERSEY LAW REVISION COMMISSION  
15 Washington Street  
Newark, New Jersey 07102  
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## INTRODUCTION

In 1982 the Supreme Court Task Force on Jury Utilization and Management completed an extensive study of the jury system and issued a report recommending a wide variety of improvements and modifications in the system of jury selection. Since the issuance of the Task Force Report many improvements have been made in the management of the jury system through changes in court rules and administrative practices. Periods of jury service have generally been decreased, "one day, one trial" systems have been implemented in some counties in order to reduce juror waiting time, and juror yields, i.e., the percentage of summoned jurors who actually appear for jury service, have been improved. However, some of the broader, policy-based recommendations of the Task Force which required legislative change were contained in legislation which was vetoed along with legislation which would have increased juror fees.

This project continues the work of the Law Revision Commission in revising the statutes relating to the New Jersey court system; it constitutes a complete revision in the text and organization of the statutes relating to petit jury and grand jury selection and impaneling. Many of the specific changes recommended in this Report were adopted from the recommendations of the Supreme Court Task Force which were not previously implemented. This Report contains no recommendations, however, on the subject of modifying the present system of juror compensation.

One of the most important recommendations of the Supreme Court Jury Utilization and Management Task Force was that the statutory qualifications for jury service be modified in order to increase the number of citizens eligible for jury service. The Law Revision Commission endorses the position taken by the Supreme Court Task Force on the importance of the civic obligation of all citizens to participate in the jury system. In the words of the Task Force Report, at 10:

The basic position taken by the Task Force throughout its term was that jury service is an obligation of citizenship in which all citizens are obligated to participate and that no one is too busy or too important to serve. This philosophy is gaining strength throughout the country as part of the many jury reforms being introduced nationwide. The basis for it is fundamental fairness. For years, jury service has been laid on the backs of many of the same people who serve over and over again, while others exercise exemptions or find excuses for not serving. If every citizen did his civic duty and served for one day or one week, serving as a juror once in a lifetime would not be unrealistic. At present, some citizens are serving every few years; this is unfair and should be remedied.

Broadening the jury pool involves a number of specific statutory changes recommended by the Task Force and included in this Report. The first and most important is the elimination of all class and occupational exemptions and disqualifications from jury service. Under the present system automatic exemptions from jury service are available to numerous classes of people, including fish and game wardens, police and fire personnel, physicians and dentists, legislators, and telegraph and telephone operators and linemen. 2A:69-2. Persons either "directly or indirectly connected with the administration of justice" are disqualified from jury service under 2A:69-

1. The Task Force report noted that these exemptions and disqualifications result in a significant reduction in the number of persons available for jury service. In one study of the exercise of statutory exemptions, the number ranged as high as 38 and 43 percent in some counties, with a rough average of approximately 20 percent overall. The Task Force Report noted that arguments have been made that some of the exemptions are based on the public necessity of the services provided by police, fire and medical personnel and others included in the exempted classes. As noted in the Task Force Report, however, these arguments are unconvincing, as vacations, holidays and medical absences are able to be accommodated in these professions and occupations. Moreover, the statutes proposed in this Report include a provision permitting excuses for severe hardship, and a provision permitting deferral of jury service. These provisions will allow any problems stemming from a potential juror's occupational obligations to be dealt with on a case-by-case basis, in the same manner as such issues are raised by citizens in other occupations.

The proposed statutes in this report also include a provision for an excuse for persons 70 years of age or older, in place of the former disqualification of such persons from jury service. Under this proposed section citizens 70 years of age or older who are able and willing to serve as jurors may do so, while those who are unable may claim the excuse.

In this proposed draft, the Commission has continued the provision in the present statute for the use of voter registration lists and the list of motor vehicle licensees as the source of names of prospective jurors. Questions have been raised as to whether the voter registration and motor vehicle licensee lists include as many as possible of the persons eligible for jury service, and whether other sources should be used to obtain names of prospective jurors. See State v. Ramseur, 106 N.J. 123 (1987). The Commission received and considered many suggestions concerning lists of county residents which might be used, most of which suggestions were rejected either because the proposed lists are unavailable under federal law (e.g., lists of welfare and unemployment benefits recipients, see, e.g., 45 C.F.R. 205.50; 20 C.F.R. 401.1; N.J.A.C. 10:81-7.34; N.J.A.C. 12:17-7.1)) or because the lists would be impractical to use even if available (e.g., telephone directory listings, which usually include only one name per household and frequently do not include a first name). The only government-maintained list which was proposed which would have practical value is the list of state income tax filers and homestead rebate applicants maintained by the Division of Taxation. The Commission recommends that these lists be utilized both to broaden the juror source lists and to provide a more up-to-date and accurate source of address information.

The Commission considered whether a statewide system for the maintenance of juror lists and the selection of jury panels should be established, but concluded that it would not be appropriate at this time. Systems currently are maintained on the county level, consistent with the statutory provisions concerning the respective obligations of the state and the counties for the the court system. The Commission believes, however, that the Supreme Court should consider exercising its rule-making and administrative authority to impose uniform standards in certain particulars of the jury selection process. For example, some counties use a one-step qualification and summoning process, while others still use a two-step



process, which involves a separate mailing of juror qualification questionnaires, followed by the issuance of summonses. If study bears out the anecdotal evidence that a one-step process is more efficient and results in a better ultimate juror yield, the court should consider requiring the use of a one-step process in all counties. The Commission's proposed statutes do not preclude such an approach. Similarly, a number of counties have instituted "one trial, one day" systems for jury service. In those counties, jurors who are not seated on a jury at the end of the first day of jury service are dismissed, and those who are seated are dismissed after service on a single trial. This is another area in which the Supreme Court should consider the imposition of a statewide standard.

## **Chapter 20 - Qualifications and selection of jurors**

### **2B:20-1. Qualifications of jurors**

**Every person summoned as a juror:**

- a. shall be 18 years of age or older;**
- b. shall be able to read and understand the English language;**
- c. shall be a citizen of the United States;**
- d. shall be a resident of the county in which the person is summoned;**
- e. shall not be serving a sentence of imprisonment, or be on probation or parole, as a result of a conviction of any indictable offense under the laws of this State, another state, or the United States;**
- f. shall not have any mental or physical disability which will prevent the person from properly serving as a juror.**

**Source: 2A:69-1**

#### **COMMENT**

This section combines the separate source sections on qualification and ineligibility for jury service. Certain of the qualification and ineligibility provisions have been eliminated, in accordance with the recommendations of the Supreme Court Jury Utilization and Management Task Force. The upper age limit of 75 for jury service has been eliminated; the new section on excuses from jury service, 2B:20-10, now provides that persons age 75 or over may claim an excuse. The lower age limit has also been changed from 21 to 18. The requirement that jurors be able to write the English language has been eliminated as unnecessary, in accordance with the Task Force recommendation; the requirements that the juror be able to read and understand the English language have been retained. The two-year state residency requirement has been eliminated, to bring the juror eligibility provisions into line with the provisions relating to eligibility to vote and to obtain a driver's license.

This section also replaces the former provision disqualifying convicted felons from jury service with a provision which limits the period of disqualification to the completion of the person's sentence or the person's discharge from probation or parole; this change is consistent with the 1971 amendment to R.S. 19:4-1 concerning the right of suffrage.

The requirement that a juror not be "either directly or indirectly with the administration of justice" has been eliminated, in accordance with the Task Force

recommendation that occupational exemptions and qualifications be eliminated. A person's occupation is a factor to be considered in relation to a person's suitability to sit on a particular jury, not as an absolute bar to jury service.

## **2B:20-2. Preparation of juror source list**

**a. The names of persons eligible for jury service shall be selected from a single juror source list of county residents whose names and addresses shall be obtained from a merger of the following lists: registered voters, licensed drivers, filers of state gross income tax returns and filers of homestead rebate application forms. The county election board, the Division of Motor Vehicles and the State Division of Taxation shall provide these lists annually to the Assignment Judge of the county. The Assignment Judge may provide for the merger of additional lists of persons eligible for jury service that may contribute to the breadth of the juror source list. Merger of the lists of eligible jurors into a single juror source list shall include a reasonable attempt to eliminate duplication of names.**

**b. The juror source list shall be compiled once a year, or more often as directed by the Assignment Judge.**

**Source: 2A:70-1; 2A:70-2; 2A:70-4; 2A:70-6**

### **COMMENT**

This section combines the provisions of the source sections, and eliminates some details such as the number of names which must be on a juror list and the requirement that separate lists be prepared for petit jurors and grand jurors. The provision in 2A:70-2 giving the Assignment Judge the discretion to eliminate persons who are in his opinion "unfit for jury service" from the juror list has been eliminated as inappropriate. See the proposed new section on questionnaires, which permits the Assignment Judge to send questionnaires to persons on the juror source list to determine their eligibility for jury service.

The section adds the list of income tax filers and homestead rebate applicants to the voter registration list and the list of motor vehicle licensees now used as the source of names of prospective jurors. The addition of this list will result in an increase in the percentage of eligible persons being considered for jury service. By including more people as potential jurors the burden on any individual juror will be reduced and jury lists will be more representative of the whole population.

This section also gives assignment judges the authority to use additional lists as sources of potential jurors, if the use of additional lists will contribute the breadth of the juror source lists.

Proposals for the use of additional lists of potential jurors to expand the juror source list must include consideration of the cost of merging those additional lists into the lists presently used. As new lists are added, the chances increase that names already on the juror source list will be duplicated. If the duplicates are not eliminated, then the effect of adding the additional names is diluted. While some of the work of eliminating duplicate names can be done electronically, much of the work must be done manually. Additional lists could be more effectively merged if the jurors' social security numbers were available for this purpose; such use, however, is presently prohibited by federal law. The Commissioners urge that federal law be changed to permit the use of social security numbers for the purpose of obtaining the largest possible, cross-representative juror source lists.

### **2B:20-3. Questionnaires concerning qualifications**

a. The Assignment Judge may direct that questionnaires be sent to potential jurors, requesting that they provide pertinent information concerning their qualifications for jury service, and any claims for exemption or deferral.

b. Questionnaires may be sent to all persons on the juror source list, or to persons randomly selected from the juror source list, either before or with the service of a summons for jury service.

Source: 2A:70-5

#### **COMMENT**

This proposed section continues the provision in the source section giving each county, at the direction of the Assignment Judge, the option to send questionnaires to persons selected for jury service prior to summoning them for service. The provision in the source section that persons who fail to answer questionnaires are in contempt of court, has been moved to a new section covering failure to appear for service and refusal to serve.

### **2B:20-4. Public and random selection of jurors**

a. Before each session of the Superior Court, the Assignment Judge shall provide for the drawing of names from the juror source list of persons to be summoned for service as grand and petit jurors.

b. The Assignment Judge shall specify the number of panels of grand and petit jurors to be drawn, the number of names to be drawn for each panel and the form and manner of preparation of the lists of names drawn. The lists shall state the name and address and, if available, occupation of each juror to be summoned.

c. The Assignment Judge shall provide for the selection of additional panels of grand and petit jurors from the juror source list at any time when it appears that additional panels of jurors will be required.

d. Both the drawing of names and the assignment of selected names to panels shall be public and random.

e. The Assignment Judge may provide for the random selection of jurors, and their assignment to panels, by the use of electronic devices, if:

(1) the method of random selection is specified with particularity in the instructions of the assignment judge; and

(2) the specification of the method and any programs and procedures used to implement the method, including any computer programs or portions of computer programs which are utilized, are available for public inspection upon request.

Source: 2A:70-4a; 2A:71-3.1; 2A:71-4; 2A:71-8; 2A:71-10; 2A:71-12

#### **COMMENT**

This proposed section combines and simplifies the provisions of the source sections regarding the selection of panels of petit jurors, giving the Assignment Judge of the county the authority to provide for the drawing of an appropriate number of panels prior to the beginning

of each session of the Superior Court, and additionally as needed during the session. The standard for selection of jurors was discussed in State v. Long, 204 N.J. Super. 469 (Law Div. 1985). The court examined the entire statutory scheme, as well as the constitutional requirements governing the selection of jurors from the juror source list, and concluded that the selection process must be "random," i.e., one "which provides pools of jurors that comprise a representative cross section of the community selected in a manner that gives each person an equal chance to be selected, and which spreads the burden of service evenly among the eligible populace." Id. at 485 n. 9.

#### **2B:20-5. Certification, filing and posting of juror lists**

**The list of names randomly selected from the juror source list shall be filed and publicly posted in the office of the County Clerk. The Assignment Judge shall certify on the list that the process specified for the selection of jurors and their assignment to panels has been followed.**

**Source: 2A:70-3**

#### **COMMENT**

This proposed section continues the prior practice requiring certification and filing of juror lists, and their public posting in the office of the County Clerk.

#### **2B:20-6. Designation of period of service for petit jury panels**

**a. The Assignment Judge shall designate the period of service of each panel of jurors selected from the juror source list.**

**b. A panel of jurors may be designated to serve during a portion of the then current session of the Superior Court, or during a portion of the next session of the Superior Court.**

**Source: 2A: 71-9**

#### **COMMENT**

This section gives the Assignment Judge the power to designate the period of service of each panel of petit jurors. The current practice varies depending upon the needs of each individual county, but is usually one week. Subsection (b) gives the Assignment Judge the power to designate that a panel shall serve during the then current session, or during the next session of the Superior Court. There are three sessions of the Superior Court each year. See R. 1:30-2(b).

#### **2B:20-7. Summoning of jurors**

**a. Upon receipt of a list of persons selected to serve on a panel of jurors, the sheriff shall, under the direction of the Assignment Judge, cause the persons to be summoned.**

**b. The sheriff shall make a return to the Assignment Judge of all of the jurors summoned.**

**Source: 2A:72-2, 2A:72-4**

#### COMMENT

Subsection (a) of this proposed section substantially continues the language of source section 2A:72-2. Subsection (b) reduces source section 2A:72-4 to its essential content of requiring the sheriff to make a return to the Assignment Judge of all jurors summoned.

#### **2B:20-8. Form and service of summons**

**a. The summons for jury service shall be by written notice and shall state the date, time and place where the juror is to appear for service.**

**b. The summons shall be served at least 30 days prior to the date upon which the juror is to appear, by regular mail addressed to the juror's usual residence or business address unless service at another address is ordered by the Assignment Judge. Service of the summons shall be complete upon mailing.**

**c. If a sufficient number of jurors is unavailable due to a successful challenge or other unanticipated occurrence and new panels of jurors must be selected from the juror source list, the Assignment Judge may direct that the summons be served less than 30 days prior to the date upon which the jurors are to appear.**

**Source: 2A:72-5, 2A:71-11**

#### COMMENT

This proposed section simplifies the language of the source section, and continues the practice of summoning jurors by mail. The jurors must be summoned 30 days before they are required to appear. The thirty day period specified in the source section balances the need of the courts to have sufficient available jurors, and the need of persons summoned for jury service to make appropriate arrangements to permit them to serve. Subsection (c) permits service of the summons less than 30 days before the required appearance in the exceptional situation in which all available panels of jurors have been successfully challenged and additional panels of jurors must be summoned.

#### **2B:20-9. Excuses and deferrals by Assignment Judge**

**a. A person may be excused from jury service or may have jury service deferred only by the Assignment Judge of the county in which the person was summoned, or by the Assignment Judge's designee.**

**b. The Assignment Judge may require verification of any of the facts supporting the grounds for a request for excuse or deferral. Records shall be kept of all requests for excuses and deferrals, and of the granting of excuses and deferrals.**

**Source: 2A:78-1**

#### COMMENT

This proposed section requires requests for excuses or deferrals to be decided by the Assignment Judge or the judge's designee, and further requires that records of excuses and deferrals be kept. In many cases the records will consist of the returned jury questionnaires; in others the correspondence received from prospective jurors seeking excuses and deferrals, and an indication of the action taken on the correspondence, will constitute a record. In the case

of telephone requests for excuses and deferrals, some record must be kept of the reasons for the excuse or deferral proffered by the prospective juror and the action taken on the request; the precise form and manner of keeping such records is the responsibility of the jury management office and will depend on the recordkeeping system used. Proposed subsection 2B:20-12 specifies the time period during which such records must be kept.

#### **2B:20-10. Grounds for excuse from jury service**

**An excuse from jury service shall be granted only if:**

- a. The prospective juror is 75 years of age or older;**
- b. The prospective juror has served as a juror within the last three years in the county to which the juror is being summoned; or**
- c. Jury service will impose a severe hardship due to circumstances which are not likely to change within the following year. Severe hardship includes the following circumstances:**

**(1) The prospective juror has a medical inability to serve which is verified by a licensed physician.**

**(2) The prospective juror will suffer a severe financial hardship which will compromise the juror's ability to support himself, herself, or dependents. In determining whether to excuse the prospective juror, the Assignment Judge shall consider:**

- (a) the sources of the prospective juror's household income;**
- and**
- (b) the availability and extent of income reimbursement; and**
  - (c) the expected length of service.**

**(3) The prospective juror has a personal obligation to care for another, including a sick, aged or infirm dependent or a minor child, who requires the prospective juror's personal care and attention, and no alternative care is available without severe financial hardship on the prospective juror or the person requiring care.**

**(4) The prospective juror provides highly specialized technical health care services for which replacement cannot reasonably be obtained.**

**(5) The prospective juror is a health care worker directly involved in the care of a mentally or physically handicapped person, and the prospective juror's continued presence is essential to the regular and personal treatment of that person.**

**(6) The prospective juror is a member of the full-time instructional staff of a grammar school or high school, the scheduled jury service is during the school term, and a replacement cannot reasonably be obtained. In determining whether to excuse the prospective juror or grant a deferral of service, the Assignment Judge shall consider:**

- (a) the impact on the school considering the number and function of teachers called for jury service during the current academic year; and**

**(b) the special role of certified special education teachers in providing continuity of instruction to handicapped students.**

**Source: 2A:69-4; 2A:78-1**

**COMMENT**

This proposed section follows the recommendation of the Supreme Court Jury Utilization and Management Task Force that excuses from jury service be given only in cases of severe hardship. The source section permitted excuses from jury service without setting a standard for the granting of excuses, and permitted the Assignment Judge to designate a later time when the excused juror might serve.

This proposed section and the one following it clearly distinguish excuses from deferrals. An excuse from jury service discharges the potential juror's obligation to serve until the juror is next selected from the jury list. A deferral from jury service results in the rescheduling of jury service to a later time within a year. The severe hardship must be expected to continue for a year period. Thus, for example, if a person has a physical inability to serve due to recuperation from surgery, a deferral of service usually will be appropriate rather than an outright excuse.

This provision includes a list of circumstances that constitute "severe hardship." A potential juror who can establish the existence of the specified circumstances is entitled to be excused from jury service. The list is not exclusive, and assignment judges have the discretion to consider other analogous circumstances which would constitute a severe hardship justifying an excuse from jury service. Circumstances found not to constitute a severe hardship might justify a deferral of jury service pursuant to 2B:20-11. The assignment judge is given broad discretion under 2B:20-11 to defer jury service to another time within the following year. The aim of 2B:20-11 is to permit the assignment judge to consider individual circumstances and arrange an accommodation that will result in a potential juror being able to serve.

**2B:20-11. Deferral of jury service**

**Upon a request for deferral of jury service or upon the denial of a request for an excuse from jury service, the Assignment Judge may direct that the jury service of a prospective juror be deferred to another time within the next twelve months.**

**Source: 2A:78-1**

**COMMENT**

This proposed section complements the new section on excuses from jury service. A prospective juror whose request for an excuse is denied, or who requests a deferral in the first instance, may be granted a deferral of jury service to another time within the following year. No attempt is made in this section to codify the myriad circumstances which would justify the granting of a deferral of jury service. For example, the jury service of a full-time student may be deferred until a vacation period or the end of the school term; the jury service of a person recovering from an illness may be deferred; the service of a worker who is scheduled to travel on business may be deferred. Under this section, the matter is left to the sound discretion and experience of the Assignment Judge.

## **2B:20-12. Retention of records**

**All records concerning the granting of excuses from and deferrals of jury service, and all juror questionnaires, shall be retained for a period of three years. All other records relating to the summoning, impaneling and charging of jurors shall be retained for five years.**

**Source: New**

### **COMMENT**

The only existing provision concerning retention of jury records is 47:3-9(v), which relates to the retention of records by county clerks. The draft provisions parallel that provision in requiring that most records concerning juries be retained for five years. The Commission recommends, however, that because of the volume of questionnaires and records of excuses and deferrals, this information be retained only for three years.

## **2B:20-13. Discharge of unneeded jurors**

**If the number of jurors in attendance is greater than is necessary for the business of the court, the Assignment Judge may discharge the unneeded jurors before the expiration of the period for which they were summoned. The jurors discharged shall be selected randomly.**

**Source: 2A:78-3**

### **COMMENT**

This section is substantially identical to the source section.

## **2B:20-14. Failure to respond to questionnaire or summons**

**a. Persons who are sent questionnaires concerning their qualifications for jury service who fail to respond to the questionnaire without reasonable excuse shall be liable for a fine not to exceed \$500, payable to the county from which the questionnaire was sent, or may be punished for contempt of court.**

**b. Persons summoned as jurors who, without reasonable excuse, either fail to appear for jury service or refuse to serve, shall be liable for a fine not to exceed \$500, payable to the county in which the person was summoned, or may be punished for contempt of court.**

**Source: 2A:70-5; 2A:79-1**

### **COMMENT**

This section conforms the provisions of the two source sections by imposing a fine both for failing to respond to a questionnaire regarding jury service and for failing to appear for service or for refusing to serve. An additional section, 2A:79-4, containing a sanction for refusal to be sworn as a juror, is recommended for repeal as unnecessary; the refusal to be sworn is treated as refusal to serve by this section.



## **2B:20-15. Notice and collection of fines**

**a. The Assignment Judge may direct the sheriff to send written notice to a person who has failed to respond to a questionnaire concerning jury service, or who has failed to appear for jury service or has refused to serve, that a fine has been imposed. The notice shall state the amount of the fine, the manner of payment to be made to the sheriff, and the consequences of failure to pay the fine within 30 days of the date specified in the notice. The notice shall be served in the same manner as a summons.**

**b. If a defaulting juror fails to pay the fine in response to the notice, the Assignment Judge may issue process directing the sheriff to recover the fine and costs by levy on the defaulting juror's personal property.**

**Source: 2A:79-2, 2A:79-3**

### **COMMENT**

This proposed section is substantially similar to the source sections.

## **2B:20-16. Excuse from employment for jury duty; compensation**

**Any person employed full-time by any agency, independent authority, instrumentality or entity of the State or of any political subdivision of the State shall be excused from employment at all times the person is required to be present for jury service in any court of this State, any court of another state, or any federal district court or in the United States District Court for New Jersey, and shall be entitled to receive from the employer the person's usual compensation for each day the person is present for jury service, less the amount of per diem fee for each day of jury service as shown on a statement issued to the juror by the sheriff or other court officer making payment of juror fees.**

**Source: 2A:69-5; 2A:69-6**

### **COMMENT**

This proposed section combines the provisions of the source sections and generalizes the language of the source provisions.

## **2B:20-17. Employment protection**

**a. An employer shall not penalize an employee with respect to employment, or threaten or otherwise coerce an employee with respect to that employment, because the employee is required to attend court for jury service.**

**b. An employer who violates subsection (a) of this section is guilty of a disorderly persons offense.**

**c. If an employer penalizes an employee in violation of subsection a. of this section, the employee may bring a civil action for economic damages suffered as a result of the violation and for an order requiring the reinstatement of the employee. The action shall be commenced within 90 days from the date of the violation or the completion of jury service,**

**whichever is later. If the employee prevails, the employee shall be entitled to a reasonable attorney's fee fixed by the court.**

**Source: New**

**COMMENT**

One of the most important recommendations of the Supreme Court Jury Utilization and Management Task Force was that persons summoned for jury service be protected from retaliation by an employer for fulfilling this important civic obligation. This section prohibits employers from firing, threatening or coercing employees who are summoned for jury service or who appear for jury service, and declares it a disorderly persons offense to do so. The employee is also provided with a civil action for recovery of economic damages, and for reinstatement, if the employee is fired for appearing for jury service. The term "economic damages" is intended to exclude recovery for pain and suffering and emotional distress.

**2B:20-18. Oath of allegiance**

**The following oath shall be administered to every person summoned for service as a juror who is not excused from service shall, before beginning service upon the panel:**

**"Do you swear or affirm that you will support the Constitution of the United States and the Constitution of this State?"**

**Source: 2A:69-1.1**

**COMMENT**

This section eliminates the additional language which was added to the source section in 1953.

**Chapter 21 - County grand juries**

**2B:21-1. Number of grand juries**

**The Assignment Judge for each county shall impanel one or more grand juries for that county, as the public interest requires. There shall be at least one grand jury serving in each county at all times.**

**Source: 2A:71-5; 2A:71-6; 2A:71-7**

**COMMENT**

This section has been rewritten to parallel the sections on petit jurors. The particularity of sections 2A:71-6 and 2A:71-7 are unnecessary in light of the generality of this proposed section.

**2B:21-2. Impaneling grand jury**

**a. A grand jury shall consist of not more than 23 persons selected from the panel of jurors summoned for service as grand jurors. The grand**

jurors shall be selected publicly and randomly, in the same manner as is provided by statute for the impaneling of petit jurors.

b. The Assignment Judge, or a Superior Court judge designated by the Assignment Judge, shall conduct the voir dire of members of the grand jury panel and shall decide all requests for excuse or deferral of service the grand jury.

c. The Assignment Judge, or a Superior Court judge designated by the Assignment Judge, shall excuse any person from service on the grand jury if the person is a federal, state or local government police officer or prosecutor.

d. The prosecutor may object to the selection of any person as a grand juror on the basis of the person's inability to be impartial or on the grounds that the person does not meet the qualifications specified in [proposed section 2B:20-1]. The objections by the prosecutor shall be made on the record and shall be decided by the Assignment Judge.

Source: 2A:73-1; 2A:78-6; new

#### COMMENT

The substance of subsection a. of this section is drawn from 2A:73-1, but states in the affirmative that the grand jury consists of no more than 23 members, and that the selection of persons for grand jury service shall be public and random. The source section stated these matters inferentially. Subsections (b) and (c) are new, but reflect the long-standing practice in the impaneling of a grand jury. The Assignment Judge conducts the selection process and the voir dire; the prosecutor may be present and may object to the selection of any grand juror for cause, on the ground that the juror is unable to be impartial. The prosecutor's objections must be made on the record and be decided by the Assignment Judge; unlike the impaneling of a petit jury, the prosecutor is not entitled to any peremptory challenges in the impaneling of a grand jury.

#### 2B:21-3. Oath of grand jurors

The following oath shall be administered to all of the members of the grand jury:

**"Do you as a member of this grand jury of the State of New Jersey and county of (county) swear or affirm that you will support the Constitution of the United States and the Constitution of this State; that you will diligently inquire into all matters brought before you to the best of your skill, knowledge and understanding; that you will take no action through envy, hatred or malice nor for fear, favor or affection, or for reward or the hope of reward; that you will make a true presentment of all matters coming before you, and that you will keep secret the proceedings of the grand jury?"**

Source: 2A:73-3

#### COMMENT

This section continues the substance of the source section while simplifying its language.

#### **2B:21-4. Vacancies in grand jury**

**A grand juror who becomes ill, dies or does not appear for service after having been sworn may be replaced at the direction of the Assignment Judge. The replacement grand juror shall be selected publicly and randomly and shall be sworn in the same manner as the grand juror being replaced.**

**Source: 2A:73-2**

#### **COMMENT**

This section continues the substance of the source section while simplifying its language.

#### **2B:21-5. Selection of foreperson and acting foreperson**

**The foreperson and the deputy foreperson of each grand jury shall be selected publicly and randomly from the persons impanelled as members of the grand jury. A person selected as the foreperson or deputy foreperson may freely decline to serve in the position, in which case another person shall be selected publicly and randomly to serve.**

**Source: New**

#### **COMMENT**

This new section addresses the problem discussed in State v. Russo, 213 N.J. Super. 219, 228-29 (Law Div. 1986), and State v. Ramseur, 106 N.J. 123, 236-38 (1987), concerning the manner in which the foreman and acting foreman of the grand jury are selected. A person selected as foreperson or acting foreperson may freely decline the position, but remains a member of the grand jury.

#### **2B:21-6. Swearing of witnesses by foreperson**

**a. The foreperson of the grand jury shall administer the following oath to witnesses who give evidence before the grand jury:**

**"Do you swear or affirm that you will tell the truth, the whole truth, and nothing but the truth?"**

**b. The foreperson shall, before being discharged, certify to the court the names of the witnesses who have been sworn.**

**Source: 2A:73-4**

#### **COMMENT**

This section continues the substance of the source section while simplifying its language. The text of the oath to be taken by grand jury witnesses has been added.

#### **2B:21-7. Indictment**

**An indictment may be found only upon concurrence of 12 or more grand jurors who either were present during, or who have read or listened to**

**the record of, all of the proceedings concerning the indictment and who have examined all exhibits presented with respect to the indictment.**

**Source: New**

**COMMENT**

This provision codifies the common law rule stated in State v. Reynolds, 166 N.J. Super. 570 (Law Div. 1979) that 12 jurors must vote to return an indictment, as modified in State v. Ciba-Geigy Corp., 222 N.J. Super. 343 (App. Div. 1988), which held that an absent grand juror may cast a valid vote if the grand juror has reviewed the stenographic transcript of the presentation for which the grand juror was absent.

**2B:21-8. Record of proceedings**

**The testimony of witnesses, comments by the prosecuting attorney, and colloquy between the prosecuting attorney and witnesses or members of the grand jury shall be recorded stenographically or electronically.**

**Source: 2A:73B-1**

**COMMENT**

This section continues the substance of the source section while simplifying its language and providing for either stenographic or electronic recording of the grand jury proceedings.

**2B:21-9. Statement of investigation**

**a. A person who has been investigated by a grand jury and against whom no indictment has been returned, may request the grand jury to issue a statement indicating that a charge against the person was investigated and that the grand jury did not return an indictment from the evidence presented. The grand jury shall issue the statement upon the approval of the court which summoned the grand jury. The statement shall issue upon the completion of the investigation of the charge, but not beyond the end of the grand jury's term.**

**b. A person who has been called to appear before a grand jury for a purpose other than the investigation of a charge against the person, may request the grand jury to issue a statement indicating that the person was called only as a witness in an investigation, and that the investigation did not involve a charge against the person. The grand jury shall issue the statement upon the approval of the court which summoned the grand jury. The statement shall issue upon the completion of the investigation of the charge or a series of related charges, but not beyond the end of the grand jury's term.**

**Source: 2A:73B-2**

**COMMENT**

This section continues the substance of the source section while simplifying its language.

## **2B:21-10. Unauthorized disclosure of grand jury proceedings**

**a. Any person who, with the intent to injure another, purposely discloses any information concerning the proceedings of a grand jury, other than as authorized or required by law, commits a crime of the fourth degree. A public officer or employee who is convicted of a violation of this section shall be dismissed from public office or employment.**

**b. A person injured as a result of a violation of subsection a. of this section may bring a civil action against the person convicted of the violation. The person convicted shall be liable to the person injured for actual damages, punitive damages of not less than \$1,000.00 or more than \$100,000.00, reasonable litigation costs and reasonable attorney fees.**

**Source: 2A:73B-3**

### **COMMENT**

This section continues the substance of the source section while simplifying its language.

## **Chapter 22 - State grand juries**

### **2B:22-1. Impaneling state grand jury**

**a. There shall be at least one State grand jury with jurisdiction extending throughout the State serving at all times.**

**b. The State grand jury shall be impaneled by a judge of the Superior Court designated for that purpose by the Chief Justice.**

**c. The Attorney General or the Director of the Division of Criminal Justice may, when they determine it to be in the public interest, apply in writing to the designated judge requesting that one or more additional State grand juries be impaneled. The judge may, for good cause shown, order the impaneling of additional State grand juries.**

**Source: 2A:73A-2**

### **COMMENT**

This section continues the substance of the source section while simplifying its language.

### **2B:22-2. Powers and duties of state grand jury**

**a. A State grand jury shall have the same powers and duties and shall function in the same manner as a county grand jury except that its jurisdiction shall extend throughout the State. The law applicable to county grand juries shall apply to State grand juries to the extent that it is consistent with the specific provisions relating to State grand juries.**

**b. The Supreme Court may promulgate rules to govern particularly the procedures of State grand juries.**

**Source: 2A:73A-3**

**COMMENT**

This section continues the substance of the source section while simplifying its language.

**2B:22-3. Selection of state grand jurors**

**a. The Administrative Director of the Courts, upon receipt of an order directing the impaneling of a State grand jury, shall prepare a list of prospective jurors randomly drawn from the current juror lists of the several counties. The list of prospective state grand jurors prepared by the Administrative Director of the Courts shall contain numbers of prospective jurors from each county in the same relative proportion as the population of each county bears to the total population of the State.**

**b. The designated judge shall impanel a State grand jury from the prospective jurors on the list. The selection of jurors for service on the state grand jury shall be public and random.**

**Source: 2A:73A-4**

**COMMENT**

The Commission recommends that the restriction in the prior statute on the number of state grand jurors from any single county who may serve on a particular state grand jury be abandoned as it raises constitutional questions concerning the randomness and representativeness of the state grand jurors. The Commission recommends a system in which the selection of state grand jurors is completely random and is as similar as possible to the selection process used for county grand jurors. The Commission's recommended solution to the problem of representativeness in state grand juries is the random selection of state grand jurors from a list composed of a proportional number of jurors from each county in the state, based upon population. .

**2B:22-4. Summoning of state grand jurors**

**The Administrative Director of the Courts shall transmit the names of the prospective jurors selected for service on the State grand jury to the sheriffs of the counties in which the prospective jurors reside. The sheriffs of the respective counties shall cause the prospective jurors resident in their counties to be summoned for service on the State grand jury.**

**Source: 2A:73A-5**

**COMMENT**

This section continues the substance of the source section while simplifying its language.

#### **2B:22-5. Judicial supervision of state grand jury**

The judge designated by the Chief Justice shall maintain judicial supervision over the grand jury. All indictments, presentments and formal returns of any kind made by a State grand jury shall be returned to the designated judge.

Source: 2A:73A-6

#### **COMMENT**

This section continues the substance of the source section while simplifying its language.

#### **2B:22-6. Presentation of evidence to state grand jury**

The Attorney General or the designee of the Attorney General shall present evidence to the State grand jury.

Source: 2A:73A-7

#### **COMMENT**

This section continues the substance of the source section while simplifying its language.

#### **2B:22-7. Return of indictment or presentment**

The judge who issues an order impaneling a State grand jury shall designate the county of venue for the purpose of trial of an indictment returned by the State grand jury. The judge may direct the consolidation of an indictment returned by a county grand jury with an indictment returned by a State grand jury and may fix the venue for trial of both indictments.

Source: 2A:73A-8

#### **COMMENT**

This section continues the substance of the source section while simplifying its language.

#### **2B:22-8. Expenses of state grand jury**

a. The State shall pay the expenses of impaneling and operating a State grand jury out of funds appropriated for this purpose to the Department of Law and Public Safety, Division of Criminal Justice.

b. The expenses incurred by a county for the prosecution and trial of a State grand jury indictment shall be paid by the State out of funds appropriated for this purpose to the Department of Law and Public Safety, Division of Criminal Justice. The county treasurer shall make application for payment of the expenses to the Assignment Judge of the county, and the Assignment Judge shall fix and certify the amount of the expenses.

Source: 2A:73A-9



COMMENT

This section continues the substance of the source section while simplifying its language.

**Chapter 23 - Petit Jurors**

**2B:23-1. Number of jurors**

a. **Juries in criminal cases shall consist of 12 persons. Except in trials of crimes punishable by death, the parties in criminal cases may stipulate in writing, before the verdict and with court approval, that the jury shall consist of fewer than 12 persons.**

b. **Juries in civil cases shall consist of 6 persons unless the court shall order a jury of 12 persons for good cause shown.**

Source: New

COMMENT

This section reflects the amendments made to the New Jersey Constitution, Art. 1, ¶9, in 1973, and to R. 1:8-2 in 1975.

**2B:23-2. Selection of trial jury from panel**

a. **When a jury is required for trial, the names or identifying numbers of the jurors who constitute the panel or panels from which the jury is to be selected shall be placed on uniform pieces of paper or other uniform markers. The markers shall be deposited in a box.**

b. **The box containing the markers shall be shaken so as to mix the markers thoroughly and the officer designated by the court shall, at the direction of the court, publicly in open court, draw the markers from the box, one at a time, until the necessary number of persons is randomly selected. If any of the persons so selected is successfully challenged or excused from serving on that jury, the drawing shall be continued until the necessary number of persons is selected.**

c. **The Assignment Judge of the county may provide for the random selection of jurors for impaneling by the use of electronic or electro-mechanical devices, if:**

(1) **the method of random selection is specified with particularity in an order of the Assignment Judge; and**

(2) **the specification of the method and any programs and procedures used to implement the method, including the relevant computer programs or portions of computer programs which are utilized, are available for public inspection upon request.**

Source: 2A:74-1; 2A:74-8

#### COMMENT

This section retains the specific procedure in 2A:74-1 for selecting the jury. In the controlling case, State v. Wagner, 180 N.J. Super. 564 (App. Div. 1981), the trial judge exercised no procedure to assure randomness; he simply placed in the jury box the first fourteen jurors who entered the courtroom. The appellate court reversed the two defendants' convictions, finding it "vital that the juries be selected in a manner wholly free from taint and suspicion. To that end the pertinent practice safeguards in the statute must be carefully observed." Wagner, 180 N.J. Super at 567.

Subsection (c) also permits the use of modern technology, such as computers, in the selection of jurors for service on a particular jury. These methods may be used, however, only if the process is random, and the public may have sufficient access to the technology used to evaluate the randomness of the process.

#### **2B:23-3. Impaneling of additional jurors**

The court may direct the impaneling of a jury with additional members having the same qualifications and impaneled and sworn in the same manner as a jury of 12 or 6. All the jurors shall hear the case, but the court for good cause may excuse any of them from service provided the number of jurors is not reduced to less than 12 or 6 in an appropriate civil case. If more than the prescribed number are left on the jury at the conclusion of the court's charge, the clerk of the court in its presence shall, by drawing names, randomly select that number of jurors' names as will reduce the jury to the required number.

Source: 2A:74-2

#### COMMENT

This section streamlines the source statute amended in 1975.

#### **2B:23-4. Names of selected trial jurors**

The names of the jurors selected and sworn to try a case shall be made a part of the record of the case.

Source: 2A:74-4

#### COMMENT

This section simplifies the language of the source section.

#### **2B:23-5. Names of jurors drawn for trial jury replaced in pool**

After a jury has been selected and sworn, the names or identifying numbers of jurors not sworn to try the case shall be returned to the general pool of eligible jurors before the drawing of another jury. The names or identifying numbers of those jurors shall be returned to the general pool of eligible jurors unless the Assignment Judge directs otherwise.

Source: 2A:74-5

**COMMENT**

This section is a more concise version of the source statute.

**2B:23-6. Oath of jurors**

The following oath shall be administered to each juror:

"Do you swear or affirm that you will try the matter in dispute and give a true verdict according to the evidence?"

Source: 2A:74-6

**COMMENT**

This section deletes the archaic language of the source section.

**2B:23-7. Oath of officer attending jury**

The following oath shall be administered to the officer appointed to attend the jury:

"Do you swear or affirm that you will do your best to keep every person sworn on this jury together in a private place, and that you will not allow any person to speak to them, nor speak to them yourself, except by order of the court, and except to ask them if they have agreed on a verdict, until they have so agreed?"

Source: 2A:74-7

**COMMENT**

This section eliminates the archaic language of the source section.

**2B:23-8. Jurors to serve beyond period for which drawn until completion of trial**

When a jury does not complete its trial service during the session for which its members are to serve as jurors, the court may order that the jury shall serve until the completion of the trial even though such trial may extend into the next session or sessions.

Source: 2A:74-11

**COMMENT**

This section reduces the wordiness of the source section.

**2B:23-9. Juries drawn from other counties**

a. When a court orders a trial by a jury drawn from outside the county in which the court is sitting, the order shall specify the number of jurors to be returned and shall be directed, and made returnable, to the sheriff of the county from which the jury is to be taken. The jurors shall be

competent jurors in the county from which they are to be taken and shall be selected in the same manner as the general panel of jurors is selected.

b. The county in which the trial will be held shall pay the expense of summoning and returning the jurors and of their attendance at the court.

Source: 2A:76-1, 2A:76-2

COMMENT

This section condenses and combines the two source sections and the versions of them in the Report of the Jury Utilization and Management Task Force and deletes the designation, "foreign jury."

**2B:23-10. Examination of jurors**

a. In the discretion of the court, parties to any trial may question any person summoned as a juror after the name is drawn and before the swearing, and without the interposition of any challenge, to determine whether or not to interpose a peremptory challenge or a challenge for cause. Such examination shall be permitted in order to disclose whether or not the juror is qualified, impartial and without interest in the result of the action. The questioning shall be conducted in open court under the trial judge's supervision.

b. The examination of jurors shall be under oath only in cases in which a death penalty may be imposed.

Source: 2A:78-4

COMMENT

This section is a concise version of the source section and is consistent with R. 1:8-3(a). In State v. Moore, 122 N.J. 420, 457 (1991), the court defined the test for excluding a prospective juror for cause as "whether the person's beliefs or attitudes would substantially interfere with the duties of a juror."

**2B:23-11. Challenge to qualifications of jurors**

It shall be good cause for challenge to any person summoned as a juror that the person does not possess the qualifications required by section 2B:20-1 or that the person's name does not appear on the jury lists prepared pursuant to section 2B:20-4. If the challenge is verified according to law or on the person's oath, the person shall be discharged.

Source: 2A:69-3, 2A:78-6

COMMENT

This section combines the substantial elements of the two source sections. The second paragraph of 2A:78-6 has been eliminated as duplicative of proposed section 2B:23-15.

## **2B:23-12. Interest in action by or against county or municipality**

**In an action in which a county or municipality is or may be a party or otherwise has an interest in the action, it shall not be a ground for challenge to the jury panel that the court officers, court employees or jurors, solely because they are inhabitants of the county or municipality, are interested in the action or are taxed in the county.**

**Source: 2A:78-5**

### **COMMENT**

This section retains the substance of the versions found in the source section and in the Report of the Jury Utilization and Management Task Force. The statute, passed originally in 1849, was the basis of the recent decision in *In re Presentation of Passaic Cty. Grand Jury*, 220 N.J. Super. 470 (Law Div. 1986). The court denied petitioners' (former Paterson municipal officials) motion to quash a grand jury presentment which charged them with mismanagement of CETA funds. The court found no evidence that participation of five Paterson residents on the grand jury comprised *per se* bias and articulated the benefit derived from N.J.S. 2A:78-5 which bars *per se* disqualification of residents and taxpayers. This section does not, of course, bar challenges to jurors for other reasons.

## **2B:23-13. Peremptory challenges**

**Upon the trial of any action in any court of this State, the parties shall be entitled to peremptory challenges as follows:**

**a. In any civil action, each party, 6.**

**b. Upon an indictment for kidnapping, murder, aggravated manslaughter, manslaughter, aggravated assault, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, aggravated arson, arson, burglary, robbery, forgery if it constitutes a crime of the third degree as defined by subsection b. of N.J.S. 2C:21-1, or perjury, the defendant, 20 peremptory challenges if tried alone and 10 challenges if tried jointly and the State, 12 peremptory challenges if the defendant is tried alone and 6 peremptory challenges for each 10 afforded defendants if tried jointly. The trial court, in its discretion, may, however, increase proportionally the number of peremptory challenges available to the defendant and the State in any case in which the sentencing procedure set forth in subsection c. of N.J.S. 2C:11-3 might be utilized.**

**c. Upon any other indictment, defendants, 10 each; the State, 10 peremptory challenges for each 10 challenges allowed to the defendants. When the case is to be tried by a jury from another county, each defendant, 5 peremptory challenges, and the State, 5 peremptory challenges for each 5 peremptory challenges afforded the defendants.**

**Source: 2A:78-7**

### **COMMENT**

This section is virtually identical to the source section except for redesignation of the subsections.

**2B:23-14. Trial of challenges to jurors**

**All challenges to panels of jurors or to individual jurors shall be decided by the court.**

**Source: 2A:78-8**

**COMMENT**

This proposed section retains the substance of the source section.

**2B:23-15. Time for making challenges**

**a. Challenges to jurors may be made at any time before the juror is sworn to try the case.**

**b. No challenge to a juror may be made after the juror is sworn to try the case unless:**

**(1) the basis for the challenge could not reasonably have been known earlier to the person making the challenge; and**

**(2) the challenge is based upon the juror's inability to render a fair and impartial verdict.**

**Source: 2A:78-9**

**COMMENT**

This section combines the rule of 2A:78-9, which permits jury challenges to be made at any time up to the point the juror is sworn to try the case, and 2A:78-6, which prohibits challenges to juror qualifications after the juror is sworn. This proposed section would permit post-swearing challenges only if the basis of the challenge was not or could not have been previously known, and if the basis for the challenge is the juror's inability to render a fair and impartial verdict.

**2B:23-16. Jury of view**

**a. At any time during trial the court may order that the jury view the lands, places or personal property in question to understand the evidence better. The court shall direct the viewing procedure. The order shall be directed to the proper officer, specifying the day and place in question. Neither side shall give evidence when the jury is viewing. The officer who executes the order shall, by a special return, certify that the view has occurred according to the order.**

**b. In a civil case, the court shall determine which party shall bear the expense of a view.**

**c. The trial shall proceed even though a view which was ordered has not taken place.**

**Source: 2A:77-1; 2A:77-3; 2A:77-2**

**COMMENT**

Subsection a. of the section condenses source section 2A:77-1 and its version in the Report of Jury Utilization and Management Task Force. Subsection b. retains the substance of source section 2A:77-3. Subsection c. condenses source section 2A:77-2.

**2B:23-17. Verdict by five-sixths of the jury**

**In any civil trial by jury, at least five-sixths of the jurors shall render the verdict unless the parties stipulate that a smaller majority of jurors may render the verdict.**

**Source: 2A:80-2**

**COMMENT**

This section condenses the source section and is consistent with R. 1:8-9.

**2B:23-18. Disagreement of jurors**

**If the jury does not agree on a verdict, the court may order a new trial.**

**Source: 2A:80-3**

**COMMENT**

This section modernizes the source section.

**SECTION TO BE COMPILED IN TITLE 2B:**

**2B:4-4. Grand jury clerks**

**a. The assignment judge of each county may appoint and set the salary of a clerk for the grand jury. The salary of the grand jury clerk shall be paid by the county.**

**b. The assignment judge of each county may appoint and set the salary of such assistants to the clerk of the grand jury as may be necessary for the operation of the grand jury. The salary of the assistants to the clerk of the grand jury shall be paid by the county.**

**Source: 2A:73-5; 2A:73-6; 2A:73-7**

## TABLE OF DISPOSITIONS

<p>2A:69-1 2A:69-1.1 2A:69-2</p>	<p>2B:20-1 2B:20-18 Deleted</p>	<p>The Commission has recommended the elimination of all occupational exemptions from jury service</p>
<p>2A:69-3 2A:69-4 2A:69-5 2A:69-6 2A:70-1 2A:70-2 2A:70-3 2A:70-4 2A:70-4a 2A:70-4.1 2A:70-5 2A:70-6 2A:71-3.1 2A:71-4 2A:71-5 2A:71-6 2A:71-7 2A:71-8 2A:71-9 2A:71-10 2A:71-11 2A:71-12 2A:71-13</p>	<p>2B:23-11 2B:20-10 2B:20-16 2B:20-16 2B:20-2 2B:20-2 2B:20-5 2B:20-2 2B:20-4 Deleted 2B:20-3; 2B:20-14 2B:20-2 2B:20-4 2B:20-4 2B:21-1 2B:21-1 2B:21-1 2B:20-4 2B:20-6 2B:20-4 2B:20-8 2B:20-4 Deleted</p>	<p>Unnecessary.</p>
<p>2A:71-14</p>	<p>Deleted</p>	<p>Unnecessary; the delegation of duties in the absence of a county clerk or deputy county clerk should be left to the appropriate assignment judge. Unnecessary. To the extent that the Superior Court has derivative powers concerning jury selection and impaneling as the successor to pre-1948 courts, that power derives from the judiciary article of the 1947 Constitution and need not be statutorily specified.</p>
<p>2A:72-1</p>	<p>Deleted</p>	<p>Unnecessary. The "ordering" of jurors by the assignment judge is effectively provided for in proposed sections 2B:20-4 Public and random selection of jurors; 2B:20-6 Designation of period of service for petit jury panels; and 2B:20-7 Summoning of jurors.</p>
<p>2A:72-2 2A:72-4 2A:72-5 2A:72-6 2A:72-7 2A:72-8</p>	<p>2B:20-7 2B:20-7 2B:20-8 Deleted Deleted Deleted</p>	<p>Unnecessary. See identical provision, R.S.10:1-8. See 2C:30-1.</p>



2A:73-1	2B:21-2
2A:73-2	2B:21-4
2A:73-3	2B:21-3
2A:73-4	2B:21-6
2A:73-5	2B:4-4
2A:73-6	2B:4-4
2A:73-7	2B:4-4
2A:73A-1	Deleted
2A:73A-2	2B:22-1
2A:73A-3	2B:22-2
2A:73A-4	2B:22-3
2A:73A-5	2B:22-4
2A:73A-6	2B:22-5
2A:73A-7	2B:22-6
2A:73A-8	2B:22-7
2A:73A-9	2B:22-8
2A:73B-1	2B:21-8
2A:73B-2	2B:21-9
2A:73B-3	2B:21-10
2A:74-1	2B:23-2
2A:74-2	2B:23-3
2A:74-3	Deleted

Unnecessary.

Unnecessary. "Talesman" is a term referring to jurors summarily summoned for service, off the street or by appearing at factories and businesses, when the regularly-summoned panel of jurors has been exhausted. This method of obtaining jurors is of questionable constitutionality and has not been in use for some years.

2A:74-4	2B:23-4
2A:74-5	2B:23-5
2A:74-6	2B:23-6
2A:74-7	2B:23-7
2A:74-8	2B:23-2
2A:74-10	Deleted
2A:74-11	2B:23-8
2A:74-12	Deleted
2A:76-1	2B:23-9
2A:76-2	2B:23-9
2A:77-1	2B:23-16
2A:77-2	2B:23-16
2A:77-3	2B:23-16
2A:78-1	2B:20-9; 2B:20-10; 2B:20-11
2A:78-2	Deleted
2A:78-3	2B:20-13
2A:78-4	2B:23-10
2A:78-5	2B:23-12
2A:78-6	2B:21-2; 2B:23-11
2A:78-7	2B:23-13
2A:78-8	2B:23-14
2A:78-9	2B:23-15
2A:79-1	2B:20-14
2A:79-2	2B:20-15

See comment to 2A:74-3.

Unnecessary.

Unnecessary.

2A:79-3	2B:20-15
2A:79-4	Deleted
2A:80-1	Deleted
2A:80-2	2B:23-17
2A:80-3	2B:23-18

Unnecessary; see proposed section 2B:20-14.  
Unnecessary.

**REPORT AND RECOMMENDATIONS  
RELATING TO ARTICLES 3 AND 4  
OF THE UNIFORM COMMERCIAL CODE**

**NEW JERSEY LAW REVISION COMMISSION  
15 Washington Street  
Newark, New Jersey 07102  
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## INTRODUCTION

The National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute have approved Revised Article 3 and Amended Article 4 of the Uniform Commercial Code (revised articles). Article 3 governs negotiable instruments and Article 4 governs bank collections. Both articles are part of the uniform commercial code adopted by New Jersey in 1961.<sup>1</sup> The New Jersey Law Revision Commission has studied the revised articles and recommends that the Legislature adopt them with two non-uniform amendments. The non-uniform amendments modify the loss allocation rules of the revised rules.

The present law of commercial paper and bank collections does not address the economic realities of the automated collection, process and payment of negotiable instruments. The revised articles respond to these economic realities and recognize the requirement of rapid funds availability. The revised articles also clarify ambiguities in existing statutory language and resolve disputes produced by case law. While there are conceptual differences between the present and revised articles, many current concepts are carried forward in the revisions.

The Prefatory Note to the revised articles identifies the benefits that the revisions confer on users, the public and the banks.<sup>2</sup> The benefits for users include: (1) direct suits, (2) an expanded definition of "good faith" to include "reasonable commercial standards of fair dealing," (3) improved loss rules for cashier's checks and (4) reduced risk of forming unintentional accord and satisfaction agreements.<sup>3</sup> The benefits to the public include: (1) increased certainty in rules to allow better planning of financial transactions, (2) removal of impediments to automation, (3) lower costs by allowing banks to automate procedures and (4) reduced litigation flowing from certainty of rules.<sup>4</sup> The benefits to banks include: (1) a new definition of "ordinary care" to exclude manual inspection of checks, (2) expansion of the *per se* negligence rules for employers, (3) truncation of bank statements and (4) certainty of obligations.<sup>5</sup> The Commission found that, in general, the revised articles improve existing law for all parties.

However, the Commission recommends two changes in the Official Text. First, the Official Text slightly alters the loss allocation rule for checks containing a forged drawer's signature. The revised rules may increase the risk of loss for bank customers. As a result, the Commission recommends an amendment to Section 3-406 to limit the customer's obligation to pay an unauthorized check even though the customer's negligence contributed to the forgery. Second, the Official text does not address the question of whether a check containing a facsimile signature is a "properly payable"

1 N.J.S. 12A:3-101 to 12A:4-506.

2 U.C.C. Revised Article 3 and Amended Article 4, Prefatory Note 5-6 (1990 Official Text)(hereafter R.U.C.C.).

3 The term "direct suits" refers to actions between parties who do not deal directly with one another. The existing articles often prohibit actions between these remote parties. For example, under the present rules, a depository bank cannot sue a drawer based on its negligence for contributing to a forgery. Girard Bank v. Mount Holly State Bank, 474 F. Supp. 1225 (D.N.J. 1979) (creating a common law cause of action between depository bank and drawer of check). The revised rules allow depository banks to sue drawers of checks even though the latter do not deal often with the former. R.U.C.C. 4-208(c). In addition, payees can avoid "accord and satisfaction" by requiring the debtor to send payment to a specific office. R.U.C.C. 3-311(c)(1).

4 R.U.C.C., Prefatory Note at 5.

5 Id. at 7-8.

item when the signature is unauthorized, but is identical to the signature on file. The Commission recommends an amendment to Section 4-401 to allow a bank to pay an item bearing a facsimile signature, whether authorized or not, provided the customer authorizes the bank to pay checks bearing the facsimile signature.

The non-uniform amendments do not change the basic structure or concepts of the Code. Nor do they upset balances struck by various parties who participated in the drafting process of the revised articles. In the first instance, the proposed amendment carries forward the existing loss allocation rule for forged drawer signature checks. In the second instance, the proposed amendment clarifies the statutory language and intent of the revised articles. The need for the amendments outweighs the need for strict uniformity.

Nineteen states have adopted Revised Article 3 and Amended Article 4 as of October 26, 1992: Arkansas, California, Connecticut, Florida, Hawaii, Illinois, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Pennsylvania, Virginia and Wyoming. The revised articles also are pending before several other legislatures, and are expected to be enacted widely. New Jersey is one of the slowest states to adopt recommendations of the NCCUSL concerning the Code. The Commission urges the Legislature to act promptly to enact the revised articles. The lengthy drafting process achieved a consensus among various interest groups to facilitate adoption of the revised articles. In addition, the Commission has spent several months considering the impact of the revised articles on New Jersey law and has determined that they would improve existing law.

### **Loss Allocation and the Forged Drawer Signature**

Loss allocation rules come into play when a person generates a loss by stealing funds from the check payment system. The loss allocation rules then fix liability on parties based on their role and conduct in the miscarried transaction. Since loss allocation rules dictate whether banks or customers take losses when transactions go awry, they have important public consequences. Assume, for example, that a customer has a checking account and loses some blank checks. A thief takes a blank check, completes the check for \$100 and signs the customer's name. The bank pays the check and charges the customer's account. Loss allocation rules determine who takes the loss in such a case -- the bank or the customer.

#### **a. Present law**

A bank is entitled to pay a check only if it is a "properly payable" check.<sup>6</sup> A check is "properly payable" when it is authorized by the customer and contains the customer's signature. This rule is based on the implied contract between the bank and customer providing that the bank has authority to charge the customer's account only when authorized to do so. An unauthorized signature is inoperative as that of the person whose name is signed unless the person ratifies the signature or is precluded from denying it.<sup>7</sup> In the hypothetical, the check is not "properly payable" because it was signed by the thief, not the customer. The bank is not entitled to pay the check, and charge the customer's account, because the customer did not authorize the payment of the check.

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6 N.J.S. 12A:4-401(a).

7 N.J.S. 12A:3-404(1).

However, the Code allows the bank to shift the risk of loss to the customer if his negligence substantially contributed to the making of the forged signature.<sup>8</sup> This rule is known as the "preclusion defense." The customer is, in effect, precluded from denying the validity of the signature. An intervening theft does not break the chain of causation. Assuming the preclusion applies, because the customer's negligence substantially contributed to the forgery, then the customer bears the \$100 loss.

Notwithstanding the customer's negligence, the Code allows the customer to pass back the risk of loss to the bank if the customer shows that the bank was negligent in paying the check.<sup>9</sup> The customer's assertion of contributory negligence, if successful, bars the bank's preclusion defense. In effect, the bank is precluded from raising the preclusion defense. One way of demonstrating that the bank acted negligently is to argue that the bank had a duty to compare the signature on the check with the signature on the signature card. Since the bank is presumed to know the customer's signature, the bank's failure to verify the validity of the signature may establish that the bank failed to exercise ordinary care in paying the check. In the hypothetical, if the customer proves the defense of contributory negligence, the bank takes the loss even though the customer was negligent.

Some recent cases acknowledge that, due to automation, banks no longer manually inspect the signatures on checks, and banks argue that they pay checks in good faith and in accordance with reasonable commercial standards if they pay them without signature review. For example, in Rhode Island Hosp. Trust Nat. Bank v. Zapata, the First Circuit Court of Appeals found that a bank which examined all signatures on checks greater than \$1,000, examined signatures on checks between \$100 and \$1,000 only if there was reason to suspect a problem and did not examine any signature on checks less than \$100, exercised ordinary care in paying an item.<sup>10</sup> The Supreme Court of Tennessee in Vending Chattanooga v. Am. Nat. Bk. & Tr., adopted a similar line of reasoning.<sup>11</sup> Therefore, payment by a bank over a forged drawer signature may not constitute negligence even when the bank did not compare the signature on the check with the one on the signature card. New Jersey courts have not considered this issue. Reported cases to date have not imposed liability on the customer for a forged drawer signature unless there was an employer-employee or other close relationship between the drawer and forger.<sup>12</sup> However, given the widespread use of automation, it is possible that the New Jersey courts would follow the rationale of Zapata and Vending Chattanooga.

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8 N.J.S. 12A:3-406 states "Any person who by his negligence substantially contributes to a material alteration of the instrument or to the making of an unauthorized signature is precluded from asserting the alteration or lack of authority against a holder in due course or against a drawee or other payor who pays the instrument in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business."

9 N.J.S. 12A:3-406. "Of course negligence does not travel without its companion, contributory negligence and if both the customer and his bank are negligent, the two will usually offset one another and reopen the customer's claim on the forgery." White and Summers, Uniform Commercial Code 689 (3d ed. 1988). N.J.S. 12A:3-406 states a "payor who pays in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business."

10 848 F. 2d at 294 (1st Cir. 1988).

11 730 S.W. 2d at 628 (Tenn. 1987). See also Wilder Binding Co. v. Oak Park Trust and Savings Bank, 552 N.E. 2d 783 (Ill. 1990).

12 E.g., Brogan Cadillac v. Central Jersey Bk. & Tr., 183 N.J. Super. 333 (Law Div. 1981)(bank not liable to holder in due course for checks stolen and then forged in bank's name);

b. The revised articles

The revised articles track the present loss allocation scheme. However, the revised articles introduce two new concepts impacting liability of customers for losses due to forged drawer's signature checks. First, the revised rules adopt a comparative negligence standard to allocate loss between negligent parties.<sup>13</sup> Comparative negligence assigns liability according to level of fault and rejects the "winner take all" approach. The comparative negligence approach is designed to reduce litigation on the theory that parties will settle disputes if they know that it is unlikely one party will take the loss if the suit is litigated. In contrast, the present loss allocation rule follows a "winner take all" approach; it imposes liability on the person in the best position to avoid the loss.<sup>14</sup>

Second, the revised rules redefine the bank's duty of ordinary care in paying a check.<sup>15</sup> The new definition of ordinary care does not require a drawee bank using an automated payment procedure to examine the drawer's signature on checks. This definition establishes a new legal standard. Under present law, a bank's failure to examine the signature on a check prior to payment may constitute a failure to exercise ordinary care in the payment of the check. Since the bank's failure to sight review checks is often the only act of contributory negligence the customer may assert against the bank, the revised definition of ordinary care may alter the traditional liability of bank and customer on losses due to forged drawer signatures when the customer's negligence substantially contributes to making the forgery.

The revised rules, if applied to the above hypothetical, demonstrate such a result. Under the revised rules, assuming the bank proves that the customer's negligence substantially contributed to the making of the forged signature, the customer cannot argue that the bank's failure to examine the signature on the check with the signature on the signature card constitutes a failure to pay the check in accordance with reasonable commercial standards. The revised standard of ordinary care for the bank excludes a duty to examine the check before payment. The negligent customer takes the loss. Even if the bank fails to act with ordinary care in some other way, the customer and bank share the loss in proportion to their fault.

The Commission has determined that the possible increased risk of loss customers bear under the revised rules is unjustified. In many situations, some small act of negligence by the customer may contribute to a forged drawer signature on a check. Under the revised rules, banks will almost never be negligent in paying the check because they are not required to examine the check before payment. As a result, the cost of the forgery is placed on the customer in these cases. That result constitutes a change in current practice. The decision not to examine signatures on checks is sound, but the banks should bear the cost of that decision because they designed the automated payment system.

13 E.g., R.U.C.C. 3-404(d), R.U.C.C. 3-405(b), R.U.C.C. 3-406(b), and R.U.C.C. 4-406(e).

14 Rapson, Loss Allocation in Forgery and Fraud Cases: Significant Changes Under Revised Articles 3 and 4, 42 Ala. L. Rev. 435 (1991) where Mr. Rapson states "The guiding principle and rationale for the loss allocation rules of former Uniform Commercial Code ... Articles 3 and 4 was said to be that loss should be imposed upon the party best able or in the best position to avoid the loss."

15 R.U.C.C. 3-103(a)(7) provides, "In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general banking usage not disapproved by this Article or Article 4."



The available empirical data on bank losses due to fraud indicates that present practice of allocating loss resulting from forged drawer signature checks is efficient. In 1992, the Commission conducted a survey of New Jersey banks and found that losses due to forged drawer signature checks are small. Banks now pay this cost and spread these losses across the customer base. Because the existing practice works well, there is no reason to change it. As a result, the Commission recommends a change in the official text that would prevent the bank from raising the preclusion defense against a customer whose negligence substantially contributes to a forged drawer signature if an examination of the drawer's signature would have revealed the forgery. Section 3-406(a) is amended accordingly.

### **Automated Signing of Checks**

Customers who sign checks by mechanical means pose special problems for banks attempting to verify whether the check is authorized. The bank cannot tell from an examination of the signature on the check whether the signature is a forgery. Yet, in the absence of negligence, the bank paying an unauthorized check bearing a facsimile signature cannot charge the customer's account because the check is not "properly payable." Even when the bank and customer agree that the bank is authorized to pay such checks, the courts are reluctant to enforce the agreement.<sup>16</sup> Such contracts between customer and bank, it is argued, allow the bank to disclaim its obligations of good faith and ordinary care in violation of Section 4-103.

The Commission takes a different view. Use of facsimile signatures increases the risk that banks will pay unauthorized checks containing the approved signature because there is no way of determining the lack of authorization to pay. Checks containing facsimile signatures, whether authorized or not, are virtually identical on their face. Hence, the parties should be permitted to vary the rule imposing loss on the bank for payment of an unauthorized check. To the extent that this rule of liability is based on the premise that the bank has the capacity to ascertain the validity of the instruction to pay the check by knowing the customer's signature, the use of facsimile signatures undercuts the premise for the rule. A check containing an unauthorized facsimile signature should be considered a "properly payable" check provided a contract between the bank and customer allows the bank to pay checks containing facsimile signatures whether authorized or not. The amendment to Section 4-401 implements this view.

### **Non-Uniform Amendments**

#### **Amended Section 3-406. Negligence Contributing to Forged Signature or Alteration of Instrument.**

**(a) A person whose failure to exercise ordinary care substantially contributes to an alteration of an instrument or to the making of a forged signature on an instrument is precluded from asserting the alteration or the forgery against a person who, in good faith, pays the instrument or takes it for value or for collection. A bank which pays a**

<sup>16</sup> E.g. Mercantile Stores Co. v. Idaho First National Bank, 102 Idaho 820, 641 P. 2d 1007 (Ct. App. 1982); and Cumis Ins. Co. v. Girard Bank, 522 F. Supp 414 (E.D. Pa. 1981). In both cases, despite corporate resolutions authorizing the banks to pay checks bearing facsimile signatures whether authorized or not, the courts refused to enforce the contracts.

check on a forged signature without an examination of the signature which would have revealed the forgery may not assert this preclusion against a person who complies with Section 4-406.

(b) Under subsection (a), if the person asserting the preclusion fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss, the loss is allocated between the person precluded and the person asserting the preclusion according to the extent to which the failure of each to exercise ordinary care contributed to the loss.

(c) Under subsection (a), the burden of proving failure to exercise ordinary care is on the person asserting the preclusion. The burden of proving that an examination of the check would have revealed a forged signature is on the person claiming that the preclusion does not apply. Under subsection (b), the burden of proving failure to exercise ordinary care is on the person precluded.

#### COMMENT

The last sentence of subsection (a) amends the official text of Section 3-406. The amendment stops a bank from raising the "preclusion" defense if an examination of the check would have revealed the forged signature. The amendment counterbalances the definition of "ordinary care" in Section 3-103(7) specifying that banks are not required to examine checks provided the checks are processed, collected or paid by automated means. The amendment does not allow banks, which elect to process, collect or pay checks by automated means, to preclude a customer from denying the forgery if the customer complies with the notification requirements of Section 4-406. If a hypothetical sight review would not have discovered the forged signature, then the bank may assert the preclusion defense against the customer whose negligence substantially contributed to the forgery. In the event the customer does not comply with Section 4-406, then the bank may assert the preclusion defense against the customer regardless of whether a hypothetical sight review would have revealed the forged signature.

In subsection (c), the person who claims that the bank may not raise the preclusion defense in a forged signature case bears the burden of proving that a hypothetical examination of the forged signature check by the bank would have revealed the forgery.

#### Amended Section 4-401. When Bank May Charge Customer's Account.

(a) A bank may charge against the account of a customer an item that is properly payable from that account even though the charge creates an overdraft. An item is properly payable if it is in accordance with any agreement between the customer and bank and is either (1) authorized by the customer, or (2) bears the customer's facsimile signature made by mechanical means used by the customer to authorize payment.

(b) A customer is not liable for the amount of an overdraft if the customer neither signed the item nor benefited from the proceeds of the item.

(c) A bank may charge against the account of a customer a check that is otherwise properly payable from the account, even though payment was made before the date of the check, unless the customer has given notice to the bank of the postdating describing the check with reasonable certainty. The notice is effective for the period stated in Section 4-403(b) for stop-payment orders, and must be received at such time and in such manner as to afford the bank a reasonable opportunity to act on it before the bank takes any action with respect to the check described in Section 4-303. If a bank charges against the account of a customer a check before the date stated in the notice of postdating, the bank is liable for damages for the loss resulting from its

act. The loss may include damages for dishonor of subsequent items under Section 4-402.

(d) A bank that in good faith makes payment to a holder may charge the indicated account of its customer according to:

(1) the original terms of the altered item; or

(2) the terms of the completed item, even though the bank knows the item has been completed unless the bank has notice that the completion was improper.

#### COMMENT

The amendment to subsection (a) provides that an item is "properly payable" if it conforms to a contract between the bank and customer and "bears the customer's facsimile signature made by mechanical means used by the customer to authorize payment." The amendment allows parties to vary the rule that banks cannot pay an unauthorized item. Under the amendment, items containing facsimile signatures are "properly payable" if there is a contract between the bank and customer authorizing the bank to pay items containing the facsimile signatures whether authorized or not. The rationale for the rule is that the use of facsimile signatures prohibits the bank from determining the validity of the order to pay. A customer who authorizes payment of items by non-handwritten means bears the risk of loss for payment of unauthorized items when so agreed between the bank and customer. The amendment rejects the view of Cumis Ins. Co. v. Girard Bank, 522 F. Supp 414 (E.D. Pa. 1981). In Cumis, the court refused to enforce the deposit contract between the customer and bank which provided that the customer was liable for losses due to the unauthorized use of facsimile signatures. The court found that the deposit contract disclaimed the bank's responsibility for "its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure" in violation of Section 4-103(a). Based on these same reasons, the court also found that the deposit contract violated Section 1-102(3) and public policy.

The amendment to Section 4-401 alters the traditional "properly payable" rule when the customer authorizes the bank to pay checks bearing facsimile signatures made by mechanical means. The amendment is not inconsistent with the duty of good faith and ordinary care imposed on banks by Sections 1-102(3) and 4-103(a), and the deposit contract may not vary these basic Code rules. The amendment also does not extend to signatures that resemble the facsimile signature when the forgery was accomplished by non-mechanical means such as tracing. E.g., Mercantile Stores Co. v. Idaho First National Bank, 102 Idaho 820, 641 P. 2d 1007 (Ct. App. 1982).



**STATE OF NEW JERSEY**  
**NEW JERSEY LAW REVISION COMMISSION**

**TENTATIVE REPORT**

relating to

**Title 45- Professions and Occupations**

**June 1992**

This tentative report is being distributed so that interested persons will be advised of the Commission's tentative recommendations and can make their views known to the Commission. Any comments received will be considered by the Commission in making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives.

It is just as important to advise the Commission that you approve of the tentative recommendations as it is to advise the Commission that you believe revisions should be made in the recommendations.

**COMMENTS SHOULD BE RECEIVED BY THE COMMISSION  
NOT LATER THAN SEPTEMBER 13, 1992.**

Please send comments concerning this tentative report or direct any related inquiries, to:

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**NEW JERSEY LAW REVISION COMMISSION**  
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## INTRODUCTION

Title 45 of the Revised Statutes contains provisions regulating the practice of certain professions and occupations. These provisions have accreted over the years beginning in the nineteenth century. Chapter 1 of the title contains general provisions; each of the other chapters is devoted to the regulation of a particular profession or occupation. The chapters regulating particular professions each contain varying combinations of provisions concerning the establishment of a regulatory board, licensing provisions, professional standards, and, traditionally, enforcement provisions concerning license revocations, suspensions and other disciplinary actions. These provisions vary greatly from profession to profession, both in substance and in their procedural aspects.

The purpose of this project is to clarify certain of the enforcement provisions which concern license revocations and suspensions. An effort to standardize these provisions was made in 1978 with the adoption of the Uniform Enforcement Act, but questions remain as to the effect of the repeal provisions of that Act. In particular, the provisions permitting regulation of advertising and the provisions concerning drug and alcohol abuse, are in need of revision and clarification.

### 1. THE UNIFORM ENFORCEMENT ACT

In 1978 the Legislature enacted C. 45:1-14 to -26 to make uniform the enforcement provisions in Title 45 (hereafter, the Uniform Enforcement Act). The bill statement accompanying the legislation recounted the historical basis for the lack of uniform enforcement provisions, and stated:

Senate Bill No. 497 would establish uniform standards for disciplinary actions and the investigative and enforcements [sic] powers which may be exercised by the Attorney General in implementing professional and occupational licensing statutes. The purpose is to create a modern, effective enforcement mechanism consistent with the need for consumer and patient protection, to establish consistent standards for licensee conduct in dealing with the public, and to clarify the Attorney General's administrative authority in relation to the professional and occupational boards within the Division of Consumer Affairs.

To provide a full complement of remedial and protective powers in administrative actions, authority is conferred to enter cease and desist orders, to order corrective action to be taken and to order the return of any moneys, excluding consequential damages, acquired by unlawful practices. The act is deemed remedial, and does not alter any prior statutory enactments except those dealing with the substantive areas of investigative and enforcement powers and bases for disciplinary action. Prior law is repealed and superseded only to the extent that it is inconsistent with the terms of this act.

Bill Statement, S497, enacted as L.1978, c. 73. Reprinted in Title 45, Professions and Occupations, 45:12 to End (West Publishing Co. Cum. Supp. 1989) at 6-7.

The treatment of prior law as expressed in the bill statement was fully implemented by the bill. First, the legislative findings section of the enacted statute repeats the statements that the provisions are intended to establish uniformity, that they are remedial, and that they are to be afforded a liberal construction:

#### **45:1-14. Legislative findings and declarations; liberal construction of act**

The Legislature finds and declares that effective implementation of consumer protection laws and the administration of laws pertaining to the professional and occupational boards located within the Division of Consumer Affairs require uniform investigative and enforcement powers and procedures and uniform standards for license revocation, suspension and other disciplinary proceedings by such boards. This act is deemed remedial, and the provisions hereof should be afforded a liberal construction.

Second, in lieu of specific repealer provisions, the act included a general repealer provision:

#### **45:1-26 Repeal of inconsistent acts and parts of acts**

All acts and parts of acts inconsistent with this act are hereby superseded and repealed.

A year later, the Legislature enacted a bill, L.1979 c.432, which repealed specifically most of the sections generally repealed by the Uniform Enforcement Act. However, a few sections which seem to have been affected by the general repealer were nevertheless left in place:

45:5-8	Revocation of podiatry license;
45:6-7	Revocation of dentistry license;
45:6-22	Revocation of dental intern license;
45:9-16	Revocation of medical license;
45:9A-17	Revocation of hearing aid dispenser license;
45:11-35	Revocation of nursing school license;
45:12-11	Revocation of optometry license;
45:14-12	Revocation of pharmacist certificate;
45:14-12.2	Suspension of pharmacist certificate;
45:14-35	Revocation of pharmacy permit;
45:14B-24	Revocation of psychologist license.

Each of these sections establishes grounds for revocation of the license to practice a particular health care profession. However, many other revocation provisions relating to health care professions were specifically repealed: 45:9-37.7, physical therapists (old law); 45:9-42.13, bio-analytical laboratories; 45:9-42.41, clinical laboratories; 45:11-32, nurses; 45:12A-7, orthoepists; 52:17B-41.22, ophthalmic dispensers. Similar sections applying to other kinds of professions were specifically repealed: e.g. 45:2B-18, accountants, and 45:3-8, architects. Other kinds of sections made invalid by the Uniform Enforcement Act, such as provisions on procedure for enforcement, were specifically repealed for all professions.

The continuation of certain license revocation provisions creates uncertainty in the law on this subject. Conflicting arguments can be made that the grounds for the revocation of a professional license are those in the provision of the Uniform Enforcement Act, 45:1-21, in the applicable unrepealed section, or in both. For the uniform provision, it could be argued that if a section is affected by the general repealer in 45:1-26, the failure to repeal it specifically is of no consequence. In support of the specific revocation sections, it could be argued that the Legislature, in failing to repeal a relatively coherent class of provisions, was expressing the view that they were not affected by the general repealer. Complicating the matter further, two of the sections, 45:9-16 (revocation of medical license) and 45:5-8 (revocation of podiatry license) were amended after the enactment of the general repealer.



L.1982 c.91; L.1989 c.300. That amendment may constitute a re-enactment of the two sections if they were affected by the general repealer, and may supersede the uniform section, 45:1-21, in regard to physicians and podiatrists.

While the effect of this uncertainty in the law is reduced by the similarity in grounds for revocation in the uniform and most of the individual provisions, any uncertainty in this important area is intolerable. Moreover, the similarity in provisions means that there is no purpose in retaining the individual revocation sections. To the extent that the individual provisions vary from the uniform provision and from each other, no reason appears for the variance. For example, the provisions on use of drugs and alcohol vary from none (audiologists); through addiction to narcotics (pharmacists); habitual intemperance (hearing aid dispensers); habitual use of drugs or chronic inebriety (optometrists); use impairing the practice of the profession (physicians, dentists, podiatrists, psychologists) to any habitual use of drugs or alcohol (dental technicians). It was the purpose of the Uniform Enforcement Act to eliminate inconsistency where it could not be justified by the needs of particular profession or occupation. Bill Statement, S497, quoted above.

It is the goal of this report to recommend statutory amendments to make the Uniform Enforcement Act provisions apply comprehensively to all professional boards within the Division of Consumer Affairs. The first step is to repeal the sections which conflict with the Uniform Enforcement Act but were not repealed specifically in 1979. The second is to deal with the issues of substance abuse and advertising. Amendments are recommended that are more specific than current provisions of the Uniform Enforcement Act but provide a uniform approach to these issues. In addition, examination of the statutes establishing the various professional boards reveals that some boards are not specifically granted the authority to make regulations. Amendments are recommended to cure this defect.

Last, since the enactment of the Uniform Enforcement Act, a number of boards regulating professions or occupations have been created. While the act was amended to be applicable to some of those boards, some were left outside its ambit. See, 45:3B-1 to 24 (regulating audiologists and speech-language pathologists); 45:6-48 to 69 (regulating dental auxiliaries), and 45:14D-1 to 25 (regulating public movers and warehousemen). It appears that failure to apply the Uniform Enforcement Act to these regulatory bodies was inadvertent. This report recommends statutory Amendments to remedy this situation.

## 2. REPEAL OF SPECIFIC LICENSE REVOCATION PROVISIONS

Each of the license revocation provisions recommended for repeal contains a slightly different array of revocation grounds. Many of the particular grounds are substantially identical to grounds in the Uniform Enforcement Act revocation provision. Other grounds proscribe conduct which is included in one of the more general uniform grounds. There are also situations where, although the approach taken by a ground in an individual revocation section is different from that taken by the cognate ground in the Uniform Enforcement Act section, the effect is the same and the subject matter is adequately covered. The effect of repealing these grounds is negligible. Grounds related to advertising or to substance abuse present a more complicated problem and are dealt with separately below. Last, there are grounds in a few of the sections which do not fit well into the categories of the Uniform Enforcement Act provision. Each of these is noted, and the effect of its repeal is examined.

**45:3B-21 Audiologists and speech-language pathologists:**

**EXISTING STATUTE**

**EQUIVALENT SUBSECTION OF 45:1-21**

subsection (a); fraud in license	(a); substantially identical
subsection (b); fraud in services	(b); substantially identical
subsection (c); unprofessional conduct	(e); substantially identical
subsection (d); violation of act, regulations	(h); substantially identical

**45:5-8 Podiatrists:**

**EXISTING STATUTE**

**EQUIVALENT SUBSECTION OF 45:1-21**

first ground; impaired ability	(i) and proposed (j); substantially identical
second ground; crime	(f); substantially identical
third ground; false diploma	(a); conduct included
fourth ground; unprofessional conduct	(e); substantially identical
fifth ground; violation of reciprocity	(h); conduct included
sixth ground; employing unlicensed person	(h); conduct included
seventh ground; crime	(f); substantially identical
eighth ground; false advertising	(b); conduct included
ninth ground; advertising	none; see note on advertising
tenth ground; false name	(b); conduct included
eleventh ground; using "clinic" etc.	(b); conduct included

**45:6-7 Dentists:**

**EXISTING STATUTE**

**EQUIVALENT SUBSECTION OF 45:1-21**

subsection (a); fraud in license	(a); substantially identical
subsection (b); crime	(f); substantially identical
subsection (c); use of intoxicants	proposed (j); see note to subsection (j)
subsection (d); gross malpractice	(c); substantially identical
subsection (e); employing unlicensed persons	(h); see note
subsection (f); violation of act	(h); conduct included
subsection (g); advertising	none; see note on advertising
subsection (h); working for unlicensed person	(h); see note

**NOTE**

Subsection (e) makes the employment of an unlicensed person to do work that requires a license a ground for revocation. This conduct would amount to aiding in a violation of the licensing requirement for dentists which would be covered by subsection (h) of the Uniform Enforcement Act revocation section. Subsection (h), working for an unlicensed person, would normally also constitute aiding in violation of the licensing requirement. However, that conduct could also be declared unprofessional conduct and forbidden by regulation, bringing the conduct within Subsections (e) and (h) of the uniform provision.

45:6-22 Dental interns:

EXISTING STATUTE

EQUIVALENT SUBSECTION OF 45:1-21

grounds for dentists included by reference; additional ground:  
violation of 45:6-20,21

(h); conduct included

45:6-59 Dental auxiliaries:

EXISTING STATUTE

EQUIVALENT SUBSECTION OF 45:1-21

subsection (a);  
subsection (b);  
subsection (c);  
subsection (d);  
subsection (e);

(a); substantially identical  
(f); substantially identical  
proposed (j); see subsection (j)  
(c) and (d); adequately covered  
(h); conduct included

45:9-16 Physicians:

EXISTING STATUTE

EQUIVALENT SUBSECTION OF 45:1-21

ground (a); insanity  
ground (b); condition impairing ability  
ground (c); crime  
ground (d); incapacity  
ground (e); advertising  
ground (f); false diploma  
ground (g); violation of 45:9-22  
ground (h); gross malpractice  
ground (i); incompetence  
ground (j); advertising

(i); included  
(i); included; see proposed (j)  
(f); substantially identical  
(i); substantially identical  
none; see note on advertising  
(a) and (b); conduct included  
(h); conduct included  
(c),(d) and (i); adequately covered  
(c),(d) and (i); adequately covered  
none; see note on advertising

45:9A-17 Hearing aid dispensers:

EXISTING STATUTE

EQUIVALENT SUBSECTION OF 45:1-21

subsection (a); crime  
subsection (b); fraud in license  
subsection (c)(1); sale through fraud  
subsection (c)(2); employing unlicensed person  
subsection (c)(3); deceptive advertising  
subsection (c)(4); bait and switch  
subsection (c)(5); use of "doctor" etc  
subsection (c)(6); intemperance  
subsection (c)(7); immorality  
subsection (c)(8); lending license  
subsection (c)(9); imitating trademarks  
subsection (c)(10); false trade name  
subsection (c)(11); payment for referral  
subsection (d); disease  
subsection (e); false name  
subsection (f); violation of act, regulations

(f); substantially identical  
(a); substantially identical  
(b); conduct included  
(h); included  
(b); conduct included  
(b); conduct included  
(b); conduct included  
(b); conduct included  
(e), (i) and proposed (j); see note  
(e), (f) and (i); see note  
(h); included  
(b); conduct included  
(b); conduct included  
(e); conduct included  
(i); see note  
(b) and (h); conduct included  
(h); substantially identical

NOTE

Subsections (c)(6) and (7) make "habitual intemperance" and "gross immorality" grounds for revocation. These grounds are both vague and broad. If the intemperance or immorality is totally unrelated to the practice of the profession and has not lead to the conviction of crime, it should not be the basis for revocation of a license. Conduct which could be prosecuted appropriately under them would be covered by subsections (e), (f) or (i), or proposed subsection (j) of 45:1-21. Subsection (d) is unduly broad; in theory it would include the common cold; not every contagious disease is a danger to patients. To the extent appropriate, this ground is covered by subsection (i) of 45:1-21.

45:11-35 Nursing schools:

EXISTING STATUTE

EQUIVALENT SUBSECTION OF 45:1-21

first ground; fraud	(a) and (b); conduct included
second ground; dishonesty	(a) and (b); conduct included
third ground; incompetency	(c), (d) and (i); adequately covered
fourth ground; acts derogatory to nursing	(e); see note
fifth ground; failure to obey regs.	(h); included
sixth ground; crime	(f); substantially identical
seventh ground; failure to obey order	(e) and (h); conduct included

NOTE

The fourth ground, conduct derogatory to nursing, is vague, but where that conduct constitutes professional misconduct, it is covered by subsection (e) of 45:1-21.

45:12-11 Optometrists:

EXISTING STATUTE

EQUIVALENT SUBSECTION OF 45:1-21

subsection (a); fraud in obtaining license	(a); substantially identical
subsection (b); incompetence	(c), (d) and (i); adequately covered
subsection (c); fraud on patients	(b); conduct included
subsection (d); inebriety and use of drugs	(i) and proposed (j); adequately covered
subsection (e); disease	(i); included
subsection (f); crime	(f); substantially identical
subsection (g); crime	(f); substantially identical
subsection (h); false advertising	(b); conduct included
subsection (h); advertising	none; see note on advertising
subsection (i); directories	none; see note on advertising
subsection (j); displaying goods	none; see note on advertising
subsection (k); displaying license	none; see note on advertising
subsection (l); use of "doctor"	(b) and (e); adequately covered
subsection (m); use of "clinic" etc.	(b) and (e); adequately covered
subsection (n); working for law violator	(h); see note
subsection (o); fraud	(b); included
subsection (p); soliciting business	none; see note on advertising
subsection (q); professional cards	none; see note on advertising
subsection (r); signs	none; see note on advertising
subsection (s); violating regulation	(h); included
subsection (t); ass'n. with unlicensed person	(h); see note

subsection (u); working in store	see note on advertising
subsection (u); working for unlicensed person	(h); see note
subsection (v); required exam	(e) and (h); see note
subsection (x); gross malpractice	(c); substantially identical

**NOTE**

Subsections (n), (t) and a portion of (u) all forbid licensed optometrists from working for, or with, unlicensed persons. To the extent that such work constitutes aiding the unlicensed person to practice optometry without a license, that conduct can be prosecuted under ground (h) of the uniform provision. If the board felt that the profession of optometry required a clearer prohibition, it would be authorized to declare that conduct professional misconduct or to forbid it by regulation. Those actions would make the conduct additionally reachable under subsections (e) and (h).

**45:14-12 Pharmacists:**

**EXISTING STATUTE**

**EQUIVALENT SUBSECTION OF 45:1-21**

subsection (a); paying rebates	(e); conduct included
subsection (b); providing prescription forms	none; see note on advertising
subsection (d); claiming superiority	none; see note on advertising
subsection (e); fostering interest of group	(e); see note
subsection (f); giving rebates	none; see note on advertising
subsection (g); advertising prices	none; see note on advertising

**NOTE**

Subsection (e) requires as a ground for revocation conduct which "compromises the quality or extent of professional services made available." If this language is read narrowly, any such conduct would be covered by subsection (e) of the Uniform Enforcement Act provision as unprofessional conduct. However, if this language is read broadly, and the subsection is interpreted as forbidding senior citizen discounts or requiring every pharmacist to participate in every prescription insurance program, no part of the uniform provision would replace it automatically. If that kind of restriction is intended, it should be promulgated specifically by regulation of the board. The proposed section on advertising would give authority for that kind of regulation if the board does not already possess the authority. Violation of regulation is a ground for license revocation under the Uniform Enforcement Act, 45:1-21 subsection (h).

**45:14-12.2 Unlawful sale of narcotics:**

**EXISTING STATUTE**

**EQUIVALENT SUBSECTION OF 45:1-21**

sale in violation of 24:18-7 or 10	(h) and (e); conduct included
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**45:14-35 Pharmacies:**

**EXISTING STATUTE**

**EQUIVALENT SUBSECTION OF 45:1-21**

violations of pharmacy chapter and 12.2.	(h); included; see also, disposition of 45: 14-12
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45:14B-24 Psychologists:

EXISTING STATUTE

subsection (a); fraud in application  
subsection (b); false name  
subsection (c); crime  
subsection (d); intemperance, use of drugs  
subsection (e); violation of act, regulation  
subsection (f); negligence  
subsection (f); misconduct  
subsection (g); advertising

EQUIVALENT SUBSECTION OF 45:1-21

(a); substantially identical  
(a) and (b); conduct included  
(f); substantially identical  
proposed (j); conduct included  
(h); substantially identical  
(c) and (d); appropriately covered  
(e); substantially identical  
none; see note on advertising

3. AMENDMENT OF 45:1-21 TO COVER DRUG AND ALCOHOL ABUSE  
EXPLICITLY

Nearly every one of the license revocation sections recommended for repeal makes drug or alcohol abuse a ground for revocation. As is noted above, these provisions vary greatly in detail. At present, the only subsection in the Uniform Enforcement Act which bears on drug and alcohol use is 45:1-21(i), which provides that a board may discipline upon proof that a licensee:

**i. Is incapable, for medical or any other good cause, of discharging the functions of a licensee in a manner consistent with the public's health, safety and welfare.**

While this provision may be usable to revoke the licenses of persons whose drug or alcohol problems are of primary concern to regulators, its lack of specific mention of these particular problems is inconsistent with current attention given to this area. Lest the repeal of sections including specific provisions on drug and alcohol abuse be considered a reduction in the ability of the professional boards to revoke the licenses of persons whose drug or alcohol use is inconsistent with the proper practice of their profession, a new subsection should be added to 45:1-21 as follows:

**j. Has engaged in drug or alcohol use which impairs the ability to practice the occupation or profession with reasonable skill and safety.**

The wording of this subsection is taken from provisions added to the sections regulating the revocation of physicians' and podiatrists' licenses as part of L.1989, c.300. The scope of the provision balances the legitimate interest in public safety against rights of the person licensed. The provision will allow the revocation of licenses where that is necessary to protect the public.

In addition, in the interest of providing all grounds for revocation in one place, an additional subsection is recommended to replace C. 45:1-13, which should then be repealed:

**k. Has prescribed or dispensed controlled dangerous substances indiscriminately or without good cause, or where the applicant or holder knew or should have known that the substances were to be used for unauthorized consumption or distribution or that substances previously**

prescribed or dispensed were used for unauthorized consumption or distribution.

#### 4. REGULATION OF ADVERTISING

Of the license revocation provisions recommended for repeal, some forms of advertising, other than false advertising, are made a ground for revocation in the following:

45:5-8	Podiatrists (eighth ground)
45:6-7	Dentists (subsection (g))
45:6-22	Dental interns (by reference to 45:6-7)
45:9-16	Physicians (ground (j))
45:12-11	Optometrists (subsections (h),(i),(j),(k),(p),(q),(r) and (u))
45:14-12	Pharmacists (subsections (d),(f) and (g))
45:14B-24	Psychologists (subsection (g))

Restrictions in this area have become problematic with the decision in Bates v. State Bar of Arizona, 433 U.S. 350 (1977) which held that price advertising by attorneys could not be forbidden without impermissibly restricting freedom of speech. Later Supreme Court cases have provided some guidance concerning the nature of limitations which may be placed on professional advertising consistent with the constitution. In In re R.M.J., 455 U.S. 191 (1982), the Court held:

Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. 455 U.S. at 203.

And in Zauderer v. Office of Disciplinary Council, 471 U.S. 626 (1985) it held:

Commercial speech that is not false or deceptive and does not concern unlawful activities, however, may be restricted only in the service of a substantial governmental interest and only through means that directly advance that interest. 471 U.S. at 688.

The test of constitutionality involves balancing substantial state interests against First Amendment protections. There has been a substantial amount of litigation in this area, but no rule has emerged which can provide certain guidance. Given the state of the law, a statutory restriction on advertising must be flexible enough to withstand challenge. This flexibility is achieved by allowing particular professional boards to enact regulations to control advertising and related business practices with precision when detailed restrictions are found to be in the public interest. With this approach, each board may restrict advertising in ways that are found appropriate to the extent that the developing case law allows. The Commission recommends that the statutory restriction on advertising be made a new subsection (l) of 45:1-21:

**l. has employed forms of advertising forbidden by law or regulation.**

#### 5. CLARIFICATION OF CERTAIN REGULATORY AUTHORITY:

In reviewing the statutory provisions governing the activities of regulatory boards, it became apparent that the authority of some boards to enact regulations is quite specifically

granted, while that of others is only implicit. The Commission recommends that the authority of the boards to adopt administrative regulations should be granted specifically in 45:9-2 (the power of the State Board of Medical Examiners to adopt regulations governing the practice of podiatry) and in 45:6-3 (the authority of the dental board to make regulations governing the practice of dentistry).

## 6. TEXT OF RECOMMENDED AMENDMENTS:

### **Physicians and Surgeons:**

#### **45:9-2. Officers; seal; subpoenas; issuance; refusal to obey; regulations and bylaws; fees.**

The board shall elect a president, a secretary and a treasurer from its membership and shall have a common seal, of which all courts of this State shall take judicial notice. Its president, or secretary, may issue subpoenas to compel attendance of witnesses to testify before the board and administer oaths in taking testimony in any matter pertaining to its duties, which subpoenas shall issue under the seal of the board and shall be served in the same manner as subpoenas issued out of a County Court of this State. Every person who refuses or neglects to obey the command of such subpoena, or who, after appearing, refuses to be sworn and testify shall, in either event, be liable to a penalty of \$50.00 to be sued for in the name of the board in any court of competent jurisdiction, which penalty when collected shall be paid to the treasurer of said board. It shall make and adopt all necessary rules, regulations and bylaws not inconsistent with the laws of the State or of the United States, whereby to perform the duties and to transact the business required under the provisions of this article (section 45:9-1 et seq.) and chapter 5 (45:9-5-1 et seq.) of this title, including regulations concerning advertising and business practices of licensees when it finds that the regulations are necessary to protect the public.

The board shall charge for licenses and other services performed by it the fees provided in chapter 9 of Title 45 of the Revised Statutes, or where not so provided, such fees as it shall prescribe by rule or regulation. The board shall make such disposition of all fees and moneys collected by it and such reports in connection therewith as directed by the Director of the Division of Budget and Accounting.

#### COMMENT

The recommended amendment makes two changes. First, the authority of the Board to adopt regulations governing the practice of podiatry, which is covered under chapter 5 of Title 45, is stated expressly. Second, the addition of specific authority to regulate advertising and business practices makes it clear that the repeal of the express provisions governing advertising in 45:9-16 (physicians) and 45:5-8 (podiatrists) is not intended to prohibit the board from making regulations on those subjects. The inclusion of the requirement that such regulations be "necessary to protect the public" codifies the limitations recognized in United States Supreme Court cases on the power to limit commercial speech.

### **Dentists and Dental Interns:**

#### **45:6-3. Rules; examinations; qualifications of applicants for examination.**

The board shall from time to time adopt [rules] all regulations and bylaws necessary to perform the duties and to transact the business required under the provisions of this



title, including all regulations and bylaws necessary for its own government and for the examination of candidates for licenses to practice dentistry, and regulations concerning advertising and business practices of licensees when it finds that the regulations are necessary to protect the public. Any rule altering the nature or increasing the severity of the examination or the subjects to be included therein shall not be enforced until six months after its adoption and public promulgation. The examination of applicants shall be confined to written or oral, or both written and oral, examinations upon subjects properly relating to the science of dentistry, the knowledge of which is necessary to the proper and skillful practice of said science. The board may also require from applicants, as part of the examination, demonstration of their skill in operative and prosthetic dentistry. No person shall be examined by the board unless he is at least 18 years of age, of good moral character, and shall present to the board a certificate from the Commissioner of Education of this State, showing that before entering a dental college he had obtained an academic education consisting of a four years' course of study in an approved public or private high school or the equivalent thereof, unless he has been graduated in course with a dental degree from a dental school, college or department of a university approved by the board, or holds a diploma or license conferring full right to practice dentistry in some foreign country and granted by some authority recognized by the board. Any member of the board may inquire of any applicant for examination concerning his qualifications, and may take testimony of anyone in regard thereto, under oath, which he is hereby empowered to administer.

Notwithstanding any provision of law to the contrary, no person who is a graduate of an unapproved dental school shall be examined by the board unless he has successfully completed at least two years of study of a board approved curriculum at a dental school, college or department of a university approved by the board, with a dental degree having been conferred by the school.

#### COMMENT

This amendment both generalizes authority of the board to adopt regulations, and adds express authority to adopt regulations governing advertising and business practices. The addition of specific authority to regulate advertising and business practices makes it clear that the repeal of the express provisions governing advertising in 45:6-7 (dentists) and 45:6-22 (dental interns) is not intended to prohibit the board from making regulations on those subjects. The inclusion of the requirement that such regulations be "necessary to protect the public" codifies the limitations recognized in United States Supreme Court cases on the power to limit commercial speech.

#### Optometrists:

#### 45:12-4. Rules and regulations; seal; records; semiannual examinations.

The board shall conduct an investigation and ascertain the facts relating to the practice of optometry for the purpose of determining the need for, and the desirability of, rules to promote the safety, protection and welfare of the public and to effectuate the purposes of this chapter and to aid the board in the performance of its powers and duties hereunder, and the board shall thereupon make and promulgate rules and regulations for the said purposes including regulations concerning advertising and business practices when it finds that the regulations are necessary to protect the public. Any member thereof may, upon being duly designated by the board, or a majority thereof, administer oaths or take testimony concerning any matter within the jurisdiction of the board. The board shall adopt a seal, of which the secretary shall have the care and custody, and all courts of this State shall take judicial notice of said seal. Said secretary shall keep a record of all the

proceedings of the board, which shall be open to public examination. The board shall hold, at least twice in each year, an examination of applicants for registration to practice optometry if there shall be such applicants.

**COMMENT**

This amendment adds express authority to adopt regulations governing advertising and business practices, to make it clear that the repeal of the express provision governing advertising in 45:12-11 is not intended to prohibit the board from making regulations on those subjects. The inclusion of the requirement that such regulations be "necessary to protect the public" codifies the limitations recognized in United States Supreme Court cases on the power to limit commercial speech.

**Pharmacists:**

**45:14-3. Officers of board; by-laws and rules; meetings; examinations; general powers and duties of board.**

The board shall elect a president, a secretary who may or may not be a member of the board, and a treasurer, and may make by-laws and rules for the proper fulfillment of its duties under this chapter, including regulations concerning advertising and business practices when it finds that the regulations are necessary to protect the public. It shall meet on the third Thursday of January, April, July and October, in the city of Trenton, and at such other times and places as may be required. It shall examine into all applications for registration, and grant certificates of registration to all persons whom it shall judge on examination to be properly qualified to practice pharmacy. The examination shall include the subjects of materia medica, pharmacy, chemistry and toxicology. It shall keep a book of registration in which shall be entered the names and places of business of all persons registered under this chapter, and also a book of record of all its official transactions, which books shall be legal evidence of such transactions in any court of law. It may examine into all cases of alleged violations of this chapter and shall cause the prosecution of all persons not complying therewith; and it shall annually report to the governor and to the New Jersey Pharmaceutical Association, on or before the first day of November in each year, upon the condition of pharmacy in the state, which report shall embrace a detailed statement of the receipts and expenditures of the board.

**COMMENT**

This amendment adds express authority to adopt regulations governing advertising and business practices, to make it clear that the repeal of the express provision governing advertising in 45:14-12 is not intended to prohibit the board from making regulations on those subjects. The inclusion of the requirement that such regulations be "necessary to protect the public" codifies the limitations recognized in United States Supreme Court cases on the power to limit commercial speech.

**Psychologists:**

**45:14B-13. Meetings; chairman, vice-chairman and secretary; seal; quorum; rules and regulations; issuance of permit or license; expenses; subpoenas.**

The board shall, at its first meeting, to be called by the Governor as soon as may be following the appointment of its members, and at all annual meetings, to be held in June of each year thereafter, organize by electing from among its members a chairman, vice-chairman and secretary whose election shall be subject to the approval of the Attorney General. Such officers shall serve until the following June 30 and until their successors are appointed and qualified. The board shall adopt a seal which shall be affixed to all licenses issued by the board. The board shall administer and enforce the provisions of this act. The board shall hold at least one regular meeting each year; but additional meetings may be held upon call of the chairman or at the written request of any 2 members of the board. Four members of the board shall constitute a quorum and no action at any meeting shall be taken without at least 3 votes in accord. The board shall from time to time adopt such rules and regulations and such amendments thereof and supplements thereto as it may deem necessary to enable it to perform its duties under and to carry into effect the provisions of this act, including regulations concerning advertising and business practices when it finds that the regulations are necessary to protect the public. The board shall examine and pass on the qualifications of all applicants for permits or licenses under the act, and shall issue a permit or license to each qualified successful applicant therefor, attesting to his professional qualifications to engage in the practice of psychology.

Each member of the board shall be reimbursed for actual expenses reasonably incurred in the performance of his duties as a member of or on behalf of the board. Subject to the approval of the Attorney General, the board shall be empowered to hire such assistants as it may deem necessary to carry on its activities. All expenditures deemed necessary to carry out the provisions of this act shall be paid by the State Treasurer from the license fees and other sources of income of the board, within the limits of available appropriations according to law, but in no event shall expenditures exceed the revenues of the board during any fiscal year. The board, through its chairman or secretary, may issue subpoenas to compel the attendance of witnesses to testify before the board and produce relevant books, records and papers before the board and may administer oaths in taking testimony, in any matter pertaining to its duties under the act (including, without limitation, any hearing authorized or required to be held by the board under any provisions of this act), which subpoenas shall issue under the seal of the board and shall be served in the same manner as subpoenas issued out of the Superior Court. Every person who refuses or neglects to obey the command of any such subpoena, or who, after hearing, refuses to be sworn and testify, shall, in either event, be liable to a penalty of \$50.00 to be sued for in the name of the board in any court of competent jurisdiction, which penalty when collected shall be paid to the secretary of the board.

**COMMENT**

This amendment adds express authority to adopt regulations governing advertising and business practices, to make it clear that the repeal of the express provision governing advertising in 45:14B-24 is not intended to prohibit the board from making regulations on those subjects. The inclusion of the requirement that such regulations be "necessary to protect the public" codifies the limitations recognized in United States Supreme Court cases on the power to limit commercial speech.

**Uniform Enforcement Act:**

**45:1-21. Grounds for refusal to admit to examination, refusal to issue or to suspend or revoke any certificate, registration or license.**

A board may refuse to admit a person to an examination or may refuse to issue or may suspend or revoke any certificate, registration or license issued by the board upon proof that the applicant or holder of such certificate, registration or license

- a. Has obtained a certificate, registration, license or authorization to sit for an examination, as the case may be, through fraud, deception, or misrepresentation;
- b. Has engaged in the use or employment of dishonesty, fraud, deception, misrepresentation, false promise or false pretense;
- c. Has engaged in gross negligence, gross malpractice or gross incompetence;
- d. Has engaged in repeated acts of negligence, malpractice or incompetence;
- e. Has engaged in professional or occupational misconduct as may be determined by the board;
- f. Has been convicted of any crime involving moral turpitude or any crime relating adversely to the activity regulated by the board. For the purpose of this subsection a plea of guilty, non vult, nolo contendere or any other such disposition of alleged criminal activity shall be deemed a conviction;
- g. Has had his authority to engage in the activity regulated by the board revoked or suspended by any other state, agency or authority for reasons consistent with this section;
- h. Has violated or failed to comply with the provisions of any act or regulation administered by the board;
- i. Is incapable, for medical or any other good cause, of discharging the functions of a licensee in a manner consistent with the public's health, safety and [welfare.] welfare;
- j. Has engaged in drug or alcohol use which impairs the ability to practice the occupation or profession with reasonable skill and safety;
- k. Has prescribed or dispensed controlled dangerous substances indiscriminately or without good cause, or where the applicant or holder knew or should have known that the substances were to be used for unauthorized consumption or distribution or that substances previously prescribed or dispensed were used for unauthorized consumption or distribution; or
- l. Has employed forms of advertising forbidden by law or regulation.

**STATE OF NEW JERSEY**  
**NEW JERSEY LAW REVISION COMMISSION**

**TENTATIVE REPORT**

relating to

Contempt

December 1992

This tentative report is being distributed so that interested persons will be advised of the Commission's tentative recommendations and can make their views known to the Commission. Any comments received will be considered by the Commission in making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives.

It is just as important to advise the Commission that you approve of the tentative recommendations as it is to advise the Commission that you believe revisions should be made in the recommendations.

**COMMENTS SHOULD BE RECEIVED BY THE COMMISSION  
NOT LATER THAN FEBRUARY 1, 1993.**

Please send comments concerning this tentative report or direct any related inquiries, to:

John M. Cannel, Esq., Executive Director  
NEW JERSEY LAW REVISION COMMISSION  
15 Washington Street, Room 1302  
Newark, New Jersey 07102  
201-648-4575



## INTRODUCTION

The law governing contempts of court is a mixture of statutory law, judicial decisions and court rules. In re Yengo, 84 N.J. 111, 119 (1980). Current statutory provisions on this subject are contained in N.J.S. 2A:10-1 et seq. and in N.J.S. 2C:1-5(c) and 2C:29-9, the provisions in Title 2C pertaining to the crime of contempt. The relevant court rules are contained in R. 1:10-1 et seq., entitled "Contempt of Court and Enforcement of Litigant's Rights Related Thereto." As is the case with many of the chapters in Title 2A of the statutes, the overlap between statutes and court rules, and the necessity for consulting judicial opinions, makes this a confusing area of law.

The confusion in the law of contempts arises in part because the categories of contempt are neither well-defined in the relevant sources nor well understood. Contempt was a crime at common law and remains a crime under today's criminal code, but the contempt power is also brought to bear to vindicate the private interests of litigants in purely civil actions. It is necessary to distinguish between so-called criminal contempts, in which the court punishes an offender in order to vindicate its own authority, and so-called civil contempts, in which the court uses the contempt power to advance the interests of private litigants. The same act might merit punishment as a "criminal contempt" and at the same time justify an award of relief to vindicate a litigant's private interests, thus it is said that it is difficult in some cases to distinguish between criminal and civil contempts. In Re Daniels, 118 N.J. 51, 60 (1990). Following the New Jersey Supreme Court opinion in N.J. Department of Health v. Roselle, the court amended the court rules to distinguish more clearly between these categories of contempt, denominating the former category of civil contempt as "relief in aid of litigants' rights." R. 1:10-5.

Further problems attend the exercise of the summary contempt power. In exercising the summary contempt power, the court punishes for contempt without either indictment or trial by jury, and the judge affronted by a contemptuous act frequently adjudicates the contempt and assigns punishment. This summary procedure raises due process questions that have not been answered definitively in the decided cases. See, e.g., In Re Daniels, 118 N.J. at 63 (due process rights of one charged with contempt are measured on a "sliding scale ... depending on the nature of the liberty interest involved and the degree of reliability required in the fact-finding process").

The power of a court to punish for contempt is said by the courts themselves to be inherent, in as much as this authority is "derived from necessity" and ceases "only where such necessity ceases." State v. Doty, 32 N.J.L. 403, 404 (Supreme Ct. 1868). The contempt power is said to derive from the common law. See In re Yengo, 84 N.J. 111, 130 (1980), cited in In Re Daniels, 118 N.J. at 59; In Re Cheeseman, 49 N.J.L. 115, 139-141 (Sup. Ct. 1886); In Re Verdon, 89 N.J.L. 16, 17, 20 (Sup. Ct. 1916), rev'd on other grounds sub nom. Attorney-General v. Verdon, 90 N.J.L. 494 (E. & A. 1917); see also Illinois v. Allen, 397 U.S. 337, 347 (1970) (Justice Brennan called the court's constitutional power regarding contempts "fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace.").

Historically, legislation concerning contempts of court began with attempts to limit the exercise of the contempt power in cases where the judiciary was abusing the power. This pattern is seen in the federal system, where the federal contempt statute appears to have been directed against judicial attempts to interfere with newspaper comments on trials. See In Re Buehrer, 50 N.J. 501, 514 (1967), citing Frankfurter and Landis, Power of Congress over Procedure in Criminal Contempts in 'Inferior' Federal Courts, 37 Harv. L. Rev. 1010, 1023-28 (1924). The federal act, which became the model for many similar state enactments including that of New Jersey, sought to limit the power of federal courts to deal with contempts in a summary manner, *i.e.*, without the protections afforded a defendant in a criminal proceeding, by defining the summary contempt power as applying only to the following situations:

... the misbehavior of any person or persons in the presence of said courts, or so near thereto as to obstruct the administration of justice, the transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree or command of the said courts.

The first attempt of the New Jersey Legislature to limit the contempt power came in 1884, with the enactment of a statute which provided for a de novo appeal on both law and fact in cases in which a person was adjudged in contempt by a court of jurisdiction "inferior" to the Supreme Court. The Supreme Court heard an appeal pursuant to the statute in a case involving a newspaper publisher acquitted of a charge of assault and battery, who was held in contempt by the Court of Oyer and Terminer for publishing an article "intended to cast discredit upon the grand jury that had indicted him, upon the sheriff who had summoned the jury, and upon the judge who had presided at his trial." In Re Cheeseman, 49 N.J.L. 115, 136, 137 (Sup. Ct. 1886). The conviction for contempt was upheld, the court finding that the New Jersey courts, as successors to the English courts of common law, had the "legal power to punish summarily for any words uttered by speech, by writing or by printing outside of the regular course of litigation, which were designed to bring contempt upon the courts in the exercise of their judicial functions, or to pervert in a pending cause the due administration of justice." Id. at 141.

In a series of similar cases in the ensuing years the courts used the contempt power to penalize out-of-court criticism by the press. See, *e.g.*, In Re Holt, 55 N.J.L. 384, 385 (Sup. Ct. 1893)(conviction for contempt in Court of Quarter Sessions of the Peace, for publication of newspaper article "calling in question the impartiality of the court in the trial of a certain indictment," set aside for failure of proper procedure); Croasdale v. Court of Quarter Sessions, 88 N.J.L. 506 (1916)(Court of Quarter Sessions held to have jurisdiction to try contempt charge against publisher for publishing newspaper editorial "criticizing the alleged inaction of the county prosecutor and of the Quarter Sessions in a criminal matter"); Attorney-General v. Verdon, 90 N.J.L. 494 (E. & A. 1917), *rev'ing* In re Verdon, 89 N.J.L. 16, 17, 20 (Sup. Ct. 1916)(contempt prosecution by the Hudson County Court of Quarter Sessions, against newspaper publishers for "certain newspaper publications reflecting upon it, and tending to bring it into disrepute").



Eventually, the legislature responded to these incidents with a 1917 statute expressly modeled after the federal contempt statute, and closely following its language. The statute provided:

No power of any court in this State to punish contempt shall be construed to extend to any case except the misbehavior of any person in its actual presence, the misbehavior of any officer of said court in his official transactions, and the disobedience by any party, juror, witness or other person, to any lawful writ, process, order, rule, decree or command of the said court.

L. 1917, c.37, sec. 1, p. 71.

Thus, the Legislature defined contempt in such a way as to exclude press or other out-of-court criticism of the judiciary. The statement to the bill described the exercise of the summary contempt power by the courts "to summarily summon before them persons criticizing their officials acts and to fine or imprison such persons at will and without a jury trial" as "truth-stifling, despotic, and exceedingly dangerous to liberty" and further stated that the purpose of the bill was "to prevent abuses of this power." N.J. Department of Health v. Roselle, 34 N.J. 331, 341 (1961).

Questions were raised immediately as to the constitutionality of the 1917 statute as a limitation on the authority of the "common law" New Jersey courts, particularly the Court of Chancery, see In Re Merrill, 88 N.J. Eq. 261 (Perrog. Ct. 1917)(holding that a litigant's ex parte letter to judge was contempt "in the actual presence of the court" within the meaning of the 1917 act, but questioning whether the act could constitutionally limit the authority of the Prerogative Court to punish for contempt); In Re Bowers, 89 N.J. Eq. 307, 309 (Ch. 1918)(holding that the threat of political harm against a litigant's attorney if he did not withdraw from representing the litigant, constituted contempt even though not covered by the 1917 act) and In Re Caruba, 139 N.J. Eq. 404, 426 (Ch. 1947), aff'd 140 N.J. Eq. 563 (E. & A. 1947), cert. denied, 335 U.S. 846 (1948)(citing In Re Bowers with approval). In particular, in In Re Caruba, the Court of Chancery referred to the federal contempt statute upon which the New Jersey statute was modeled, and suggested that the authority of Congress to limit the contempt power of the lower federal courts stemmed from the fact that the federal courts are courts of limited jurisdiction and powers, unlike the New Jersey courts, which draw their powers and authority from the common law. 139 N.J. Eq. at 410-11.

Despite the questions raised concerning the authority of the Legislature to limit the courts' summary contempt power, however, there do not appear to have been any instances of the exercise of the summary contempt power to punish press criticism of the courts for some time after the adoption of the 1917 statute. The issue of courts punishing press criticism was recognized to have constitutional implications in the late 1940's with decisions by the United States Supreme Court which held that the use of the contempt power by state courts to silence out-of-court press criticism was subject to the limitations of the first and fourteenth amendments. See, e.g., Bridges v. California, 314 U.S. 252 (1941); Craig v. Harney, 331 U.S. 367 (1947); see also In Re Matzner, 59 N.J. 437,442 (1971)(criminal contempt for journalistic utterances sustainable only where individual charged was responsible for the utterance "with the intent to create a clear and imminent

danger of substantial prejudice to the fair trial of the case"); In Re Look Magazine, 109 N.J. Super. 548,554 (Law Div. 1970)(first amendment limits contempt power to those utterances that constitute "a serious and immediate threat" to the administration of justice).

The 1917 legislation defining the summary contempt power was carried forward in the 1937 Revised Statutes as R.S. 2:15-1. When Title 2 was revised following the adoption of the 1947 constitution, this provision was carried forward again, as N.J.S. 2A:10-1, which currently provides:

The power of any court of this state to punish for contempt shall not be construed to extend to any case except the:

- a. Misbehavior of any person in the actual presence of the court;
- b. Misbehavior of any officer of the court in his official transactions; and
- c. Disobedience or resistance by any court officer, or by any party, juror, witness or any person whatsoever to any lawful writ, process, judgment, order, or command of the court.

Nothing contained in this section shall be deemed to affect the inherent jurisdiction of the superior court to punish for contempt.

Also in the 1951 revision of Title 2, the Legislature retained the common law crime of contempt in 2A:85-1, and again in the revision of the Criminal Code, the principle of 2A:85-1 was continued in 2C:1-5(c), which provides that "This section does not affect the power to punish for contempt, either summarily or after indictment, or to employ any sanction authorized by law for enforcement of an order or a civil judgment or decree." In 1981 the legislature added 2C:29-9, in order to "grade" the offense of contempt for purposes of determining appropriate punishment within the scheme established by the Criminal Code. In grading the offense as one of the fourth degree, the provision also defines the crime as occurring when a person "purposely or knowingly disobeys a judicial order or hinders, obstructs or impedes the effectuation of a judicial order or the exercise of jurisdiction over any person, thing or controversy by a court, administrative body or investigative entity."

The New Jersey Supreme Court has imposed limitations on the exercise of the summary contempt power in the last several decades, through the adoption of court rules and in its judicial decisions. The current court rules provide that a contempt which is committed "in the actual presence of a judge" may be adjudicated summarily, without issuance of process, that is, without notice or order to show cause. The order adjudicating the contempt must contain a certification that the judge "saw or heard the conduct constituting the contempt." R. 1:10-1. All other proceedings for contempt must be instituted through issuance of an order for arrest or an order to show cause. 1:10-2. A person arrested on a charge of contempt "shall be admitted to bail." R. 1:10-3. A contempt proceeding may be prosecuted only the Attorney General, a county prosecutor, or an attorney designated by the court. Only with the consent of the person charged may a judge "allegedly offended or whose order was allegedly contemned" hear and decide the

proceeding. R. 1:10-4. The punishment in a summary contempt proceeding is limited to those which attach to a "petty offense," typically defined as up to six months imprisonment, and a fine not exceeding \$1,000. See In Re Buehrer, 50 N.J. at 519-20.

In Re Daniels is the New Jersey Supreme Court's most recent opinion on the subject of contempt; in it the Court makes numerous pronouncements about the nature of the contempt power and the rights of persons accused of contempt. Daniels, a public defender representing a criminal client, was cited for contempt by a Superior Court judge who accused Daniels of having responded to a ruling by the judge with nonverbal conduct that the judge regarded as sarcastic and disrespectful. 118 N.J. at 57. Daniels objected to the judge's characterization of his conduct, but the judge discharged the jury, found Daniels to be in contempt, and gave Daniels an opportunity to be heard before passing sentence. Daniels objected again to the judge's characterization of his conduct, declined to call any witnesses because he did not have a chance to speak with them (affidavits of court personnel stating they had not seen Daniels engaged in the conduct were submitted at a later point), but asked to consult an attorney, a request the judge declined. Id. at 57. The judge then found that Daniels had laughed at his rulings in open court, held him guilty of contempt, and sentenced him to two days in jail and a \$500 fine. Id. at 58.

On appeal, the New Jersey Supreme Court vacated the sentence of imprisonment but upheld the imposition of the fine, holding that Daniels had properly been charged and convicted under the summary contempt power set forth in R. 10:1-1. According to the Court, the summary contempt power permits a judge to charge a person on-the-spot with contempt that the judge has "seen or heard," afford the person charged with an opportunity to be heard on the charge, but not to be represented by an attorney, and to be sentenced immediately on a finding of contempt. Thus, the judge is permitted to act as prosecutor, judge and jury in the same proceeding. In vacating the sentence of imprisonment, however, the court appeared to be imposing a significant qualification on the exercise of the power by limiting the permissible sentence in a summary contempt proceeding to a fine or other sanction not involving imprisonment. See id. at 65. In addition, in the course of the opinion the court made a number of statements that suggest that where there is a dispute of fact as to the commission of the act or the nature of the conduct, or where the incident involves a "personal confrontation" between the judge and the person accused of contempt, the matter should be referred to another judge for adjudication. See id. at 64-65.

Also in In Re Daniels, the court outlined the steps that a court should follow in adjudicating a contempt; the court's comments are worth outlining at length, as the procedures the court outlined are not embodied in the court rules at the present time:

Some of the steps a court should follow, then, are:

(1) It should immediately evaluate the gravity of the misconduct and decide whether it should invoke its right, power, and duty to charge or adjudicate the contempt. Conduct that falls short of contempt may be handled informally, outside the structure of Rule 1:10, some matters by

a rebuke in chambers, some by reference to other disciplinary bodies. Conduct that amounts to contempt may require immediate action under Rule 1:10.

(2) Once the court has determined that it should exercise the contempt power, it should immediately inform the party that it considers the act contemptuous and afford the party an opportunity to retreat or explain the circumstances, and thus avoid, perhaps, any need for adjudication.

(3) Depending on the degree of the contempt, the court must evaluate whether it calls for immediate adjudication lest there be a 'demoralization of the court's authority' before the public. Cooke v. United States, 267 U.S. 517, 536 ... (1925). An example would be a witness or lawyer who refuses a lawful order of the court to cease interruption or to refrain from insult or invective in the course of a trial.

(4) If immediate adjudication of such conduct is called for the court must evaluate whether the record will adequately disclose the essence of the contempt. As noted supra at 64, in most instances of invective the record will adequately describe the misconduct. Other misconduct may be less graphic and call for fuller fact-finding. We need not, however, magnify what is a self-evident offense, such as an obscene gesture, into a megatrial.

(5) If the contempt involves personal insult to the court (as opposed to other personnel in the system, as in Ex parte Terry, supra, 128 U.S. 289 ... or In re McAlevy, 94 N.J. 201 ... (1983)), the court should consider whether there is any appearance of personal confrontation or loss of objectivity that would require reference of the matter to another judge.

(6) Finally, if the conduct appears to be such that imprisonment may be warranted and immediate action is not essential to prevent demoralization of the court's authority before the public, or to assure continuity of proceedings, as in the case of a continually disruptive spectator, both a more formal charging process and reference to another judge for adjudication and sentence would ordinarily be required in order to accord due process. The charge should particularly inform the part of the need to present evidence in mitigation, or, as here, to call other witnesses in the courtroom to state their accounts of the event.

In the Daniels opinion, the Court makes broad declarations about the extent of the summary contempt power, but appears to cut that power back significantly by qualifying the exercise of the summary contempt power and reiterating the applicability of the constitutionally based rights to the presumption of innocence and proof beyond a reasonable doubt. This revision of the contempt statutes codifies the limitations recognized in the Daniels opinion.

In reviewing the statutes regarding contempt and the many judicial decisions involving the exercise of the contempt power, the Law Revision Commission concluded that the courts should resort to the use of the contempt power only sparingly, in those cases in which other remedies are inadequate. In particular, in situations in which attorneys engage in offensive conduct, judges should first consider whether the conduct may be dealt with by the imposition of sanctions under the court rules, or by reference to the attorney disciplinary process.

#### PROPOSED STATUTE

### Section 1. Punishment for contempt of court

**Contempt of court shall be punishable only in a proceeding pursuant to this chapter or upon indictment pursuant to the Code of Criminal Justice.**

**Source: New**

#### COMMENT

This section provides that a person shall be "punishable" for contempt pursuant to this chapter or under the Criminal Justice Code, Title 2C. This chapter is concerned, therefore, only with so-called criminal contempt, *i.e.*, the authority to punish for an act that constitutes contempt. Note that if a contempt is prosecuted under Title 2C, the accused is entitled to all of the rights attendant upon any other criminal prosecution, including indictment and trial by jury. Civil contempt, the use of sanctions to coerce obedience to a court's command, is covered by R. 1:10-5, and is referred to as "relief in aid of litigant's rights." Civil contempt is not governed by the statutes in this chapter.

### Section 2. Acts constituting contempt of court

**A person is guilty of contempt of court if the person:**

- a. knowingly disobeys any lawful order of a court of this State; or**
- b. knowingly commits an act intended to obstruct a court of this State, in the presence of a judge of the court.**

**Source: 2A:10-1; 2A:10-6; 2A:10-7**

#### COMMENT

This section clarifies the language of the source section which defines the acts which constitute contempt of court, and adds language setting the "mens rea" standard of knowledge, which has been recognized as necessary to sustain a finding of "criminal" contempt. See Department of Health v. Roselle, 34 N.J. 331, 337 (1961) ("The act or omission [constituting contempt] must be accompanied by a mens rea, a willfulness, an indifference to the court's command"); see also In Re Daniels, 118 N.J. 51, 69 (1990) (suggesting that the mens rea requirement is that the conduct is "knowing and willful and evidence[d] an intent to flout the authority of the Court," citing In Re Mattera, 34 N.J. 259, 273 (1961)). The court in In Re Daniels also suggests that in the adjudication of contumacious conduct which takes place before the judge in a courtroom, a prior, unheeded warning of the "obstructive nature" of the conduct establishes the intentional character of the conduct. *Id.* at 69-70; see also *id.* at 67 (stating that when a judge concludes that the contempt power should be exercised, the

offending party should immediately be informed, and be given "the opportunity to retreat or explain the circumstances").

The language in the current statute concerning the "misbehavior of any officer of the court in his official transactions" has been eliminated. The Law Revision Commission recommends that such conduct be prosecuted under the statutes penalizing official misconduct, see 2C:30-2. "Misbehavior" of a court officer which falls short of the statutory definition of official misconduct or does not constitute any other offense, but which constitutes disobedience of a court order under proposed subsection 2(a) or obstruction of the court under 2(b), could still be dealt with as contempt under the revised statute.

The language "a court of this State" includes the constitutional courts and legislative courts, including the municipal courts, as was specifically provided in 2A:10-7.

### **Section 3. Process**

**a. A court shall institute a prosecution for contempt by the issuance of an order for arrest or an order to show cause specifying the acts which are alleged to constitute contempt.**

**b. A court may institute a prosecution for contempt without the issuance of an order for arrest or an order to show cause if:**

**(1) the contemptuous act was seen or heard by the judge who is prosecuting the contempt; and**

**(2) the contemptuous act has disrupted or threatens to disrupt proceedings before the prosecuting judge; and**

**(3) the person charged with contempt is informed that the person's conduct is considered contemptuous.**

**Source: 2A:10-8**

#### **COMMENT**

This section provides that a court may institute contempt proceedings either by issuance of process or without issuance of process, in those cases where the contempt is in the presence of the court and threatens to disrupt ongoing proceedings. In such cases, the person charged must be informed that the conduct is considered contemptuous, in order to give the person the reasonable opportunity to respond to the accusation in the absence of a written charge. In cases which do not involve immediate disruption or threat of disruption, a formal charging process like that involved in other minor criminal offenses should be undertaken. See In Re Daniels, 118 N.J. 51, 68 (1990).

### **Section 4. Bail**

**A person charged with contempt in a proceeding commenced by the issuance of an order for arrest shall be admitted to bail pending a hearing.**

**Source: New**

#### **COMMENT**

This section is consistent with R. 1:10-3, which reiterates the constitutional right to bail in cases where a prosecution for contempt is commenced by the issuance of an order for

arrest. See also R. 3:26-1 (stating the constitutionally-based right of all persons to bail prior to conviction) and N.J.S. 2C:6-1 (bail for disorderly persons offenses generally limited to a maximum of \$2,500).

## **Section 5. Hearing and proof**

**a. A person may not be found guilty of contempt unless the charge is proved by competent evidence establishing the guilt of the accused beyond a reasonable doubt.**

**b. A person charged with contempt shall be entitled to a hearing at which evidence and witnesses may be presented in defense of the charge.**

**c. A person charged with contempt shall not be tried by the judge who instituted the prosecution for contempt if:**

**(1) the conduct alleged to constitute contempt consists primarily of personal disrespect or vituperative criticism of the prosecuting judge; or**

**(2) the prosecuting judge's recollection of, or testimony concerning the conduct alleged to constitute contempt is necessary to establish guilt.**

**Source: New**

### **COMMENT**

Subsection (a) of this proposed section states the fundamental principle that a person accused of contempt is entitled to the presumption of innocence and proof of guilt beyond a reasonable doubt. In Re Daniels, 118 N.J. 51, 69 (1990). Subsections (a) and (b), read together, reflect the principle that even in those cases in which the contempt appears clear, the person accused must always be given the opportunity to explain the conduct alleged to constitute contempt, even if the acts allegedly constituting the contempt took place in open court in the sight and hearing of the prosecuting judge. Id. Thus, in a case in which the contempt consists of statements made in open court, the proof requirement may be met by the transcript of the proceedings, subject to the right of the accused to explain the intent of the words reflected in the record. See In Re DeMarco, 224 N.J. Super. 105 (App. Div. 1988).

Subsection (c) of this section reflects the principle of In Re Daniels that in cases which involve the need for fact-finding, or "personal insult to the court," adjudication should be referred to a neutral fact-finder. Id. at 63-65 & 68.

## **Section 6. Prosecution**

**A charge of contempt may be prosecuted by the Attorney General, a county prosecutor or an attorney appointed by the court.**

**Source: New**

### **COMMENT**

This provision is consistent with R. 10-4.

## Section 7. Penalties

a. A finding of contempt pursuant to this chapter shall be punished in the same manner as a disorderly persons offense, as provided in the Code of Criminal Justice.

b. The penalty imposed upon a finding of contempt pursuant to this chapter shall not include a period of incarceration, nor shall any fine in excess of \$500 be imposed, nor shall any other consequence of magnitude be imposed, unless the person found guilty of contempt was afforded the right to counsel.

Source: New

### COMMENT

This section provides that a conviction for contempt of court shall be punishable in the same manner as a disorderly persons offense is punishable pursuant to the Code of Criminal Justice. Under 2C:43-8 the period of incarceration for a disorderly persons offense is limited to a definite term not exceeding six months; under 2C:43-3(c), the fine currently is limited to \$1,000. Limiting the punishment to that for a disorderly persons offense effectively precludes the attachment of the constitutional rights of indictment and trial by jury. In Re Buehrer, 50 N.J. 501, 513 (1967).

Subsection (b) of this section does, however, provide a statutory right to counsel in all cases in which any period of incarceration may be imposed, where the fine exceeds \$500, or where any other consequence of magnitude may attach. That any period of incarceration, no matter how short, is a "consequence of magnitude," was recognized by the Supreme Court in In Re Daniels, 118 N.J. 51, 65 (1990). Where a "consequence of magnitude" may attach, a right to counsel normally attaches. Rodriguez v. Rosenblatt, 58 N.J. 281 (1971).

## Section 8. Review of convictions for contempt

a. Every finding of contempt pursuant to this chapter shall be appealable in the manner provided by the Rules of Court.

b. The reviewing court shall make independent findings of fact and conclusions of law based upon the record of the proceedings in the court below.

c. The sentence imposed by the reviewing court shall not be greater than that imposed by the court below.

Source: 2A:10-3

### COMMENT

This section continues the provision in the source section for the right of appeal on both the law and the facts in all contempt cases. The court in In Re Daniels emphasized that the right of appeal de novo in contempt cases "is a fail-safe mechanism for assuring that the contempt power is not abused." In Re Daniels, 118 N.J. 51, 62 (1990), citing In Re Yengo, 84 N.J. 111, 135 (1980).



**STATE OF NEW JERSEY**  
**NEW JERSEY LAW REVISION COMMISSION**

**TENTATIVE REPORT**

relating to

Transportation - Chapter 13 Traffic Control Devices and Traffic Regulation

December 1992

This tentative report is being distributed so that interested persons will be advised of the Commission's tentative recommendations and can make their views known to the Commission. Any comments received will be considered by the Commission in making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives.

It is just as important to advise the Commission that you approve of the tentative recommendations as it is to advise the Commission that you believe revisions should be made in the recommendations.

**COMMENTS SHOULD BE RECEIVED BY THE COMMISSION  
NOT LATER THAN FEBRUARY 24, 1993.**

Please send comments concerning this tentative report or direct any related inquiries, to:

John M. Cannel, Esq., Executive Director  
NEW JERSEY LAW REVISION COMMISSION  
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## CHAPTER 13. TRAFFIC CONTROL DEVICES AND TRAFFIC REGULATION

### INTRODUCTION

This chapter on and concerns the authority to make traffic regulations applicable to particular highways to place traffic control devices, signs, traffic lights and the like, to notify the public of the regulations. At present, the law on this subject is intermixed with traffic laws of general application and scattered through chapter 4 of Title 39 - Motor Vehicles.

On grants of authority to regulate, this chapter follows the substance of the current law closely. In general, the Department of Transportation may make regulations for state highways; local governments, with approval of the department, may make regulations for local highways. As in current law, local governments, without department approval, may make certain regulations for local highways that do not connect directly with highways in other localities. See 27A:13-11. The one innovation in this area is the provision of clear authority for traffic regulation of private roads. See 27A:13-12.

This chapter simplifies the law greatly as to the kinds of traffic control devices that may be placed and the meaning of those devices. Current law has separate provisions on traffic lights (39:4-105 through 39:4-121.3), signs (39:4-183.6 through 39:4-183.30) and traffic islands (39:4-196.2 through 39:4-196.3). All of those are subsumed in the classification, "traffic control device." See 27A:13-2(a). The department is given the authority to regulate the kinds of devices that may be placed in accordance with national standards. See 27A:13-1 and 27A:13-5. The authority of the department to regulate how devices are to be placed is continued from the current law but the process is simplified. Under this chapter, individual approval of the placing of each sign is eliminated where the local government provides certification that the placement is in accord with regulations. See 27A:13-10(c).

#### 27A:13-1. Legislative findings and declarations

The legislature finds and declares that National standards for traffic control devices are established by the Federal Highway Administration and published in the Manual on Uniform Traffic Control Devices for Streets and Highways. It is in the public interest that all traffic in the state be controlled in a manner which conforms with accepted national standards.

Source: New

#### COMMENT

This section is new only in the explicitness of the legislative finding. The policy that the federally established Manual on Uniform Traffic Control Devices for Streets and Highways be the basis for state regulation is now expressed in 39:4-120, 39:4-183.6, and 39:4-183.27

#### 27A:13-2. Definitions

a. "Traffic control device" means any device used to regulate or control traffic. It includes signs, traffic lights, pavement markings, barriers, safety zones, or traffic islands.

**b. "Traffic regulation" means any law or rule controlling or limiting the use of highways. It includes rules on parking.**

**Source: New**

**COMMENT**

While there is no specific source for this section, the definitions are consistent with current law. See 39:1-1 [definition of "official traffic control devices"]; 39:4-183.3, 39:4-191.1 and 196.1 as to "traffic control device;" see 39:1-1 [definition of "traffic"]; 39:4-8; and 39:4-197 as to "traffic regulation." The phrase "traffic control device" is defined to include a wide range of mechanisms used to control traffic -- everything from traffic signs to traffic islands. The inclusiveness of the definition allows a single set of statutory rules to govern all kinds of traffic control devices consistently.

**27A:13-3. Applicability**

**The provisions of this chapter shall apply, unless specifically stated to the contrary, to all highways. All provisions of this chapter shall be liberally interpreted to promote the public safety.**

**Source: New**

**COMMENT**

This section establishes that this chapter applies comprehensively to all roads open to the public. While no current statutory provision states this principle explicitly, the principle is inherent in the adoption of standards for traffic control devices.

**27A:13-4. Notice to the public**

**a. A traffic regulation shall not be effective unless due notice of it is given to the public in the manner provided in this section.**

**b. Notice of traffic regulations establishing a "No Passing" zone shall be given by placing either signs or highway pavement markings complying with department regulations at the places where a traffic regulation is applicable. Notice of other traffic regulations shall be given by signs at places where a regulation is effective.**

**c. Signs and markings shall be placed so as to be easily observed and read by pedestrians or operators of vehicles and shall conform to the standards adopted by the commissioner. These standards shall be guided by the current "Manual on Uniform Traffic Control Devices" for streets and highways.**

**Source: 39:4-183.2; 39:4-198**

**COMMENT**

Subsections (a) and (b) and the first sentence of subsection (c), though reworded, are substantially identical to 39:4-198. The second sentence of subsection (c) is derived from 39:4-183.2.

**27A:13-5. Traffic control devices**

**a. The commissioner shall adopt rules concerning the meaning, design, placement, operation, and maintenance of traffic control devices. The rules adopted by the commissioner shall be the standard for all highway and traffic signs, markings and devices**

in the state. In adopting these rules, the commissioner shall be guided by the current Manual on Uniform Traffic Control Devices for Streets and Highways which has been adopted by the Federal Highway Administrator as a national standard for application on all classes of highways. The rules adopted by the commissioner shall further conform in their legal meaning, interpretation, scope of application, general provisions and specifications with the current Manual on Uniform Traffic Control Devices for Streets and Highways.

b. All traffic control devices installed whether initial installations or replacements, shall conform to the provisions of this chapter and to the rules adopted pursuant to it.

c. All traffic control devices shall be maintained in good order by the public entity having jurisdiction over the highway on which they are placed; signs and markings shall be clearly legible at all times. Traffic control devices damaged or destroyed shall be replaced promptly. Traffic control devices which are no longer applicable shall be removed immediately.

Source: 39:4-120; 39:4-183.2; 39:4-183.6; 39:4-183.15; 39:4-183.27; 39:4-191.1

#### COMMENT

Subsection (a) of this section is derived from 39:4-183.27. It replaces that section and the nearly identical 39:4-120 and 183.6, and a portion of 39:4-191.1. Nothing in this subsection restricts the power of a police officer to direct traffic, and in doing so, to supersede traffic control devices. See 39:4-80.

Subsection (b) is derived from 39:4-183.2. Subsection (c) is derived from 39:4-183.15.

### 27A:13-6. Placement of traffic control devices

Traffic control devices may be placed on highways only by the authority of the public entity having jurisdiction over that highway and only for the purpose of regulating, warning or guiding traffic, pedestrians and parking. Traffic control devices shall conform to rules adopted by the commissioner.

This section, however, shall not prohibit public utilities or other authorized persons from erecting temporary signs to protect construction, maintenance or repair work on or near a highway; provided that the signs conform reasonably to department specifications.

Source: 39:4-120.1; 39:4-183.1; 39:4-191.1

#### COMMENT

This section is substantively identical to 39:4-183.1.

### 27A:13-7. Unauthorized devices

a. A person shall not place or maintain on or in view of any highway, any unauthorized traffic sign, marking, device or other contrivance which:

- (1) purports to be, is an imitation of, or is of nature as to be mistaken for a traffic control device; or
- (2) attempts to direct the movement of traffic; or
- (3) hides from view or interferes with the effectiveness of a traffic control device.

b. A person shall not place or maintain any commercial advertising on a traffic control device or its support.

c. This section shall not be deemed to prohibit the erection of signs upon private property adjacent to highways of signs giving useful directional information and of a type that cannot be mistaken for traffic control devices.

d. A person shall not deface, injure or remove a traffic control device.

e. Violations of this section shall be treated as motor vehicle violations and shall be punishable by a fine of not more than \$50 or imprisonment for a term not exceeding 15 days, or both.

f. Any unauthorized traffic sign, marking, device or other contrivance prohibited by this section shall be deemed a nuisance. The commissioner or the public entity with authority over the highway on which it is located may remove it or order it removed, and any person may maintain an action for its removal.

Source: 39:4-183.3; 39:4-183.4; 39:4-183.5

#### COMMENT

Subsections (a), (b) and (c) are substantially identical to 39:4-183.3. Subsection (d) is substantially identical to 39:4-183.5; Subsection (e) provides the same penalty for violations of this section as is now provided for its source sections by 39:4-203. Subsection (f) is substantially identical to 39:4-183.4.

### **27A:13-8. Regulation of state highways**

The commissioner may enact traffic regulations for state highways to meet special conditions and may install traffic control devices to enforce the regulations.

Source: 39:4-121; 39:4-138.1; 39:4-197.8; 39:4-199; 39:4-199.1; 39:4-201.1

#### COMMENT

This section is a generalization of a number of statutes giving the commissioner the power to make particular kinds of regulation for state highways or to place particular kinds of traffic control devices on state highways. The authority given to the commissioner is analogous to that given to local public entities to make traffic regulations for their local highways. The difference in wording between this section and subsection (a) of 13-11 reflects the fact that local regulation in certain cases is subject to approval by the commissioner.

### **27A:13-9. Petitions to the commissioner**

Any local public entity or person may petition the commissioner for the installation of a traffic control device on a state highway. The commissioner may investigate the need for the device after any petition but shall do so if the petitioner is a local public entity. The commissioner may install any traffic control device found necessary at the expense of the Department, or, if the petitioner is a public entity and consents, at the expense of the public entity.

Source: 39:4-121.1; 39:4-121.2; 39:4-121.3

#### COMMENT

This section is a broadened version of its sources which refer only to traffic lights. The source sections were unclear whether, upon receipt of a petition, the commissioner had a duty to investigate the need for a

traffic control device. This section allows the commissioner to conduct an investigation in any case but requires an investigation when the petitioner is a public entity.

#### **27A:13-10. Regulation of local highways**

a. A local public entity, subject to approval by the commissioner where it is required, may enact traffic regulations for highways within its control to meet special conditions and may install traffic control devices to enforce the regulations.

b. Except as provided in 27A:13-12, no traffic regulation by a local public entity shall be effective until approved by the commissioner. The commissioner shall not approve any regulation unless it is determined to be in the interest of safety and the expedition of traffic on the highways.

c. A local public entity shall not construct or place any traffic control device until its design, placement and operation are approved by the commissioner or certified as in compliance with Department rules by a licensed professional engineer.

Source: 39:4-8; 39:4-197; 39:4-201; 39:4-202

#### **COMMENT**

This section with sections 27A:13-12 regulates the power of local public entities to make traffic regulations for local highways and to place traffic control devices on those highways. Subsection (a) establishes the general authority to regulate. It replaces a number of statutes granting specific power for a wide range of specific kinds of regulation.

This section states the basic principle that, subject to the exceptions in 27A:13-12, local traffic regulation requires the commissioner's approval. The section has been divided into two subsections to reflect the fact that two separate kinds of approval are required. One involves consideration of whether the regulation is desirable; the other involves consideration of whether the traffic control devices necessary to implement the regulation meet department standards. While this distinction is important in practice and is implicit in current statutes it is not now stated explicitly. The section makes one additional substantive change: it allows certification that the device meets department standards to be made by a licensed professional engineer. Currently, Department approval is required, but, in practice, the department relies on the certification in granting approval.

#### **27A:13-11. Authority without prior approval**

a. Without the approval of the commissioner, a local public entity, for a highway under its jurisdiction which is not a continuation of and has no direct connection with any highway in any other municipality, may establish reasonable speed limits or may designate intersections as stop or yield intersections, provided that the municipal engineer, under seal as a licensed professional engineer, certifies to the commissioner that the regulation has been approved after investigation of the circumstances and appears to be in the interest of safety and the expedition of traffic on the highways. The municipal engineer shall submit to the commissioner, detailed information as to the location of streets and intersections affected, a statement of the reasons for the engineer's decision, a certified copy of the adopted local regulation, traffic count, accident and speed sampling data, when appropriate, and any other information as the commissioner may require.

b. Subject to the provisions of R.S. 39:4-138, without the approval of the commissioner, a local public entity, for a street within its control, may:

- (1) prohibit general parking;

- (2) designate handicapped parking as provided by this chapter;
- (3) designate time limit parking;
- (4) install parking meters;
- (5) designate loading and unloading zones and taxi stands;
- (6) approve street closings for periods of no more than 48 continuous hours.

Nothing in this subsection shall allow a local public entity to establish angle parking where it has not been allowed previously by markings or signs or to reinstate or add parking on any street without the approval of the commissioner.

c. Without approval of the commissioner, a local public entity may enact a temporary traffic regulation on any subject, other than the alteration of a speed limit, on which this chapter allows it to enact permanent traffic regulations, if the public entity adopts a resolution declaring that an emergency or temporary condition dictates adoption of special traffic regulations. A temporary regulation shall be effective for no more than 3 months.

d. A local public entity, on the request of the board of education or a private school, may regulate traffic at an intersection located within 300 feet of a public or private school if the local public entity first submits written information required by the commissioner, and the commissioner does not object within 90 days.

e. A local public entity may operate a traffic light placed with approval of the commissioner on a highway within its control as a flashing light during the offpeak hours between 10 p.m. to 6 a.m. if the local public entity first submits written information required by the commissioner, and the commissioner does not object within 90 days.

Source: 39:4-8; 39:4-120.2; 39:4-120.3; 39:4-120.4; 39:4-183.1a; 39:4-197.3; 39:197.4

#### COMMENT

This section provides exceptions to the rule established by 27A:13-10. Each of the exceptions is substantially identical to an exception in one of the source statutes: subsection (a) is derived from 39:4-8(b), subsection (b) from 39:4-8(c), subsection (c) from 39:4-197.3, subsection (d) from 39:4-183.1, and subsection (e) from 39:4-120.2. The subsections differ in the nature of the exceptions provided. Subsection (a), (b) and (c) provide a total exception; subsections (d) and (e) allow the commissioner the power to bar a regulation by objecting.

#### 27A:13-12. Regulation of private roads

If, as provided by law, a private road has been made subject to traffic regulation applicable to highways, with the permission of the owner of the road, the municipality in which the road is located may enact traffic regulations for the road and may authorize the installation of traffic control devices to enforce the regulations in the same manner as for highways within municipal control.

Source: New

#### COMMENT

This section is new. Many roads commonly used by the public, including roads in shopping centers and other private developments, are private roads. There are two separate problems in regard to traffic regulation on private roads: when the general state traffic laws apply on these roads and whether local traffic regulations can be made for them. This section deals with the second problem. There is now no clear statutory procedure for the enactment of traffic regulations for private roads. Some of the commissioners thought that the



Department of Transportation should have the authority to make regulations for private roads when circumstances such as the volume of traffic made regulation desirable. This section takes a more conservative approach, allowing a municipality to make traffic regulations and authorize the installation of traffic control devices for private roads in the same way that the municipality does for its own highways provided that the owners of the roads give their permission.

The other, more general problem, concerns when the general traffic laws are applicable to private roads. Sections 39:5A-1 and 39:5A-4 make all traffic laws applicable to certain private roads when the owner and the municipality so agree. In the absence of such an agreement, most of the traffic laws do not apply, and the few that apply are not sufficient to assure the safety of public users of private roads. See, State v. McColley, 157 N.J. Super. 525 (App. Div. 1978). In addition to the few traffic laws which now apply on or off highways, certain of the most basic traffic laws should apply on all private roads to which the public is admitted. These basics, the law against reckless and careless driving are relevant whatever the character of the road. Other laws that provide the rules of the road, laws requiring driving on the right, setting presumptive speed limits and the like, should apply only when the municipality and the owner decide that the road is to be treated like a public highway. The Commission recommends enactment of the following text supplementing 39:4-1 which governs the applicability of the chapter containing the traffic laws:

**The provisions of this chapter apply to vehicles on a private road if the owner of the road makes a written request to the municipality in which the road is located that motor vehicle laws be made applicable to the road, and the municipality enacts an ordinance concurring.**

**The provisions of this chapter concerning reckless driving (39:4-96) and careless driving (39:4-97) apply on highways and on all private roads to which the public is admitted.**

**The provisions of this chapter concerning driving while under the influence of liquor or drugs (39:4-50 and reports of accidents (39:4-129 and 39:4-130) apply on highways, on private roads and any in any other places where a vehicle is operated.**

## **27A:13-13. Handicapped Parking**

### **a. Restricted handicapped parking spaces are spaces:**

**(1) in front of residences, schools, hospitals and other public buildings and in shopping and business districts for use by persons issued special vehicle identification cards by the Division of Motor Vehicles, and using motor vehicles displaying certificates, for which a special vehicle identification card has been issued.**

**(2) in front of residences occupied by handicapped persons who are holders of current drivers' licenses issued by this State for use by motor vehicles equipped with special attachments and devices found necessary by the Director of the Division of Motor Vehicles for the safe operation motor vehicles by handicapped persons.**

**b. A local public entity which establishes restricted handicapped parking spaces as provided in subsection (a)(2) of this section shall provide for the issuance of permits which identify a specific motor vehicle and the location where it is to be parked. Permits shall only be issued to persons who can prove ownership and operation of the motor vehicle and residency at the location specified on it. The permit shall be 5 1/2 inches by 8 1/2 inches in size, bear an appropriate certification of authenticity and be displayed prominently within the vehicle when it is parked so as to be seen from the middle of the street. Only a motor vehicle for which a valid permit has been issued and which has such permit properly displayed shall be permitted to be parked in the restricted parking zone indicated on the permit. A local public entity may establish a fee for permits by ordinance.**

c. Restricted handicapped parking spaces may be established only where parking is not otherwise prohibited and where permitting parking would not interfere with the normal flow of traffic.

d. A person who parks a motor vehicle in a restricted handicapped parking space other than as authorized by this section shall be liable to a penalty not to exceed \$50.

Source: 39:4-197.5; 39:4-197.6; 39:4-197.7

COMMENT

This section is substantially identical to the source sections.

**27A:13-14. Enforcement on certain county highways**

A county and a municipality may agree that the municipality regulate traffic and parking on any county highway within its territory in the same way as if the highway were a municipal highway. The agreement shall specify what regulatory authority the county maintains and whether existing regulations remain in force.

Source: 39:4-197.2

COMMENT

While this section is similar to the source section, but it provides explicitly for agreements dividing regulatory authority between the county and the municipality.

**27A:13-15. Consent required**

In the exercise of its power to regulate parades, processions or assemblages, a municipality shall not prohibit normal traffic on any highway without the consent of the public entity which has control of that highway.

Source: 39:4-197.1

COMMENT

This section is substantially identical to the source section.

**27A:13-16. Additional powers of the commissioner**

In the administration and enforcement of the provisions of this chapter, the commissioner may:

a. when highways, other than totally self-contained highways, intersect each other, determine which highway is the through highway and order the public entity having control of the highways to place traffic control devices to conform with that determination;

b. order or cause the removal of warning signs regarding tracks or grade crossings of abandoned railroad lines;

c. enter into cooperative agreements with counties or municipalities to install, remove, alter or maintain traffic control devices on county or municipal highways and perform work or contract for its performance at the expense of the county or municipality;

**d. adopt regulations limiting the highways on which special classes of motor vehicles, tractors, trailers or semi-trailers may be operated.**

**Source: 39:4-143; 39:4-183.21a**

**COMMENT**

Subsection (a) is substantially identical to 39:4-143. Subsection (b) is substantially identical to 39:4-183.21a. There are no direct equivalents to subsections (c) and (d) in current statutes, but cooperative agreements as authorized by subsection (c) are common and routes for long or heavy motor vehicles have been established by regulation.

TABLE OF DISPOSITIONS

SECTION	DISPOSITION	COMMENT
39:4-8	27A:13-10; 27A:13-12	
39:4-105	Deleted	See 27A:13-5
39:4-106	Deleted	See 27A:13-5
39:4-107	Deleted	See 27A:13-5
39:4-108	Deleted	See 27A:13-5
39:4-109	Deleted	See 27A:13-5
39:4-110	Deleted	See 27A:13-5
39:4-111	Deleted	See 27A:13-5
39:4-112	Deleted	See 27A:13-5
39:4-113	Deleted	Unnecessary
39:4-114	Deleted	See 27A:13-5
39:4-115	Continued	Not within scope of Title 27A
39:4-116	Deleted	See 27A:13-5
39:4-117	Deleted	See 27A:13-5
39:4-118	Deleted	See 27A:13-5
39:4-119	Continued	Not within scope of Title 27A
39:4-120	27A:13-5(a)	
39:4-120.1	27A:13-6	
39:4-120.2	27A:13-11(e)	
39:4-120.3	27A:13-11(e)	
39:4-120.4	27A:13-11(e)	
39:4-121	27A:13-8	
39:4-121.1	27A:13-9	
39:4-121.2	27A:13-9	
39:4-121.3	27A:13-9	
39:4-122	Continued	Not within scope of Title 27A
39:4-138.1	27A:13-8	
39:4-140	Deleted	See 27A:13-10; 27A:13-11(a); 27A:13-16(a)
39:4-141	Deleted	See 27A:13-10; 27A:13-11(a)
39:4-143	27A:13-16(a)	
39:4-144	Continued	Not within scope of Title 27A
39:4-145	Continued	Not within scope of Title 27A
39:4-183.1	27A:13-6	
39:4-183.1a	27A:13-11(d)	
39:4-183.2	27A:13-4(c); 27A:13-5(b)	
39:4-183.3	27A:13-7	
39:4-183.4	27A:13-7	
39:4-183.5	27A:13-7	
39:4-183.6	27A:13-5(a)	
39:4-183.8	Deleted	See 27A:13-5
39:4-183.9	Deleted	See 27A:13-5
39:4-183.10	Deleted	See 27A:13-5
39:4-183.11	Deleted	See 27A:13-5
39:4-183.12	Deleted	See 27A:13-5
39:4-183.15	27A:13-5(c)	
39:4-183.21a	27A:13-16(b)	
39:4-183.22a	Deleted	See 27A:13-5
39:4-183.24	Deleted	See 27A:13-5
39:4-183.25	Deleted	Compilation unnecessary

39:4-183.27	27A:13-5(a)	
39:4-183.28	Deleted	Compilation unnecessary
39:4-183.29	Deleted	Compilation unnecessary
39:4-183.30	Deleted	Compilation unnecessary
39:4-191.1	27A:13-5(a); 27A:13-6	
39:4-191.2	Deleted	See 27A:13-5
39:4-191.6	Deleted	See 27A:13-5
39:4-191.7	Deleted	See 27A:13-5
39:4-196.1	Deleted	See 27A:13-10
39:4-196.2	Deleted	See 27A:13-5
39:4-196.3	Deleted	See 27A:13-5
39:4-197	27A:13-10	
39:4-197.1	27A:13-15	
39:4-197.2	27A:13-14	
39:4-197.3	27A:13-11(c)	
39:4-197.4	27A:13-11(b)	
39:4-197.5	27A:13-13	
39:4-197.6	27A:13-13	
39:4-197.7	27A:13-13	
39:4-197.8	27A:13-8	
39:4-198	27A:13-4	
39:4-199	27A:13-8	
39:4-199.1	27A:13-8	See also 27A:13-10
39:4-201	27A:13-10	
39:4-201.1	27A:13-8	
39:4-201.2	Deleted	Unnecessary
39:4-202	27A:13-10(b)	



**STATE OF NEW JERSEY**  
**NEW JERSEY LAW REVISION COMMISSION**

**TENTATIVE REPORT**

relating to

Transportation - Chapters 31, 32, 33 and 34 Public Transportation

December 1992

This tentative report is being distributed so that interested persons will be advised of the Commission's tentative recommendations and can make their views known to the Commission. Any comments received will be considered by the Commission in making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives.

It is just as important to advise the Commission that you approve of the tentative recommendations as it is to advise the Commission that you believe revisions should be made in the recommendations.

**COMMENTS SHOULD BE RECEIVED BY THE COMMISSION  
NOT LATER THAN FEBRUARY 24, 1993.**

Please send comments concerning this tentative report or direct any related inquiries, to:

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## **CHAPTERS 31, 32, 33 and 34**

### **PUBLIC TRANSPORTATION**

#### **INTRODUCTION**

Chapters 31 through 34 establish the authority of the Department of Transportation to regulate public transportation companies. That authority is now given to the department by a 1978 Executive Reorganization plan which transferred the authority from the Public Utility Commission. The statutes on public transportation are now found in Title 48 -- Public Utilities. Chapter 4 of that title concerns "autobusses", chapter 8, "ferries and steamboats", chapter 12, "railroads", chapter 15, "street railways", chapter 16, "taxicabs, autocabs and jitneys", and chapter 16A, "horsedrawn vehicles operated for hire". These chapters are intermixed with others on kinds of public utility unrelated to transportation.

Much of the current statutory material on regulation of public transportation is old. It contains detailed regulation by statute on subjects that are not now of primary importance. It reflects economic conditions that no longer obtain. At the time that many of the statutes in this area were enacted, public transportation companies were powerful economic forces. The situation has changed; there is now little to regulate. Most rail and bus service is provided by governmental entities or interstate operations acting by federal authority. There are some bus companies and a few rail companies subject to state regulation. These chapters provide authority for the Department of Transportation to require licenses for those public transportation operations and to regulate those companies as to safety, service and rates. For the most part, these chapters do not require particular kinds of regulation if those regulations no longer serve any public purpose.

This subtitle on public transportation is composed of four chapters. The first, chapter 31 contains a few provisions that apply to all kinds of regulated public transportation. The second, chapter 32, concerns public highway transportation. It requires insurance for all kinds of transportation of the public on the highways for hire. It requires the department to establish safety standards for public transportation vehicles. It also provides for comprehensive regulation of bus operations, and allows municipal regulation of taxis and jitneys.

The third chapter, chapter 33, provides for regulation of railroads. The term, "railroad" is defined to include any mode of transportation, the route of which is fixed by a track of any sort over which a vehicle moves, or by electrified rail, wires, or other power source to which a vehicle is attached. As a result, chapter 33 replaces current regulation of both railroads and street railways and contemplates future technological changes. The last chapter, chapter 34, allows the Department of Transportation to regulate waterborne transportation. At present, the only regulation of this transportation is the few, anachronistic, provisions on ferries and steamboats. See 48:8-1 to 17.

#### **CHAPTER 31 - PUBLIC TRANSPORTATION, GENERALLY**

##### **27A:31-1. Free passes for employees**

**Nothing in this subtitle shall be construed to prevent a public transportation company from issuing free passes to its employees and their families.**

**Source: 48:3-31**

**COMMENT**

This section is similar to its source but limits the class of persons who may be issued free passes.

**27A:31-2. Free transportation of police**

**Any public transportation company shall transport police officers and prosecutor's detectives engaged in the performance of their duties without fare.**

**Source: 48:3-32**

**COMMENT**

This section is substantially similar to its source.

**27A:31-3. Transportation of guide for blind person**

**Any public transportation company shall transport a blind person and that person's guide for the ordinary fare charged for a single person.**

**Source: 48:3-34**

**COMMENT**

This section is substantially identical to its source.

**27A:32-4. Regulations**

**The commissioner may issue regulations to effect the purposes of this subtitle.**

**Source: 48:2-12**

**COMMENT**

This section grants general regulatory power to the commissioner. Similar power was given to the Board of Public Utility Commissioners.

**CHAPTER 32 - PUBLIC HIGHWAY TRANSPORTATION**

**27A:32-1. Definitions**

**As used in this chapter,**

**a. "bus" means a public transportation vehicle other than:**

**(1) a taxi;**

(2) a limousine, unless the service is providing or is held out to be providing regular service between stated termini;

(3) a jitney;

(4) a vehicle used exclusively for the transportation of hotel patrons to or from airports, railroad stations or other transportation facilities;

(5) a vehicle used for the transportation of children to or from a school, camp, school or camp connected activity, child care center, pre-school center or other similar place of education, including "School Vehicle Type I" and "School Vehicle Type II" as defined in R.S. 39:1-1;

(6) a vehicle used in a ridesharing arrangement;

(7) a vehicle owned and operated by an employer and used exclusively for the transportation of its employees;

(8) a vehicle operated by authority of the New Jersey Public Transit Corporation.

b. "bus company" means any person holding a certificate of public convenience for the operation of a bus.

c. "jitney" means a public transportation vehicle carrying not more than 20 passengers and operated under municipal consent on an established route wholly in no more than four contiguous municipalities, which route is not, in whole or in part, on the same street as a bus route;

d. "limousine" means a public transportation vehicle with a carrying capacity of not more than nine passengers, not including the driver which is hired by charter or for a particular contract, or by the day or hour or other fixed period, or to transport passengers to a specified place or places, or which charges a fare or price agreed upon in advance between the operator and the passenger. It does not include taxicabs, hotel buses or school buses;

e. "taxi" means an automobile operated as a public transportation vehicle under municipal consent available for hire on the street and not providing regular service between stated termini;

f. "public transportation vehicle" means any motor vehicle operated over public highways in this State for the transportation of passengers for hire in intrastate business, whether or not it is also used in interstate commerce.

Source: 48:4-1; 48:16-1; 48:16-23

#### COMMENT

Subsection (a) and (b), the definitions of "bus" and "bus company" are derived from 48:4-1 but have been simplified and clarified. Subsection (c), the definition of "jitney" is derived from 48:16-23. Subsection (d), the definition of "limousine" Subsection (e), the definition of "taxi" is derived from 48:16-1. Subsection (f), the definition of "public transportation vehicle" is new.

#### 27A:32-2. Insurance

a. No person may operate a public transportation vehicle or a horse-drawn vehicle in the business of carrying passengers for hire unless the owner of the vehicle has filed:

(1) a copy of an insurance policy issued by an insurance company licensed in this state against liability of the vehicle owner for damages for bodily injury or death of any person resulting from an accident involving the vehicle; and

(2) a power of attorney appointing the chief fiscal officer of the municipality attorney for receipt of process served on the owner as the result of an accident involving the vehicle.

b. When the requirements of subsection (a) are satisfied, a certificate in duplicate shall issue for each vehicle covered by the insurance policy and power of attorney stating the name of the insurance company, the number and date of expiration of the policy or bond and a description of the vehicle insured. The original certificate shall be posted in a conspicuous place within the vehicle.

c. If the vehicle is a bus the filing shall be with the Department of Transportation, and that department shall issue the certificates.

d. If the vehicle is a taxi, horse-drawn vehicle, limousine or jitney the filing shall be with the clerk of the municipality in which the vehicle is operated, and that clerk shall issue the certificates. If a vehicle operates in more than one municipality, the filing shall be with the clerk of the municipality in which the owner has the principal place of business, and copies of the certificates issued by that clerk shall be filed with the clerk of each municipality in which the vehicle is operated.

e. The amount and type of insurance required for each class of vehicles for the transportation of passengers shall be set by the commissioner by regulation.

Source: 48:4-12; 48:4-19; 48:4-36; 48:4-37; 48:4-38; 48:4-40; 48:4-41; 48:4-47; 48:4-48; 48:4-49; 48:4-51; 48:4-52; 48:16-3; 48:16-4; 48:16-5; 48:16-6; 48:16-7; 48:16-14; 48:16-16; 48:16-17; 48:16-18; 48-16A-2; 48-16A-3; 48-16A-4; 48-16A-5; 48-16A-6

#### COMMENT

This section requires that public transportation vehicles and horse drawn vehicles used to carry passengers for hire carry liability insurance, register that insurance with a public authority and constitute that public authority an agent for service of process. These requirements are now made separately for each kind of vehicle. This section consolidates the requirements as well as simplifying and regularizing them. One distinction among kinds of vehicle made by the prior law is preserved: certain vehicles are regulated by municipalities, others by the Department of Transportation. Prior law specified the amount of insurance each kind of vehicle was required to carry. These amounts formed no discernable pattern; they have been replaced by subsection (e) which gives the Department of Transportation the authority to set amounts by regulation.

#### 27A:32-3. Self-insurance

a. The Commissioner of Insurance, by written order, pursuant to regulations of the Department of Insurance, may permit a corporation to carry its own liability insurance. The company may file a copy of the order with a sworn statement that the corporation is the owner of vehicles in lieu of an insurance policy or bond.

b. Permission self-insurance may be revoked by the Commissioner of Insurance if, after notice and a hearing, it appears that the corporation no longer is able to pay damages which may result from an accident involving vehicles owned by it.

Source: 48:4-13; 48:4-39; 48:4-50; 48:16-8; 48:16-9; 48:16-19; 48:16-20; 48:16A-7; 48:16A-8

#### COMMENT

This section replaces a group of source sections which deal separately with the issue of self-insurance for each kind of vehicle. The section gives authority to the Commissioner of Insurance to decide when a company could self-insure.

#### 27A:32-4. Penalty

a. Any person who knowingly operates a public transportation vehicle or a horse-drawn vehicle which is carrying passengers for hire and which is not at that time covered by insurance as required by this chapter is guilty of a crime of the fourth degree.

b. Any person who operates a public transportation vehicle or a horse-drawn vehicle in the business of carrying passengers for hire which does not display a valid permit, or who as owner permits such a vehicle to be operated, shall be guilty of a disorderly persons offense.

Source: 48:4-42; 48:4-43; 48:4-53, 48:4-54; 48:16-22; 48:16A-9

#### COMMENT

This section replaces a group of source sections which separately provide penalties for each kind of vehicle for failure to have insurance or to display the certificate issued by the regulating authority. In accord with the source statutes, failure to carry insurance is made a crime and failure to display the permit, a disorderly persons offense.

#### 27A:32-5. Standards for vehicles

a. The commissioner may adopt regulations applicable to the construction, equipment, maintenance and vehicle emission standards of vehicles for the transportation of passengers and shall provide for the inspection of those vehicles to assure compliance. Regulations concerning vehicle emission standards shall be adopted in consultation with the Division of Motor Vehicles and the Department of Environmental Protection. For the purpose of implementing this section, Department inspectors may enter all vehicles for the transportation of passengers and all premises on which those vehicles are located. The commissioner may order the immediate discontinuance of the operation of a vehicle not in compliance with regulations and that vehicle shall not be restored to service without approval. Regulations adopted under this subsection may be made applicable to buses carrying passengers between points in this state and points in other states.

b. Any person, who, without the approval of the commissioner, removes or defaces a notice of discontinuance that has been affixed to a vehicle or who operates a public transportation vehicle without a valid certificate of inspection issued by the commissioner is guilty of a crime of the fourth degree, and is subject to a civil penalty of \$1,000.

c. The commissioner may provide by regulation, for the inspection of public transportation vehicles. Any person who owns or operates a vehicle required to be inspected which does not display a valid certificate of inspection issued by the commissioner is a disorderly person.

Source: 48:4-2.1a; 48:4-2.1b; 48:4-18

#### COMMENT

This section continues the authority of the commissioner to regulate the construction, equipment, maintenance and emission standards for public transportation vehicles. This authority is now given generally by

48:4-2.1a and in regard to emission standards by 48:4-2.1b. Similar authority was given to the Board of Public Utility Commissioners by 48:4-18.

Subsection (c) provides for required inspection of public transportation vehicles. It is a continuation of 48:4-2.1a(d) and (e).

#### **27A:32-6. Certificate of public convenience**

**a. A person may not operate a bus carrying passengers for hire within this state unless that operation is permitted by a certificate of public convenience issued by the commissioner. A certificate shall be issued by the commissioner when it appears that its issuance is in the interest of public convenience, the promotion of public transportation, and the promotion of regular route bus service.**

**b. Each certificate shall be limited to a particular class of operation. Classes of operation for which certificates may be granted are:**

**(1) regular route bus service, operation between fixed termini, on a regular schedule and with provision for convenient one-way transportation in either direction;**

**(2) special bus service, operation not on a regular schedule, on a special trip arranged and designated by a bus company for a fixed charge for each passenger;**

**(3) commuter van service, operation with a seating arrangement designed to carry 8 to 15 adult passengers commuting on a daily basis to and from work;**

**(4) charter bus service, operation not on a regular schedule and pursuant to an arrangement in which a company agrees to furnish a bus and a driver for a fixed charge per trip, per bus or per mile;**

**(5) casino bus service, operation to or from any casino licensed under the "Casino Control Act," P.L. 1977, c.110 (C. 5:12-1 et seq.), unless that operation has been determined by the commissioner to be regular route bus service; and**

**(6) other classes of service as defined by regulation**

**c. Certificates may be limited by conditions as to the area of operation, equipment, maintenance, service or any other conditions related to public convenience, the promotion of public transportation and regular route bus service. Certificates for regular route bus service shall specify the route of operation. The commissioner may, upon notice and hearing, change the terms and conditions of any certificate.**

**Source: 48:4-1.2; 48:4-2.25, 48:4-3; 48:4-3.1**

#### **COMMENT**

This section establishes the basic authority of the commissioner to regulate buses, authority now given by the source sections. The approach of subsection (b), limiting certificates to particular classes of bus service, reflects current practice. However, the section is new in one aspect of its approach to bus regulation. Current law assumes that an individual certificate is issued for each bus. See, e.g., 48:4-8. This section provides for certificates for each operation. Regulatory authority was extended to casino, charter, and special bus operation by 48:4-2.25. Subsection (c) is derived from 48:4-3.1.

#### **27A:32-7. Suspension or revocation of certificates**

**a. The commissioner may, upon notice and hearing, revoke or suspend, for a specified period not to exceed one year, a certificate when the commissioner determines**

that its holder has failed to comply with any law or regulation or any conditions of the certificate.

b. A certificate may be revoked, upon notice and hearing, when the commissioner determines that no service has been provided under that certificate for the previous six months. The requirement for a hearing under this subsection shall be waived if the holder of the certificate fails to supply the commissioner, within 60 days of notice, with proof that service has been provided.

c. In the interest of public safety, the commissioner may, upon notice, suspend any certificate pending resolution of any proceeding for suspension or revocation of said certificate under this section.

Source: 48:4-7

#### COMMENT

Subsection (a) of this section is substantially identical to the first paragraph of the source section. Subsection (b) is new. It is intended to deal with the problem of bus companies which hold certificates but have provided no service under them for many years. Subsection (c) is also new. It would allow the commissioner to act to suspend a certificate when public safety requires that action.

Current law also allows the revocation of certificates when the demand for bus service is insufficient to support all companies. It seems more appropriate to leave such situations to market forces.

#### 27A:32-8. Transfer of certificate

A certificate for bus operation may be transferred by its holder with the approval of the commissioner. Application for approval may be made by either the transferor or transferee. After transfer, the transferor and transferee shall be jointly and severally liable for any outstanding debt due to the department at the time of transfer.

Source: 48:4-6

#### COMMENT

This section is substantially similar to its source.

#### 27A:32-9. Penalties

a. Any person who operates a bus without a certificate of public convenience required by this chapter, or who violates the provisions of a certificate of public convenience, is subject to a penalty of \$500 for each day of operation. This penalty may be collected pursuant to the Penalty Enforcement Act in an action initiated by the commissioner or by any bus company whose business is damaged by the operation.

b. The commissioner may bring an action in Superior Court to enjoin a bus operation without a certificate of public convenience or in violation of the provisions of a certificate of public convenience.

c. Any person who operates a bus without a certificate of public convenience required by this chapter shall be liable for damages caused by the operation to the business of any other bus company.

d. When a person is subject to a penalty under this section on more than one occasion, the commissioner may, after notice and hearing, find that that person is an unfit

**operator and revoke all certificates of public convenience held by that person and bar that person from applying for other certificates. Any order under this subsection may be relaxed by the commissioner in the public interest or to further the purposes of this chapter.**

**Source: 48:4-11**

**COMMENT**

This section is substantially similar to its source, but specifies the amount of penalty for each day of illegal operation.

**27A:32-10. Reports of finances and operations**

**The commissioner may adopt regulations requiring any bus company to furnish a report of finances and operations periodically in a specified form and providing for the examination and audit of all accounts relating to the operation of buses.**

**Source: 48:2-16; 48:4-25**

**COMMENT**

This section is substantially similar to subsections (2)(a) and (2)(b) of 48:2-16, and it subsumes the requirements of 48:4-25.

**27A:32-11. Accidents**

**The commissioner may adopt regulations requiring a bus company to give notice to the Department of any accidents occurring within the State connected with bus operations. The commissioner may investigate any accident and may make any orders or adopt any regulations with respect to safety, specifications or maintenance requirements as may appear to be in the public interest.**

**Source: 48:2-16**

**COMMENT**

This section is substantially similar to subsections (2)(c) of 48:2-16.

**27A:32-12. Investigations**

**The commissioner may investigate any matter within the Department's jurisdiction involving bus operations. The commissioner may inspect and examine all premises and all books, accounts, papers, records and memoranda kept by a bus company in respect of any matter which is within the department's jurisdiction and which would not be privileged in any judicial proceeding.**

**Source: 48:2-33**

**COMMENT**

This section is substantially similar to its source.



### **27A:32-13. Orders to bus companies**

**The commissioner may, upon hearing and notice, and by order in writing, require a bus company to furnish safe, adequate and proper service and to maintain its property and equipment in a condition that will enable it to do so. The commissioner may, pending any proceeding under this section, require the bus company to continue to furnish service and to maintain its property and equipment in a condition that will enable it to do so.**

**Source: 48:2-23**

#### **COMMENT**

This section is substantially similar to its source.

### **27A:32-14. Maintenance of service**

**A bus company holding a certificate for regular route bus service shall not discontinue or curtail that service without obtaining permission from the commissioner. The commissioner may withhold permission until after a hearing to determine if the discontinuance or curtailment will adversely affect public convenience and necessity. The hearing shall be held in the county whose residents will be affected most by the proposed discontinuance or curtailment and shall be held at a time at which persons affected will be able to attend. If regular route bus service is discontinued or curtailed, and the commissioner after a hearing finds that the service should be resumed, the commissioner may order that service be resumed forthwith or on a date fixed.**

**Source: 48:2-24; 48:2-32.3**

#### **COMMENT**

The restriction on curtailing service is derived from 48:2-24, but while the source applies to all public utilities, this section affects only regular route bus service. The provision on the time and place of hearing is substantially similar to 48:2-32.3.

### **27A:32-15. Purchase or sale of bus company property**

**a. A bus company shall not sell 60% or more of its property within any 12-month period, or agree to a merger or consolidation of its property or business, without obtaining permission from the commissioner.**

**b. A bus company shall give notice to the department in a manner prescribed by the commissioner, of every sale, purchase or lease of a bus.**

**Source: 48:3-7**

#### **COMMENT**

Subsection (a) is substantially similar to 48:3-7, but while the source applies to all public utilities, this section is limited to bus companies. Subsection (b) reflects current practice.

### **27A:32-16. Filing fares**

**Every bus company shall file with the commissioner complete schedules of fares charged by it for service provided under certificates for regular route bus service. The**

commissioner may adopt regulations requiring that bus companies file schedules of fares charged by it for all or particular kinds of service provided under certificates for other classes of bus service. No fare required to be filed may be altered except as provided by this chapter.

Source: 48:2-21

COMMENT

The restriction on curtailing service is derived from 48:2-24, but while the source applies to rates for all public utilities, this section is limited to fares for bus service. The section allows the commissioner to require that fares be filed for any class of bus service but requires filing only for regular route bus service.

**27A:32-17. Zone of rate freedom**

The commissioner shall establish annually by regulation a "zone of rate freedom" which specifies the maximum permitted percentage adjustment to any fare required to be filed by this chapter that may be made without approval. The commissioner may establish different zones for casino bus service, charter bus service, regular route bus service, and special bus service, based on the special features of these sectors of the bus industry. In establishing the zone, the commissioner shall consider all relevant factors, including but not limited to the availability of alternative modes of transportation, increases or decreases of the cost of bus operations, the interests of the users of bus services and the fares prevailing in the bus industry, as well as in other related transportation services, such as rail services. The commissioner shall establish the zone for each calendar year 60 days prior to the beginning of that calendar year.

Source: 48:4-2.21; 48:4-2.25

COMMENT

This section is substantially identical to its sources.

**27A:32-18. Change of fares without approval**

Any fare for bus service filed with the commissioner by a bus company shall be valid without action by the commissioner if:

a. The bus company files with the commissioner a complete schedule of all fares to be adjusted at least 30 days prior to their effective date and notifies the commissioner that the filing is made pursuant to this section;

b. The aggregate of increases or decreases in any single fare is not more than the maximum percentage increase or decrease permitted under the zone of rate freedom for the year in question; and

c. Public notice is posted at least 10 days prior to the effective date of the adjusted fares or in all bus terminals served by buses affected by the adjusted fares and, in the case of regular route bus service, in all buses providing service on the affected route.

Source: 48:4-2.20; 48:4-2.22

COMMENT

This section is substantially identical to its sources.

### **27A:32-19. Change of fares on petition**

**A bus company may petition the commissioner for alteration of any fare required to be filed. If, after notice and hearing, the bus company shows that the proposed alteration in fares is just and reasonable and that the existing fare is unjust, unreasonable, insufficient or unjustly discriminatory or preferential.**

**Source: 48:4-2.24**

#### **COMMENT**

This section allows petitions to change fares where the changes are not those which a company may make without approval as within the zone of rate freedom. It is substantially similar to its source.

### **27A:32-20. Unreasonable practices forbidden**

**No bus company may adopt or maintain any regulation or practice which is unjust, unreasonable, unduly preferential, arbitrarily or unjustly discriminatory or in violation of law.**

**Source: 48:3-2**

#### **COMMENT**

The restriction on unreasonable regulations is derived from 48:3-2, but while the source applies to regulations of all public utilities, this section is limited to those of bus companies.

### **27A:32-21. Municipal fees and charges**

**A municipality shall not impose a franchise tax or municipal license fee on driving, owning or operating a bus. The State shall remit annually to each municipality an amount equal to the bus franchise taxes received by the municipality during the calendar year 1972.**

**Source: 48:4-2.2; 48:4-14.1; 48:4-14.2**

#### **COMMENT**

This section is substantially identical to its sources.

### **27A:32-22. Annual assessments; tax on interstate buses**

**a. The commissioner shall make an annual assessment against each bus company of not more than 1/4 of one percent of the bus company's gross operating revenues derived from intrastate operations during the preceding calendar year. The total of the annual assessments shall not exceed the amount of appropriations to the department used for the regulation of buses.**

**b. A person who operates a bus carrying passengers on highways in this State in interstate commerce, the revenues from that operation not being subject to the assessment provided in subsection (a), shall pay to the commissioner an excise tax for the use of the highways of one-half cent for each mile that the bus is operated on highways in this State. Excise tax receipts shall be used for the construction and maintenance of highways. No excise tax shall be due on the mileage traversed in:**

- (1) providing regular route commuter bus service between a point in the State and a point outside the State;
- (2) providing bus service under contract with the New Jersey Transit Corporation; or
- (3) providing special or rural transportation bus service under a contract with a county subject to the jurisdiction of the New Jersey Transit Corporation pursuant to P.L. 1979, c. 150 (C. 27:25-1 et seq.).

c. By regulation, the commissioner shall provide procedures for the calculation and collection of assessments and excise tax, and may require persons subject to assessments or excise tax to file reports containing relevant information.

Source: 48:2-59 to 72; 48:4-20 to 34

**COMMENT**

This section is substantially identical to its sources.

**27A:32-23. Municipal taxi permits**

a. A taxi may not accept a passenger in a municipality unless the taxi has been issued a permit by the municipality. A municipality may not require fees or other charges in excess of \$50.00 per year for a permit to operate a taxi.

b. A taxi permit may be revoked by the municipality, after notice and hearing, if it appears that the person to whom it was granted has failed to comply with any terms or conditions of the permit, or any law.

c. Any person who operates a taxi without the permit required by this section is guilty of a disorderly persons offense.

Source: 48:16-2, 48:16-10, 48:16-12

**COMMENT**

This section is substantially identical to its sources.

**27A:32-24. City jitney permits; fee or franchise tax**

a. A jitney may not be operated in any municipality unless the jitney has been issued a permit by the municipality.

b. A permit may be revoked by the municipality, after notice and hearing, if it appears that the person to whom it was granted has failed to comply with any terms or conditions of the permit, or any law.

c. A municipality may require fees and other charges of not more than \$100.00 per year for a permit to operate a jitney, or in lieu of fees and charges, may assess a monthly franchise tax of not more than five per cent of gross revenues. If the jitney is operated in part outside of the municipality, the tax shall be assessed on the proportion of the revenues equal to the proportion of the jitney route which is in the municipality. If a franchise tax is imposed by a municipality, every person operating a jitney in that municipality shall file a monthly revenue statement.

**d. Any person who operates a jitney without the permit required by this section or who fails to file a revenue statement required by this section is guilty of a disorderly persons offense.**

**Source: 48:16-24, 48:16-25, 48:16-27, 48:16-28**

**COMMENT**

This section is substantially identical to its sources.

**27A:32-25. Other motor vehicle laws applicable**

**Nothing in this chapter exempts a person who owns or operates a vehicle from complying with the law relating to the ownership, registration and operation of motor vehicles in this state.**

**Source: 48:4-2; 16-11; 16-21; 16-26**

**COMMENT**

This section is substantially identical to its sources.

**27A:32-27. Evidence in suits not involving department**

**Employees of the department shall not be required to testify or provide documents with regard to information obtained in the discharge of duties under this chapter in civil actions in which the department is not a party.**

**Source: 48:2-38**

This section is substantially identical to its source.

**CHAPTER 33 - RAILROADS**

**27A:33-1. Railroad defined**

**For purposes of this chapter, "railroad" means any mode of transportation, the route of which is fixed by a track of any sort over which a vehicle moves, or by electrified rail, wires, or other power source to which a vehicle is attached. "Railroad" includes a street railway, trolley, trolley bus, trackless trolley, monorail. A railroad which is exempt from regulation because of federal or other state law, to the extent of that exemption, is not subject to this chapter.**

**Source: New**

**COMMENT**

The definition of "railroad" is new. This chapter covers not only systems traditionally known as railroads but also other forms of vehicles travelling on a fixed guideway or travelling attached to a fixed power line. Such vehicles traditionally have included trolleys and trolley buses. While few such vehicles now operate, changes in technology make new kinds feasible. Since, at present, very few rail transportation systems subject to

department regulatory power are operating, and all of these systems present similar issues, it is convenient to provide a single regulatory system for all of them. As a result, this chapter replaces both the chapter on railroads, 48:12-1 to 48:12-167, and the chapter on street railroads, 48:15-1 to 48:15-67.

#### **27A:33-2. Licences**

**a. No person may operate a railroad in this State without an appropriate license as provided by this section.**

**b. The commissioner may establish classes of railroad operation requiring a license, and establish requirements, application procedures and fees for each type of license.**

**c. The commissioner may exempt certain classes of railroad operation from the licensing requirement established by this section where it appears that those classes do not have a significant impact on transportation or are subject to other regulatory control which make Department licensing unnecessary.**

**Source: Various**

#### **COMMENT**

While there is no single source for this section, it is clear that a franchise is required for the operation of a railroad. The existence of franchises is assumed by the whole current statutory scheme. There is a reference to franchises in 48:12-2, exercise of a franchise without authority is made punishable by 48:12-157, and a railroad is not permitted to collect any passenger fares or freight charges unless those charges are authorized by the regulatory authority. See, 48:12-100 and 48:12-117.

#### **27A:33-3. Safety regulations**

**a. The commissioner may regulate the operation, maintenance, and equipment of railroads and of their rights of way to assure the safety of the public. The commissioner may also regulate the amounts and kinds of liability insurance required for railroad operations.**

**b. If any person is dissatisfied with the safety protection at a railroad crossing, that person may petition the commissioner to require appropriate safety protection.**

**Source: Various; 48:12-55**

#### **COMMENT**

At present, there are many statutes specifying particular safety requirements for railroads. See, e.g. Duty to erect fences, 48:12-46, Bells and whistles or locomotives, 48:12-57, Spark arresters on engines, 48:12-85. Subsection (a) is a generalization of these requirements. It authorizes the department to enact regulations where public safety requires. The regulatory process is more flexible than the enactment of particular statutory safety requirements, and that flexibility will allow the regulations to follow current needs more closely.

#### **27A:33-4. Service regulations**

**a. The Department may regulate the service provided by railroads, including the railroad's routes and schedules, the kinds of services provided, and rates charged for those services. By regulation, the Department may require that a railroad receive a Department**

permit to commence, change, or discontinue service or to change rates charged. The commissioner may attach conditions on any permit required pursuant to this section.

b. If a railroad is required to maintain a particular service and fails to maintain it, the commissioner may appoint an administrator to manage the railroad and provide the service. The cost of the administrator and of any operations of the railroad while under administration shall be charged to the railroad.

Source: 48:12-99 to 48:12-108; 48:12-117 to 48:12-125; 48:12-145 to 150

#### COMMENT

This section is a generalization of three groups of current provisions. Sections 48:12-99 to 48:12-108 regulate the fares and other conditions of passenger service; 48:12-117 to 48:12-125 regulate freight charges; 48:12-145 to 150 provides a remedy if a railroad fails to run trains. This section is permissive; the department may choose to regulate on some or all of the subjects. It need not do so.

### 27A:33-5. Power of eminent domain

a. When authorized by the commissioner, a railroad may take property in the exercise of the power of eminent domain. Except as limited by this section, when the construction of a route of a railroad is approved by the commissioner, that approval shall be deemed authorization for the exercise of the power of eminent domain insofar as that power is necessary for construction of that route or any station on it.

b. Any authorization to take any of the following kinds of property in the exercise of the power of eminent domain shall specifically identify the property and include a finding that the public need for railroad use of the property outweighs the current public use of the property:

- 1) public property devoted to public use;
- 2) property of a public utility;
- 3) property of another railroad.

c. The commissioner shall not authorize the taking of State land less than 25 feet under the bed of a body of water without the consent of the Commissioner of Environmental Protection.

Source: 48:12-35.1; 48:12-41; 48:15-16.1; 48:15-49

#### COMMENT

This section differs from its sources in one important respect: this section requires specific authorization by the commissioner for any exercise of eminent domain authority.

### 27A:33-6. Railroads on public rights of way

The commissioner may authorize a railroad to operate on public property or right of way with the approval of the public body having control of that property or right of way. Any approval by a public body having control of property or right of way shall have the force of contract between that body and the railroad.

Source: 48:15-3; 48:15-29; 48:15-30

**COMMENT**

The sources for this section allow a municipality to grant to a street railway company the right to run trolleys on its streets. In accord with the increased state role in transportation, this section requires permission from both the Department of Transportation and the public entity with control of the highway.

**27A:33-7. Crossing highways, other railroads, bodies of water**

**a. A railroad may construct its route across a public highway or the route of another railroad provided that the crossing is constructed in the manner allowed by Department regulations and provided that the crossing does not prevent or unnecessarily impede the use of the highway or railroad crossed**

**b. A railroad may construct its route across bodies of water, but any bridge, tunnel or other crossing shall be constructed in the manner allowed by Department regulations.**

**Source: 48:12-20; 48:12-36; 48:12-41**

**COMMENT**

This section continues the policy of the source statutes, but it is written in more general terms than its sources.

**27A:33-8. Ownership and maintenance of highway crossings**

**a. If a railroad grade crossing is not properly maintained, and as a result presents a hazard to the safety of the public, the municipality in which the crossing is located may perform necessary maintenance and petition the commissioner to order payment by the railroad or other responsible party.**

**b. If there is a dispute concerning the responsibility for maintenance of a bridge carrying a railroad over a highway, the commissioner may determine who has that responsibility. The commissioner shall assign that duty to the railroad unless it appears from review of applicable statutes, regulations, local ordinances, maintenance agreements, records concerning improvement projects and maintenance activities, and other applicable evidence that the preponderance of evidence indicates that the entity with responsibility for the highway has assumed effective control or responsibility for the bridge.**

**Source: 48:12-52; 48:12-75**

**COMMENT**

Subsection (a) continues the power given to municipalities to maintain crossings which pose a danger to the public. The source section applies to bridges as well. Bridges carries a highway over a railroad are now handled in a more comprehensive way by sections 27:5G-6 through 27:5G-19. Bridges carrying a railroad over a highway are covered by subsection (b) which is patterned after 27:5G-10.

**27A:33-9. Elimination of grade crossings**

**To the extent of available funds, the commissioner may engage in a program of elimination of grade crossings. In furtherance of this program, the commissioner may identify crossings for elimination and order route changes or the construction of overpasses to eliminate these grade crossings.**

**Source: 48:12-61 to 48:12-78**



#### COMMENT

The source sections establish a variety of programs to eliminate grade crossings. Some of these programs call for the division of cost between the state and the railroad. See 48:12-70 calling for 95% of the cost to be borne by the State. This section gives the general authority to eliminate grade crossings to the Department of Transportation. Matters concerning division of cost and responsibility for resulting structures are left to agreements among interested parties.

#### **27A:33-10. Free passage by State Officials**

**As a condition of permitting the operation of a railroad, the commissioner may require that the railroad allow free passage in coach service within the state by the following officials:**

**The Governor, justices of the Supreme Court and judges of the Superior Court, judges of the Tax Court, Attorney General and Deputies Attorney General Secretary and Assistant Secretary of State, State Treasurer and Deputy State Treasurer, State Comptroller, Deputy State Comptroller and assistant to Comptroller, State Tax commissioner, Chief Engineer in the Division of Railroad Valuation of the State Tax Department, State supervisor of inheritance tax, Clerk of the Supreme Court, Adjutant general, Quartermaster general, secretary to the Governor, executive clerk, clerk to the school fund, State Librarian, Custodian of the Capitol, supervisors of the state prisons and reformatories, Commissioner and assistant commissioners of Education, members, secretary and protectors of the Board of Fish and Game Commissioners, Secretary of the State Board of Agriculture, Commissioners of Banking and Insurance, deputy Commissioners of Banking and Insurance, chief, division of personal loan agencies of the Department of Banking, chief, license division of the Department of Banking, insurance investigator of the Department of Insurance, Department of Corrections, parole agent of the New Jersey State Prison, chief parole officer of the New Jersey State Home for Boys, chief parole officer of the New Jersey reformatory, field parole officer of the New Jersey reformatory, parole officer of the New Jersey State Home for Girls, State prison inspectors, Commissioner of the Department of Human Services, Director of the Division of Youth and Family Service, Commissioner of Labor, bureau chiefs of the Department of Labor, the members of the North Jersey Water Supply Commission, members, counsel, secretary and inspectors of the Board of Public Utility Commissioners, Commissioner of the Department of Transportation, Commissioner of the Department of Personnel, State and assistant State Purchasing Agent, Director of Public Record Office, Superintendent of Weights and Measures, State Auditor, members of New Jersey Interstate Bridge and Tunnel Commission, members, counsel and secretary of the South Jersey Port Commission, members, secretaries and engineer of the New Jersey Traffic Commission, members of the Rehabilitation Commission, members and director of the Board of Conservation and Development, members and chief engineer of the Board of Commerce and Navigation, members of the Department of Health of the State of New Jersey, Director and assistant director of Health of the State of New Jersey, members of the Board of Shell Fisheries, Director of Shell Fisheries, members and officers of both Houses of the Legislature of this State and the members of the House of Representatives and United States Senators of New Jersey.**

**If a right of free passage is required, the Commissioner shall provide by regulation for the issuance of passes to these officials.**

**Source: 48:12-109 to 116**

**COMMENT**

This section is similar to its sources but allows the commissioner discretion as to whether free passes are required of a railroad. There are three provisions on allowing free passage on all forms of public transportation, 27A:31-1 to 27A:31-3, permitting a company to issue passes for its employees and their families, and requiring free transportation of police and guides for blind persons.

**27A:33-11. Abandonment of service**

**When a railroad abandons service on any part of its route, it shall inform the department and the governing bodies of each municipality in which the abandoned parts of the route are located. If the abandoned parts of the route include any grade crossings, the Department shall inform the public body having control of each highway crossed, and assure that the warning signs and signals for the crossing are removed and replaced with appropriate signs saying: "abandoned grade crossing".**

**Source: 48:12-58.1; 48:12-125.1 to 125.3**

**COMMENT**

This section is substantially identical to its sources.

**27A:33-12. Operating railroad vehicle while intoxicated**

**No person shall operate a railroad vehicle while under the influence of or using intoxicating liquor or controlled dangerous substance as defined by L.1970, c.226, §2 (C. 24:21-2).**

**Source: 48:12-163**

**COMMENT**

The source for this section penalizes only operating a railroad vehicle while intoxicated. This section has been broadened to include operating a railroad vehicle while under the influence of a controlled dangerous substance.

**27A:33-13. Violations**

**Any person who violates a provision of this chapter or a regulation issued pursuant to it shall be liable to a penalty of up to \$1000, which may be enforced by the Commissioner in the name of the State in an action in the Superior Court or in any municipal court in accordance with the procedure prescribed in "the Penalty Enforcement Law" (N.J.S. 2A:58-1 et seq.).**

**Source: Various**

**COMMENT**

Many of the sections in the chapters of Title 48 which regulate railroads and street railways specify particular penalties for violations. This section provides a single penalty for violations of any of the provisions of the chapter.

## **27A:33-14. Railroad police**

**a. Any railroad may establish a police department.**

**b. A person shall not be employed as a railroad police officer unless approved by the Superintendent of State Police. The Superintendent of State Police shall investigate the character, competence, integrity, and fitness of persons applying to be railroad police officers and shall certify those approved.**

**c. Officers certified by the Superintendent of State Police and employed by a railroad police department shall have the powers of a municipal police officer. While on duty, a railroad police officer shall carry a badge with the words "railroad police" and the name of the railroad company by which the officer is employed. If the officer is in uniform, the officer shall wear the badge.**

**Source: 48:3-38**

### **COMMENT**

This section continues the substance of its source, but in a simplified form.

## **CHAPTER 34 - WATERBORNE TRANSPORTATION**

### **27A:34-1. Waterborne transportation defined**

**For purposes of this chapter, "waterborne transportation" means any transportation of persons over water for consideration.**

**Source: New**

### **COMMENT**

At present, there is no regulatory authority over waterborne transportation. The only law on the subject is a miscellaneous group of anachronistic statutes in chapter 8 of title 48 - Public Utilities. This chapter is patterned after the chapter on railroads. It allows the Department of Transportation to regulate waterborne transportation in the same way as it regulates rail transportation. Each of the sections grants authority for particular kinds of regulation. Together, these sections allow the department to choose the kinds of regulation needed to protect the public; they do not require that any regulation be imposed.

### **27A:34-2. Licences**

**a. By regulation, the commissioner may establish classes of waterborne transportation requiring a license, and establish requirements, application procedures and fees for each type of license.**

**b. The commissioner may exempt certain classes of waterborne transportation from the licensing requirement established by this section where it appears that those classes do not have a significant impact on transportation or are subject to other regulatory control which make Department licensing unnecessary.**

**c. No person may engage in waterborne transportation in this State without an appropriate license as provided by this section.**

**Source: New**

**COMMENT**

This section allows the department to require that a person be licensed before engaging in waterborne transportation of passengers or particular kinds of waterborne transportation of passengers.

**27A:34-3. Safety regulations**

**The commissioner may regulate the operation, maintenance, and equipment of waterborne transportation to assure the safety of the public. The commissioner may also regulate the amounts and kinds of liability insurance required for waterborne transportation.**

**Source: New**

**COMMENT**

This section allows the department to make safety regulations for waterborne transportation of passengers.

**27A:34-4. Service regulations**

**The Department may regulate the service provided by persons engaging in waterborne transportation, including the routes and schedules, kinds of service, and rates charged for those services. By regulation, the Department may require that a person operating waterborne transportation receive a Department permit to commence, change, or discontinue service or to change rates charged. The commissioner may attach conditions on any permit required pursuant to this section.**

**Source: New**

**COMMENT**

This section allows the department to make service regulations for waterborne transportation of passengers.

**27A:34-5. Facilities for waterborne transportation**

**The department may construct wharfs and other facilities for use by waterborne transportation, and may charge reasonable fees for the use of those facilities.**

**Source: New**

**COMMENT**

This section allow the department to encourage waterborne transportation of passengers by building facilities for its use.

**27A:34-6. Violations**

**Any person who violates a provision of this chapter or a regulation issued pursuant to it shall be liable to a penalty of up to \$1000, which may be enforced by the commissioner in the name of the State in an action in the Superior Court or in any municipal court in accordance with the procedure prescribed in "the Penalty Enforcement Law" (N.J.S. 2A:58-1 et seq.).**

**Source: New**

**COMMENT**

**This section provides enforcement power for any regulation under this chapter.**

**TABLE OF DISPOSITIONS**  
**Chapters 31, 32, 33 and 34 -- Public Transportation**

48:3-29	Deleted	Unnecessary
48:3-30	Deleted	Unnecessary
48:3-32	27:31-2	
48:3-33	Deleted	See 10:5-29
48:3-34	27A:31-3	
48:3-35	Deleted	Unnecessary
48:3-36	Deleted	Unnecessary
48:3-37	Deleted	Unnecessary
48:3-38	27A:33-14	
48:4-1.	27A:32-1	
48:4-1.2.	27A:32-6	
48:4-2.	27A:32-25	
48:4-2.1a.	27A:32-5	
48:4-2.1b.	27A:32-5	
48:4-2.2.	27A:32-21	
48:4-2.3.	Deleted	
48:4-2.20.	27A:32-18	
48:4-2.21.	27A:32-17	
48:4-2.22.	27A:32-18	
48:4-2.23.	27A:32-26	
48:4-2.24.	27A:32-19	
48:4-2.25.	27A:32-17	
48:4-3.	27A:32-6	
48:4-3.1.	27A:32-6	
48:4-6.	Deleted	
48:4-7.	27A:32-7	
48:4-8.	Deleted	
48:4-9.	Deleted	
48:4-11.	27A:32-9	
48:4-12.	27A:32-2	
48:4-13.	27A:32-3	
48:4-14.1.	27A:32-21	
48:4-14.2.	27A:32-21	
48:4-18.	27A:32-5	
48:4-19.	27A:32-2	
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48:4-31.	27A:32-22	
48:4-32.	27A:32-22	
48:4-33.	27A:32-22	
48:4-34.	27A:32-22	
48:4-35.	Deleted	

48:4-36.	27A:32-2	
48:4-37.	27A:32-2	
48:4-38.	27A:32-2	
48:4-39.	27A:32-3	
48:4-40.	27A:32-2	
48:4-41.	27A:32-2	
48:4-42.	27A:32-4	
48:4-43.	27A:32-4	
48:4-44.	Deleted	
48:4-45.	Deleted	
48:4-46.	Deleted	
48:4-47.	27A:32-2	
48:4-48.	27A:32-2	
48:4-49.	27A:32-2	
48:4-50.	27A:32-3	
48:4-51.	27A:32-2	
48:4-52.	27A:32-2	
48:4-53.	27A:32-4	
48:4-54.	27A:32-4	
48:4-55.	Deleted	
48:12-1	Deleted	See 27A:23-1
48:12-2	Deleted	Unnecessary
48:12-3	Deleted	Unnecessary
48:12-4	Deleted	Unnecessary
48:12-13 to 18	Deleted	Unnecessary
48:12-19	Deleted	Unnecessary
48:12-20	27A:23-5	
48:12-21	Deleted	Unnecessary
48:12-22	Deleted	Unnecessary
48:12-23	Deleted	Unnecessary
48:12-23.1	Deleted	Unnecessary
48:12-24 to 34	Deleted	Unnecessary
48:12-35.1	27A:23-5	
48:12-36	27A:23-6	
48:12-37 to 40	Deleted	Unnecessary
48:12-40.1	Deleted	See 27A:23-2
48:12-40.2	27A:23-13	
48:12-41	27A:23-5 & 7	
48:12-42	Deleted	See 27A:23-3
48:12-43 to 45	Deleted	See 27A:23-7
48:12-46	Deleted	See 27A:23-3
48:12-47	Deleted	Unnecessary
48:12-48	Deleted	See 27A:23-3
48:12-49	Deleted	See 27A:23-3
48:12-49.1	Deleted	See 27A:23-8
48:12-50	Deleted	Unnecessary
48:12-51	Deleted	See 27A:23-5; 27A:23-7
48:12-52	27A:23-8	
48:12-53	Deleted	See 27A:23-6
48:12-54	Deleted	See 27A:23-3
48:12-55	27A:23-3	
48:12-56	Deleted	See 27A:23-13
48:12-57	Deleted	See 27A:23-3
48:12-58	Deleted	See 27A:23-3

48:12-58.1	27A:23-11	
48:12-59	Deleted	See 27A:23-3
48:12-60	Deleted	See 27A:23-13
48:12-61 to 74	27A:23-9	
48:12-75	27A:23-8	
48:12-76 to 81	27A:23-9	
48:12-82 to 84	Deleted	Unnecessary
48:12-85 to 87	Deleted	See 27A:23-3
48:12-87.1 to 89	Deleted	See 27A:23-3
48:12-90	Deleted	See 27A:23-4
48:12-90.1 to 90.4	Deleted	See 27A:23-3
48:12-91 to 98	Deleted	Unnecessary
48:12-99 to 108	Deleted	See 27A:23-4
48:12-109 to 116	27A:23-10	
48:12-117 to 125	Deleted	See 27A:23-4
48:12-125.1 to 125.3	27A:23-11	
48:12-126 to 144	Deleted	See 27A:23-10
48:12-145 to 150	27A:23-11	
48:12-151	Deleted	Unnecessary, see
48:12-152	Deleted	Unnecessary, see
48:12-153	Deleted	Unnecessary
48:12-154	Deleted	Unnecessary
48:12-155	Deleted	See 27A:23-3
48:12-156	Deleted	Unnecessary
48:12-157	27A:23-13	
48:12-158	Deleted	See 27A:23-3
48:12-160	Deleted	See 27A:23-3
48:12-161	Deleted	See 27A:23-3
48:12-163	27A:23-12	
48:12-164	Deleted	Unnecessary; see, 2C:
48:12-165	Deleted	See 2C: various
48:12-166	Deleted	See 2C:20-
48:12A-17 to 21	27A:23-9	
48:15-1	Deleted	See 27A:23-1
48:15-2	Deleted	Unnecessary
48:15-3	27A:23-6	
48:15-4 to 14	Deleted	Unnecessary
48:15-16.1	27A:23-5	
48:15-17	Deleted	Unnecessary
48:15-18	Deleted	Unnecessary
48:15-19	Deleted	See 27A:23-4
48:15-20	Deleted	See 27A:23-4
48:15-21	Deleted	See 27A:23-3; 27A:23-4
48:15-22	Deleted	See 27A:23-3
48:15-23	Deleted	See 27A:23-3
48:15-24	Deleted	See 27A:23-2; 27A:23-4
48:15-25 to 27	Deleted	See 27A:23-4
48:15-28	Deleted	See 27A:23-6
48:15-29	27A:23-6	
48:15-30	27A:23-6	
48:15-31 to 34	Deleted	Unnecessary
48:15-35	Deleted	See 27A:23-3; 27A:23-4
48:15-36	Deleted	See 27A:23-3; 27A:23-4



48:15-37 to 43.3	Deleted	Unnecessary; see 27A:23-4
48:15-44 to 48	Deleted	See 27A:23-4; 27A:23-6
48:15-49	27A:23-5	
48:15-50	Deleted	See 27A:23-4 to 6
48:15-51	Deleted	Unnecessary
48:15-52 to 54	Deleted	See 27A:23-6
48:15-55	Deleted	Unnecessary
48:15-56	Deleted	Unnecessary
48:16-1.	27A:32-1	
48:16-2.	27A:32-23	
48:16-3.	27A:32-2	
48:16-4.	27A:32-2	
48:16-5.	27A:32-2	
48:16-6.	27A:32-2	
48:16-7.	27A:32-2	
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48:16-10.	27A:32-23	
48:16-11.	27A:32-25	
48:16-12.	27A:32-23	
48:16-13.	27A:32-1	
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48:16-22.	27A:32-4	
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48:16-26.	27A:32-25	
48:16-27.	27A:32-24	
48:16-28.	27A:32-24	
48:16A-1.	Deleted	
48:16A-2.	27A:32-2	
48:16A-3.	27A:32-2	
48:16A-4.	27A:32-2	
48:16A-5.	27A:32-2	
48:16A-6.	27A:32-2	
48:16A-7.	27A:32-3	
48:16A-8.	27A:32-3	
48:16A-9.	27A:32-4	

And look at:

48:3-31	amend; passes for employees
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**STATE OF NEW JERSEY**  
**NEW JERSEY LAW REVISION COMMISSION**

**TENTATIVE REPORT**

relating to

Distress - N.J.S. 2A:33-1 to 23

November 1992

This tentative report is being distributed so that interested persons will be advised of the Commission's tentative recommendations and can make their views known to the Commission. Any comments received will be considered by the Commission in making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives.

It is just as important to advise the Commission that you approve of the tentative recommendations as it is to advise the Commission that you believe revisions should be made in the recommendations.

**COMMENTS SHOULD BE RECEIVED BY THE COMMISSION  
NOT LATER THAN JANUARY 24, 1993.**

Please send comments concerning this tentative report or direct any related inquiries, to:

**John M. Cannel, Esq., Executive Director**  
**NEW JERSEY LAW REVISION COMMISSION**  
15 Washington Street, Room 1302  
Newark, New Jersey 07102  
201-648-4575



### DISTRESS - N.J.S. 2A:33-1 to 23

Distress, the act of distraining (seizing) a tenant's goods to satisfy an arrears of rent, is a common law right of the landlord exercised in a nonjudicial proceeding. New Jersey statutes have regulated distraint since 1795. The current statutes, N.J.S. 2A:33-1 to -23, derive from the 1877 compilation with one exception: 2A:33-1 was amended in 1971 to prohibit distraints for money owed on residential property. The New Jersey distress statutes violate federal constitutional standards protecting ownership of property.

Constitutional problems of statutes that allow a party to take or hold property without notice and a hearing were raised first in Sniadach v. Family Fin. Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed. 2d 349 (1969). The Court invalidated a Wisconsin statute allowing creditors to garnish wages of debtors through a summons issued by the court clerk. The Court found that a wage earner must be allowed a pre-deprivation hearing. Without notice and a hearing, pre-judgment garnishment violates due process principles. Id. at 341-42.

In Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556, reh'g denied 409 U.S. 902, 93 S.Ct. 177, 34 L.Ed. 2d 165 (1972), the Court struck down Florida and Pennsylvania replevin statutes which provided for summary seizure of goods by a state agent following a creditor's ex parte application and posting of a security bond for double the value of the seized property. The two protections which both statutes extended to debtors -- opportunity for a post-deprivation hearing and posting of a bond -- were inadequate to save the statutes. The Court held that a pre-deprivation hearing was required and that posting a bond did not satisfactorily substitute for it. Fuentes v. Shevin, 407 U.S. at 81-83.

The first case to challenge the constitutionality of New Jersey distress law was Van Ness Industries v. Claremont Painting, 129 N.J. Super. 507 (Ch. Div. 1974). The Van Ness court stated that in light of Sniadach and Fuentes, Van Ness Industries' constitutional challenge must prevail "unless a valid distinction may be drawn between residential and commercial property or unless a distraint is deemed not to involve 'state action'." Van Ness, 129 N.J. Super. at 513. The court concluded "that insofar as Chapter 33 of Title 2A authorizes distress for rents by landlords, the chapter is unconstitutional, and since the common law substantive right of distraint is governed by invalid procedural methods it may not be exercised in New Jersey." Id. at 515. The State was involved specifically by its duty to have seized goods inventoried and appraised if the distraint is not dissolved within ten days (N.J.S. 2A:33-9) and by its responsibility for depositing surplus sale proceeds with the sheriff for the tenant's benefit (N.J.S. 2A:33-10).

The definitive case regarding the unconstitutionality of New Jersey distraint law, Callen v. Sherman's, Inc., 92 N.J. 114 (1983), addressed the validity of allowing a landlord to distraint the goods of a commercial tenant for nonpayment of rent. The court found that the conduct of the landlord acting in conjunction with the constable who locked the defendant-tenant's store constituted state action and deprivation of property under the fourteenth amendment. Callen v. Sherman's, Inc., 92 N.J. at 124-125, 127. The court also found that as "no notice and hearing need be given to the lessee before distraint," that "the New Jersey statute cannot survive in its present form," concluding that "we find the New Jersey statute to be unconstitutional." Id. at 132-133.

However, the court determined that, when the statute is read in conjunction with R. 4:52-1(a), governing an order to show cause, the statute satisfies due process requirements. "By requiring notice and a pre-deprivation hearing in most cases, but permitting self-help and a post-deprivation hearing in extraordinary cases, we remove the constitutional defect and the statute may survive." Callen, supra at 137.

New Jersey distress statutes have never been amended to cure the constitutional defects. It is inappropriate to rely on court rules to make the statutes constitutional as applied. The proposed provisions provide constitutionally required pre-judgment notice and hearing and a procedure for self-help in extraordinary circumstances. R. 4:52-1 through -6, which govern injunctions, can then serve their appropriate function of providing detailed procedural guidance.

The proposed provisions encompass three additional statutes regarding hotels, lofts and self-service facilities. These statutes, like the distress statutes, allow landlords to distrain and sell property of lessees who owe rent without judicial hearing. While there are distinctions between these statutes and the distress statutes, their constitutionality is subject to question. Moreover, from a policy standpoint, it is appropriate that all distraint be governed by a single set of rules. The procedure for distraint should not turn on whether the lease is for ordinary commercial premises or for loft space.

#### **2B:Y-1. Lien of creditor upon debtor's property**

**a. A creditor who is owed rent for any leased realty including a room in a hotel or space for storage, other than premises used solely as a residence shall have a lien upon the debtor's property in an amount equivalent in value to the rent past due.**

**b. Liened property shall be limited to property that:**

- 1) is located within the leased premises, or**
- 2) has been removed from the leased premises by the debtor to evade seizure.**

**Source: New (based on N.J.S. 2A:33-1, 2A:44-47 and -48, 2A:44-165 and -166, 2A:44-188 and -189)**

#### **COMMENT**

The use of the words "creditor" and "debtor" rather than "landlord" and "tenant" and the specific reference to hotels and storage space expands the scope of the chapter beyond the current distress statutes (N.J.S. 2A:33-1 through -23). This new section encompasses three additional statutes: "Hotel Keepers" (N.J.S. 2A:44-47 through -50), "Loft Act" (N.J.S. 2A:44-165 through -168) and "Self-Service Storage Facility Act": (N.J.S. 2A:44-187 through -192).

#### **2B:Y-2. Order for enforcement of lien through seizure; satisfaction of judgment**

**a. The Superior Court may enter an order for enforcement of the lien through seizure of the debtor's property by the creditor if the Court finds that:**

- 1) the debtor has received notice of the application and of the date of the hearing, or**

2) a creditor probably will suffer immediate or irreparable damage before notice to the debtor and a hearing can occur.

b. If the creditor obtains judgment for rent, the property ordered seized may be used to satisfy the judgment.

Source: New (based on R. 4:52-1(a) and N.J.S. 2A:33-10, 2A:44-49, 2A:44-167, 2A:44-191)

#### COMMENT

By requiring that notice and hearing occur prior to distraint, subsection (a) of this new section based on R. 4:52-1(a) corrects the deficiencies of the current statutes.

### 2B:Y-3. Self-help by creditor

a. In the extraordinary case where the creditor reasonably believes that the debtor is likely to remove or destroy the property before a court order can be obtained, the creditor may seize the debtor's property before obtaining a court order.

b. At the time the creditor seizes the property, the creditor shall leave notice for the debtor at the leased premises, and shall file notice of the seizure with the court within 48 hours.

c. Upon the debtor's request, the court, within 10 days, shall hold a hearing to determine whether an order allowing the creditor to continue to hold the seized property should be entered.

Source: New

#### COMMENT

This new section detailing permissible self-help in limited instances is based on Callen v. Sherman's Inc., 92 N.J. 114, 137 (1983):

"In the extraordinary case, e.g., where the landlord learns that a tenant is loading his goods onto a truck to avoid a just claim, the landlord may still resort to self-help. The need for relief in these circumstances is so compelling that a landlord need not seek judicial approval before availing himself of the statute. A post-deprivation hearing ... will satisfy the need for due process. ..."  
(Citations omitted)

### 2B:Y-4. Reclaiming seized property

a. A debtor may apply to the court to reclaim seized property that is exempt by law from execution on a judgment or is otherwise wrongly seized.

b. A third party may apply to the court to reclaim seized property:

1) which belongs to the third party, or

2) in which the third party has rights superior to those of the creditor.

**c. Reclaimed property may not be used to satisfy the creditor's judgment.**

**Source: New**

**COMMENT**

The purpose of allowing a creditor to seize property is to provide the creditor with security for the rent owed. As a result, it is important to provide a mechanism for the debtor or other parties to reclaim property which should not be used for this purpose. Subsection a. allows the debtor to reclaim property which could not be used to satisfy a judgment. Subsection b. allows third parties, including secured creditors whose rights may be superior to that of a landlord, to enforce their rights.

**2B:Y-5. Limitation of seizure for rent**

**A creditor may seize property as security for payment of no more than one year's unpaid rent accrued as of the date of seizure.**

**Source: 2A:33-7**

**COMMENT**

This section continues the substance of its source; distraint may be used to provide security for no more than one year's rent.



## TABLE OF DISPOSITIONS

SECTION	DISPOSITION	COMMENT
	<u>Distress</u>	
2A:33-1	2B:Y-1	
2A:33-2	Deleted	Unnecessary
2A:33-3	Deleted	Unnecessary
2A:33-4	Deleted	Unnecessary
2A:33-5	Deleted	Unnecessary
2A:33-6	Deleted	Unnecessary
2A:33-7	2B:Y-4	
2A:33-8	Deleted	Unnecessary
2A:33-9	Deleted	Unnecessary
2A:33-10	2B:Y-2	
2A:33-11	Deleted	Unnecessary
2A:33-12	Deleted	Unnecessary
2A:33-14	Deleted	Unnecessary
2A:33-15	Deleted	Unnecessary
2A:33-16	Deleted	Unnecessary
2A:33-17	Deleted	Unnecessary
2A:33-18	Deleted	Unnecessary
2A:33-19	Deleted	Unnecessary
2A:33-20	Deleted	Unnecessary
2A:33-21	Deleted	Unnecessary
2A:33-22	Deleted	Unnecessary
2A:33-23	Deleted	Unnecessary
	<u>Hotel Keepers</u>	
2A:44-47	2B:Y-1	
2A:44-48	2B:Y-1	
2A:44-49	2B:Y-2	
	<u>Loft Act</u>	
2A:44-165	2B:Y-1	
2A:44-166	2B:Y-1	
2A:44-167	2B:Y-2	
2A:44-168	Deleted	Unnecessary
	<u>Self-Service Storage Facility Owners</u>	
2A:44-187	Deleted	Unnecessary
2A:44-188	2B:Y-1	
2A:44-189	2B:Y-1	
2A:44-190	Deleted	Unnecessary
2A:44-191	2B:Y-2	
2A:44-192	Deleted	Unnecessary

