

MINUTES OF COMMISSION MEETING

May 17, 2012

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7th Floor, Newark, New Jersey were Chairman Vito A. Gagliardi, Jr., Commissioners Andrew Bunn, and Albert Burstein. Professor Bernard Bell of Rutgers School of Law attended on behalf of Commissioner John J. Farmer, Jr. and Grace C. Bertone, of Bertone Piccini LLP, attended on behalf of Commissioner Rayman Solomon.

Also in attendance were Linda L. Piff, Esq., Anna-Maria Pittella, Esq., Adam J. Berner, Esq., and Shireen B. Meistrich, LCSW.

Minutes

The Minutes of the April meeting were unanimously approved on Motion of Commissioner Burstein, seconded by Commissioner Bell.

Title 39 DWI

Laura Tharney explained that she attended the May meeting of the New Jersey Police Traffic Officers Association to discuss issues presented by this project and obtain some feedback from the approximately 60 officers in attendance. The officers in attendance at the meeting were generally in favor of increased use of the ignition interlock device. During a discussion of the potential utility of the IID, one officer said that, just as locking your doors will not deter everyone who might wish to break into your house, it is still useful to lock your doors. The general feeling conveyed was that it is appropriate to use the tools at your disposal, even if no one tool solves the entire problem. The experience of the officers in attendance with IIDs was very limited. Only one, in the week before the meeting, had pulled over a driver required to have an IID installed in the vehicle who did, in fact, have one installed. The officers did, however, have considerable experience with repeat offenders and those whose driver's license was suspended but were driving without a license. With regard to the implementation of a restricted license, the NJPTOA had previously opposed the use of such licenses, but, at the time of the opposition, the restricted license had not been coupled with the use of an IID. The officers were generally supportive of efforts to encourage voluntary installation of IIDs with a resulting reduction in some of the possible penalties and shared the Commission's concerns about pre-conviction administrative suspensions. The officers at the meeting did not express any strong views either way when asked about alternatives to the IID, but generally did not favor any alternative that would require abstinence for those who used

an alternative while not doing so for those who used an IID. The officers did generally support trying scaled penalties for underage repeat drinking and driving offenders.

Ms. Tharney sought guidance from the Commission on a number of issues. She first explained that the terms used to describe the individual to whom the statute applies in section 39:4-50 were inconsistent – including references to “offender”, “person” and “defendant”. Commissioner Bunn suggested that the Commission was not doing its job if it was working on a particular statute and released it without making changes in an effort to improve the language. Commissioner Burstein said that the term used throughout should be “person” since “offender” prejudices. Commissioner Bell expressed concerns about whether these changes could be made while allowing Staff to provide the report to Senator Scutari in a timely manner. Ms. Tharney explained it was her understanding that there was time to make the changes and forward the report to Senator Scutari’s office.

Another issue in the same section concerned the language that says that someone may be in violation of the statute for allowing someone else to drive with a BAC of .08% or above. Unlike the other statutory provision that allows for a violation resulting from the actions of someone other than the person charged, this section does not require that the vehicle driven be owned by or in the control of the violator. Ms. Tharney asked if the Commission wished to make the two sections more consistent. Chairman Gagliardi asked if Ms. Tharney had asked the law enforcement officers about this issue, since the Commission did not want to do violence to something they considered important, and she said that she had not. Mr. Cannel said that such a construction might be implied, since the subsections are adjacent. Commissioner Bunn suggested making the subsection in question subsection (C)(iii). Commissioner Burstein asked how someone charged with a violation could even know that the driver had a BAC of .08% or more and Commissioner Bunn suggested that language be added to make the violation a “knowing” one so that it is not a strict liability offense. Commissioner Burstein suggested importing the “visibly intoxicated” standard from the Dram Shop Act to clarify that the individual charged has to somehow have been on notice. Chairman Gagliardi said that the Dram Shop Act language was useful since it was familiar and had been judicially interpreted.

Ms. Tharney next said that the current statutory language calls for the collection of a driver’s license upon conviction. As the Commission pointed out at the last meeting, a license is now used for a number of things in addition to driving – entry into government buildings, identification when flying, etc., and asked whether the Commission wished to address this issue or simply flag it in the comment to the section as was currently done. Commissioner Bell asked about the availability of non-driver

identification and Ms. Tharney said that such IDs were issued, but that she was not sure how quickly that might happen. Chairman Gagliardi mentioned a news item he had seen regarding a foreign national without a driver's license who wanted to arrange for travel out of the U.S. to attend his mother's funeral on short notice. His passport was in his safety deposit box, which they would not let him access without a photo identification, so he missed the funeral. Chairman Gagliardi suggested that flagging this issue in the comments was not adequate and that it should be addressed in the statute. Ms. Tharney was directed to change the language and explain the reasons for doing so in the comment. Commissioner Bell asked about rental car agencies and whether the relevant information would be available to them, and Ms. Tharney said that she did not yet know the answer.

Ms. Tharney next asked about the discrepancy between the refusal statute and 39:4-50. She explained that there had been legislative efforts to make the language of the refusal statute consistent with 39:4-50 so that an individual would gain no benefit from refusing to take a breath or other test. 39:4-50, however, applies on public, quasi-public and private property, while the refusal statute only applies on public and quasi-public (not private) property. Commissioner Burstein suggested that this issue be addressed in the comment, rather than modifying the statutory language and the Commission agreed.

With regard to underage drinking, Ms. Tharney explained that she had added penalties for repeat offenders so that a second or subsequent offender who, on at least one occasion, had a BAC of .05% or more, would be subject to the same penalties as an adult first offender. She was not able to obtain numbers from New Jersey or New York regarding the scope of this problem, but information from Pennsylvania indicated that, in 2010, approximately 2,500 drivers were charged with underage drinking and driving and, of those convicted, approximately one-third of them were repeat offenders. Commissioner Burstein asked if the BAC of .05% selected for repeat-offender status was an arbitrary median figure. Ms. Tharney said that she chose that number because that is the level at which an IID would preclude a car from starting in NJ and would not be triggered by a small amount of alcohol. Commissioner Bunn expressed reservations about modifying the statute because the Commission lacked expertise in this area. Commissioner Burstein recommended retaining the proposed modifications for consideration by the Legislature based on the research done by Staff and the Commission agreed.

Ms. Tharney asked for Commission comments on the language she had drafted incentivizing the pre-conviction use of IIDs. She explained that, in light of the

Commission's concerns about mandating use of IID's before conviction, she had drafted language incentivizing such use instead. The new section permits an individual to apply to the court after a summons is issued, and install and use an IID for the time that would be required after a conviction, in exchange for a reduction of some of the consequences that might otherwise be associated with conviction. A person who participated in this program would be subject to the lowest fine and would not be required to pay certain surcharges. In addition, the person would not be subject to loss of license, incarceration, or IDRC participation. Ms. Tharney explained that, as a result of a drafting oversight, the draft failed to include provisions explaining what happens if a person is charged or convicted of a DWI or refusal during the voluntary participation period. She explained that the draft had since been revised to provide that if charged, the individual would have to continue with the IID pending the disposition of the second charge. If convicted, the individual would be subject to all of the consequences of conviction. She added that the draft had also been modified to state that if the DWI charge is associated with a criminal charge, the disposition of the matter would await the disposition of the criminal charge.

The Commission was generally supportive of the new section because of its voluntary nature. Commissioner Bunn asked how an individual would be notified of the availability of this program. Ms. Tharney said that language could be added to require the distribution of a notice at the time the summons is issued, in the same way that notices are given in some states that require administrative suspensions. Chairman Gagliardi supported notification of that type since some individuals might not seek the assistance of an attorney until after the 30 day window for applying to participate had already passed. Commissioner Bunn asked if an individual convicted during the voluntary period would receive credit for "time served". Ms. Tharney said the draft did not currently address the issue and asked for the Commission's preference. The Commission agreed that, since such credit is given in the criminal context, it would be appropriate to do so here so that an individual who participates in the program in good faith is not subject to penalties more onerous than if he or she had opted out.

The new section limiting the transfer of a vehicle after a charge or conviction is modeled on a Hawaii statute, and requires the person seek approval before doing so, Commissioner Bell said it sounded good and asked who would make the determination about whether a transfer was approved. Ms. Tharney said it was drafted to require the approval of the Chief Administrator of the MVC. The Commission, after discussion, asked that the language be modified to require approval by the MVC generally, rather than the Chief Administrator.

The next items considered by the Commission were the alternatives to the IID included in the draft in an effort to close the loophole in the existing statutory scheme which enables an individual to avoid the imposition of the IID requirement by claiming not to have a car. As drafted, the court is able to use its discretion to impose one of four options in situations in which an individual claims not to have access to a vehicle in which an IID can be installed or to be medically unable to use an IID. The alternatives include a continuous remote alcohol monitor, the home version of an IID, home arrest and the payment of a monthly fee to the IID assistance fund. In a change from the last draft, the draft now states that the court may impose conditions at the time of sentencing, including a requirement that a defendant not have any failures for a period of time before the use of an IID or alternative device may be discontinued.

In addition, there is new language requiring an individual to make application to the court for determination of use and compliance with the IID or alternative requirement in order to make sure that the requirement has been met before the person may obtain an unrestricted license. Ms. Tharney explained that the draft was structured to allow the court to require “no fails” on the IID or alternative before an unrestricted license may be restored. Based on the information Ms. Tharney had received, monitoring need not impose costs on the state but could be done by IID or alternative vendors who can tailor the reports they produce to provide the information that the state needs to make the necessary determinations. She explained that language had been included to clarify that if the court ordered “no fails”, a BAC of less than .05% would not be counted as a failure since that is the level at which an IID would permit the person to drive.

Commissioner Bell said that it might be better to review whether or not the person was complying early in the compliance period. Ms. Tharney agreed that more monitoring would be preferable, but since the state currently does no monitoring, the best picture of total compliance might be determined at the end of the period – this way, for example, the state could determine that the individual not only installed an IID, but actually used the car with the IID in it. Commissioner Bunn expressed concern with the level of discretion imposed on the municipal court judge and both he and Commissioner Bell expressed concern about the imposition of home arrest for an offense of this nature. Ms. Tharney asked if the Commission would be more comfortable with the alternatives if the defendant was able to select the alternative to be imposed. The Commission supported that revision to the draft. As to the individual choices, the Commission supported including the continuous remote alcohol monitor, the in-home IID-type device, and the payment of the \$95 monthly fee to the IID fund to be established to defray IID and

alternative costs for indigent offenders and asked that the home arrest option be removed from the draft. The Commission determined that the language allowing the court to impose a period of no failures before the IID or alternative can be terminated could remain in the draft for the IID since it may be an important tool for the court to use. The Commission chose to retain the requirement that a defendant apply for a determination of use and compliance before the use of an IID or alternative may be discontinued.

With regard to the fees added to the draft by the Coalition of Ignition Interlock Manufacturers based on provisions that had proven successful in other states, the Commission expressed concerns about the number of fines, fees and surcharges already imposed by the statute, and Commission did not support these items.

Finally, regarding the issue of whether defendants should be allowed to drive their employers' vehicles if they are required to use IIDs for their own vehicles, Chairman Gagliardi said that when an individual is convicted of an offense involving a loss of license, there is no such exception and there should not be one here either. The Commission unanimously agreed to strike this provision and to release the report with the amendments noted.

Collaborative Law Act

Ms. Brown said that collaborative law is a dispute resolution process, especially used for matrimonial law, where the parties work with the assistance of attorneys and other collaborative law professionals without court intervention. She said that we were fortunate to have three professionals here who can speak on the process. When drafting the proposed tentative report, Staff did not adopt everything from the uniform law. Some sections concerned subjects that were more appropriate for Court Rule than statute and were not included in the report. This was made clear in the introduction. The crux of the uniform law, as adopted, is an evidentiary privilege which is given to parties and non-party participants in the process. Ms. Brown explained that she and Mr. Cannel disagreed on the scope of this privilege. She believes that the privilege should be tailored to fit this particular form of dispute resolution and Mr. Cannel was more inclined towards a broader, universal privilege that may be used in any dispute resolution scenario.

Linda Piff said that the Uniform Collaborative Law Act had been enacted in three states and is on the Governor's desk in Hawaii and Maryland. Collaborative law is practiced in 15 other countries and has been in the US since 1992. In NJ we have 7

practice groups that have been active since 1995. There are only two practice groups in other states which relate to civil law, but currently the practice groups in NJ are doing more family law than civil law dispute resolution.

Commissioner Burstein asked whether any of the speakers could explain the rationale for prohibiting attorneys who represent their clients in the collaborative stage from representing those same clients in the litigation stage. Anna-Maria Pittella said that the essence of the process is to provide negotiation for the couple. The purpose is to keep them in process and to break any impasse they may have, focusing energy on the ultimate goal. For attorneys who practice family law that are litigation minded, the goal is to be in front of the judge. Collaborative lawyers do not want to be swayed by that type of goal, and clients are on board for this at the outset.

Commissioner Burstein said that he was sure that the commenters were aware of the court rule mandating early settlement negotiations panels. Ms. Piff said that these certainly were not the same. In the context of litigation, there are different goals and early motion practice which set the adversarial tone for the parties. Once an inflammatory statement (i.e. motion) is made, the adversarial tone escalates and the children become conduits. This is different from what collaborative law attorneys do. The family structure is retained in a collaborative practice mode. Collaborative lawyers may use a “coach” who is a licensed social worker to help and talk to the parties. Children are a priority in our process. The goals of the family are explored and shared which cannot happen in court. Once the issues are resolved, the parties enter into collaborative settlement agreements. Of the hundred or so of these collaborative law divorces she has worked on, only two have come back, while when she was litigating, two came back every month. Also, the collaborative process helps avoid using court resources and is not nearly as expensive as litigation. The process is not a compromise; collaborative lawyers are resolving the case with the parties’ mutual goals in mind.

Adam Berner introduced himself as an active member of a collaborative law group in NY. He explained that there is a growing recognition that settlement in the matrimonial context is a specialty. It is about attorneys committing not to go court. There is a different perception of the lawyer during this process. This is not adversarial, and there is no fear that the other party’s attorney will eventually cross examine the opposing spouse. The settlement is getting to what is important to both sides and by making a commitment to limit the attorney’s representation the attorneys create a safe environment to focus on the needs of the family.

Ms. Piff says that the attorney becomes a partner in the problem solving and there is a different framework and skill set for the lawyers that do this work. The process also sets the tone for the parties going forward after the divorce. Privacy is also key. There is a great need for privacy in the negotiation and since no court pleadings are filed, the parties have more privacy to settle their dispute.

Chairman Gagliardi thanked the commenters for their input and asked Ms. Brown whether there was other guidance she needed from the Commission with regard to the report. Mr. Cannel said that the privilege that is in the draft was absolutely needed because in the collaborative law context, the experts who assist are not acting in the way an ordinary expert is, they operate differently and do not prepare reports. The second issue is that the collaborative law attorneys wish to have a legislative imprimatur that gives legitimacy to this form of ADR, but Mr. Cannel said he was less concerned with that because it was more symbolic than substantive.

Ms. Brown said that there is also a third aspect to this which pertains to the standards of use. Having statutory standards for the practice of collaborative law will help to weed out the attorneys that do not perform as collaborative law attorneys should. She also recognized that there was an additional guest, Shireen Meistrich, who was not an attorney but a certified social worker, who could give her views on the importance of the privilege for the experts involved in the process.

Ms. Meistrich said that there are different experts who step in at different times in the process, and all of these experts might have different ethical standards and guidelines. She explained that the experts play a shared role, but some work with individuals within the framework of the family unit during the process. She said she is concerned about the shared expert concept, as this cuts out a huge portion of the team that is concerned about servicing families and helping them but are not necessarily shared by both parties.

Chairman Gagliardi asked whether Staff had found that the privilege issue is not met at all currently in the statutes. Mr. Cannel said that many privileges exist which touch on this, but this is a special type which is owned by the professional. Even if both parties want the person to testify, the professional is not required to, and this is different from most other privileges. Commissioner Bell asked whether this had already been done with mediators. Mr. Cannel said that it had. The difficulty is that if there were two attorneys who want to do something similar without the restriction on representing a client if

litigation was necessary, they would have the same need for the privilege. Mr. Cannel said that his feeling is that if you create a special privilege particular to this modality with a great deal of specificity, it would not be available when it was needed. As new forms of ADR come into existence a privilege specific to collaborative law will not be sufficient.

Chairman Gagliardi said that Commissioner Long would probably agree but since this is a draft report, the Commission can release it to solicit comments. The Commission unanimously agreed to release the report as a tentative for comments. Ms. Brown explained that, before release, there will be some corrections made to the privilege section to make it more uniform with the mediator's privilege. Commissioner Burstein said that there are still outstanding issues that the Commission will have to discuss as comments come in, particularly in regard to the court's response, potential for malpractice and the rules of evidence.

Sexual Offenses

Keith Ronan explained that, in response to the direction of the Commission at the last meeting, Staff chose one of the three options that had been drafted with regard to the reasonable person standard for aggravated sexual assault. Staff selected the option that most closely fit the language used by the court. Staff also reached out to The Arc of New Jersey for input regarding the language for this section. The language now includes the three main criteria articulated by the court decisions plus a final sentence added by Staff to carve out an exception to the statutory prohibitions for consensual sexual relations engaged in by individuals with intellectual or developmental disabilities. This last sentence was included after Commissioner Bunn raised the issue at a prior meeting and in light of the concerns expressed by those in the community seeking to protect the rights of individuals with disabilities.

Commissioner Bell said that the word "ordinary" could be interpreted to mean "conventional" and Mr. Cannel said that is not what was intended and Staff will delete it. Commissioner Bunn said that he thinks the concept of actual consent is problematic and asked whether this paragraph would become what every defendant relied on. Mr. Cannel agreed that this was a risk and added that there is not a particularly good solution to the problem about which The Arc has been concerned for approximately a decade.

Mr. Ronan said that Disability Rights New Jersey generally supports the proposed language and agreed that the court cases discussed in the report created a problem for those with disabilities. Mr. Cannel suggested that this project will benefit from a release as a tentative report and an effort by Staff to seek input.

Commissioner Burstein asked why the identification words are victim and actor. Mr. Cannel said that these are the words used in the criminal code. Attempting to use the word “person” instead would run the risk of confusing the persons in question. Commissioner Burstein suggested that the use of the term “victim” prejudices and Mr. Cannel said that Staff can alter the term. Mr. Ronan said that Staff also tried removing “he” and “she”, a task which proved difficult. The report was unanimously released in tentative form after a motion made by Commissioner Burstein, which was seconded by Commissioner Bell.

Uniform Interstate Depositions and Discovery Act

Because the proposal involves a Commission recommendation for Court Rule changes, Ms. Brown asked the Commission to carry the memorandum on UIDDA to the next meeting so that Commissioner Long would be present. The Commission agreed and the memo was carried to the next meeting.

Collateral Consequences

Alex Fineberg briefed the Commission on the effect of the Rehabilitated Convicted Offenders Act, *N.J.S. 2A:168A-1 to -16*, on collateral consequences imposed by state law attendant convictions. He explained that the RCOA had significant limitations. Under *Maietta v. N.J. Racing Comm’n*, 93 *N.J.* 1,8 (1983), the RCOA is inapplicable to any statutory scheme that contains a “savings clause”, such as the alcoholic beverage control laws, which allow a licensee’s prospective employee to apply to the director for a waiver from the prohibition on employing applicants convicted of a “crime involving moral turpitude”. However, the statute left the grant of such a waiver to the director’s sole discretion.

Mr. Fineberg added that the case law interpreting the effect of a certificate of rehabilitation on a past conviction directly related to the license or employment sought was unclear, despite the legislature’s revision to the RCOA in 2007, which merely clarified the procedure for obtaining such a certificate. He suggested that the Commission

might wish to revise the RCOA to resolve these issues and said that Staff would be in a better position to advise the Commission after it had completed cataloging all of the statute's collateral consequences.

Mortgage Recording

Mr. Cannel said that he had given the Commission a copy of the MERS letter and that MERS did not agree with the introduction to the draft but did not object to the proposed statutory changes. Mr. Cannel said that he will discuss the report further at the June meeting.

Workers Compensation

Mr. Ronan said that this project had been resubmitted to the Commission since there had been additional procedural history added to the report to reflect events that transpired after its initial release by the Commission in December 2011. He explained that the trial court in *Quereshi v. Cintas Corp.*, 413 N.J. Super. 492 (App. Div. 2010), had twice failed to comply with the direction of the Appellate Division and that, ultimately, the Appellate Division entered an award consistent with its initial determination. Staff sought authorization to revise the report to reflect the additional information in the comment. Commissioner Bunn said that if the only modification is to the comment, that would not change anything substantive in the report and moved to release the report in final form. The motion was seconded by Commissioner Burstein and unanimously agreed to by the Commission.

Miscellaneous

Mr. Cannel and Ms. Brown reported that they had just returned from Trenton and could report that the adult guardianship bill based on the Commission's final report, had been released from the Senate Health and Human Services Committee after some last minute amendments by the Administrative Office of the Courts.

The meeting was adjourned.