

MINUTES OF COMMISSION MEETING

November 15, 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., and Commissioner Andrew Bunn. 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 Christina W. Strong, Esq., and Dr. John Halperin.

Minutes

The Minutes of the October meeting were unanimously approved on motion of Commissioner Bertone, seconded by Chairman Gagliardi.

Unemployment Compensation

David Liston said that Staff's ongoing search of New Jersey case law for decisions in which the court calls for Legislative review had yielded *Trongone v. Board of Review, Department of Labor*. In that case, the Appellate Division held that a person who was a working member of a limited liability company (LLC) that had elected to be taxed as a partnership was properly determined to be ineligible for unemployment compensation stemming from her LLC work, because LLC members, like partners in a partnership, are employers, not employees, and as such are exempt from both unemployment taxes and unemployment benefits. Mr. Liston proposed a project recommending revision of the unemployment compensation law to clarify this point, so that entrepreneurs could better understand the consequences of their choices with regard to how they form their businesses. John Cannel asked whether the rule of the case also applied to subchapter "s" corporations. Mr. Liston said the case did not speak to this.

Chairman Gagliardi questioned whether the Commission should act based on an unpublished per curium court opinion with no precedential value. Recommending such a revision would amount to making policy rather than codifying existing case law. Commissioner Bell said that the issue should be allowed to develop further in the Department of Labor. The Commissioners agreed that no action should be taken on the proposed project at this time but that Staff should continue monitoring the issue. The Commission would revisit the issue if there are significant new developments.

Uniform Determination of Death Act

Marna Brown summarized the comments that have been received so far on the draft report regarding a revised New Jersey Declaration of Death Act (NJDA) and her

research about other state statutes. Ms. Brown said that most states rely on an “in accordance with accepted medical standards” (or similar language) in their statutes and none specifically include the American Academy of Neurology (AAN) standards as a guideline. She said she could not recommend to the Commission that the regulatory authority for death determination of the Board of Medication Examiners and the Department of Health be removed from the statute, as suggested by commenters, without tying the statute to some guidelines. However, the Deputy Attorney General assigned to the Board told her that the Board could not recommend using the AAN guidelines. Ms. Brown said her research indicated that there are no current national or other uniform guidelines, although there has been a strong call for a national standard for declaring brain death. Hospitals use their own protocols, some of which, but not all, are based on the AAN guidelines.

Ms. Brown said she was concerned that the UDDA is too open-ended. Ms. Brown said that the UDDA’s reliance on “accepted medical standards” has resulted in hospitals developing their own standards, and thus led to inconsistencies between hospital determinations of brain death. Ms. Brown cited articles that call for national standards and others that report medical errors and public concern resulting from inconsistent hospital standards. Ms. Brown said she thought more comments and input from the medical community was needed before a final report is issued. The Commissioners questioned whether inconsistency among hospitals had caused problems in other states and whether there was any consensus as to what the standard should be.

Dr. Halperin said he favors doing away with state-level regulation of death determinations. He said that the neurological community agrees with and follows the guidelines set by the American Academy of Neurology. He said that the New Jersey guidelines differ from the AAN guidelines and that this difference makes death determination difficult for him as a neurologist. Dr. Halperin said he does not object to New Jersey’s having exceptions, such as the religious exception, but he believes the guidelines should be based on the same fundamental methods as the AAN guidelines. Dr. Halperin said he would like the Commission to recommend more fluid guidelines and regulations for New Jersey. He said most hospitals follow the AAN guidelines and that while there are minor variations in practice among those hospitals, those variations are not the kind that cause mistakes like the ones cited. He also pointed out that other medical fields defer to the AAN for death determinations.

Christina W. Strong, Esq., said that New Jersey is the only state that requires death determination guidelines to be put into law. She said the Board of Medical Examiners is primarily a licensing organization and was not formed to do what the law requires it to do regarding death determinations. She said that only one of the Board’s members is a neurologist. She proposed removing the statutory mandate that the Board publish guidelines and instead leave hospitals to set their own standards. Ms. Strong

submitted written proposed language of a revised statute to the Commission and represented that she had a possible legislative sponsor for a bill that adopts the proposed language. She hoped the Commission might recommend the proposed language. Chairman Gagliardi asked Ms. Strong which parties would be pleased or displeased by the removal of the mandate. Ms. Strong said doctors would be pleased but she did not know who would be displeased.

Ms. Brown said that the DAG advised that the AAN guidelines are not universally accepted because not all hospitals and medical facilities were equipped to comply with the guidelines, but also that it was unclear what alternative guidelines might be preferable. Responding to a question from Commissioner Bell, Dr. Halperin said that New Jersey is the only state that requires certain equipment to be used in making death determinations. The AAN guidelines include no such requirements. The Commissioners agreed that Staff should seek input from the American Medical Association's New Jersey chapter as well as the New Jersey Hospital Association and report back to the Commission at its next meeting.

Uniform Collaborative Law Act

The Commissioners who were present agreed that Commissioner Long, who was not present, should be part of the discussion of this subject. For this reason, the Commission postponed discussion of the Uniform Collaborative Law Act until its January meeting, when Commissioner Long could be present.

Collateral Consequences of Conviction

Laura Tharney reviewed the status of the project and discussed Staff's proposal for revision of the Rehabilitated Convicted Offenders Act (RCOA).

Some Commissioners expressed concern about the requirement on page 6 of the memorandum that a licensing authority "explain in writing" how certain factors influenced its decision to reject an application based on the applicant's criminal record. The Commissioners asked what form this writing would take, to whom it would be owed, and at what point in the administrative process. Commissioner Bunn said he believed applicants had a right to know the reasons for their rejection (in part to catch mistakes made by the agency) and was concerned that applicants would have to sue in order to obtain a written explanation. Chairman Gagliardi expressed concern that a rejecting agency might wait until its decision is appealed before giving any consideration to the enumerated factors. He suggested adding greater specificity to this provision in order to address these issues. Ms. Tharney said Staff would revise accordingly.

Commissioner Bell said, also referring to page 6 of the memorandum, that he found the meaning of "law enforcement officer" at subsection e. to be unclear and that it

was also not clear how the law would apply to agencies that handle both licensing and enforcement. Ms. Tharney said that the case law is also unclear on these issues, but that Staff would work on addressing them. Commissioner Bell added that he found the definition of “qualified offender” on page 4 to be confusing.

Responding to a question from Commissioner Bunn regarding the person to whom the act is supposed to apply, Ms. Tharney confirmed that the RCOA applies to public, not private, employers. Mr. Cannel added that disqualifying convictions often have little to do with the job in question. Commissioner Bunn said that the purpose should be to make public employers give a fair shot to applicants on a state, county and local level.

Chairman Gagliardi noted that Newark Mayor Cory Booker has been an outspoken supporter of removing barriers to employment faced by those with criminal a record. The Commissioners agreed that this is a very important and worthy project.

Miscellaneous

Ms. Brown reported that the bill resulting from the Commission’s pejorative terms project was scheduled to be heard in Assembly committee on November 19th. Mr. Cannel reported that the UCC omnibus bill was also moving forward. Ms. Tharney reported that Staff would be joined by an extern from NJIT for the spring 2013 semester. She also reported that Staff expects to make a Continuing Legal Education presentation in coordination with the Office of Legislative Services in Trenton. In addition, Ms. Tharney said she would be working with the New Jersey Law Journal to provide regular updates on the Commission’s projects.

John Cannel provided a brief update on the status of the Commission’s mortgage recording and Title 9 projects.

A motion to extend by 60 days the comment period for the tentative report relating to sexual offenses was made by Commissioner Bunn, seconded by Commissioner Bell, and unanimously approved. A motion to extend by 60 days the comment period for the tentative report relating to the Uniform Certificate of Title for Vessels Act was also made by Commissioner Bunn, seconded by Commissioner Bell, and unanimously approved.

The meeting was adjourned on motion of Chairman Gagliardi, seconded by Commissioner Bell.