

# CIVIL RIGHTS COMMISSION

September 3, 2020

Via Go to Meeting

## 1. CALL TO ORDER

The first meeting of the Risk Management Advisory Board called to order at 2:06 pm by Richard Bosson, Chair of the Civil Rights Commission. The meeting was held via Go to Meeting due to the current restrictions.

## 2. ROLL CALL

Roll call indicated the presence of a quorum as follows:

### Commission Members Present:

Richard Bosson, Chair  
Mark Baker, Vice Chair  
Denise Torres  
Zackeree Kelin  
Senator Steve Neville  
Victor J. Rodriguez  
Kim Stewart  
Stan Whitaker

### Members Excused:

Gerald Byers

### Others Present:

Ret. Professor Michael Browde, UNM Law  
Ret. Judge Linda Vanzi, New Mexico Court of Appeals  
Andrew G. Schultz, Rodey Law Firm  
Raul Burciaga, Legislative Council Service  
Secretary Ken Ortiz, General Services Department  
Alexandra Smith  
Abby Bannon-Schneebeck  
Jacques Chouinard

## 3. APPROVAL OF MINUTES

With all members in agreement the minutes were passed unanimously by voice vote.

## 4. APPROVAL OF AGENDA

With all members in agreement the agenda was passed unanimously by voice vote.

## 5. INTRODUCTION OF COMMISSION STAFF

Mr. Burciaga stated the open meeting resolution for the Commission was passed at the last meeting and was signed by the Chair and Vice Chair. The purpose for the resolution is to ensure they are in compliance with the Open Meetings Act and that members do not take official action

on items outside of a scheduled commission meeting. Mr. Burciaga also indicated the meeting notice was properly posted and a website for the commission is almost complete.

Secretary Ortiz stated the website will serve as a repository of meetings and he can show them at the next meeting once it is complete.

Mr. Burciaga introduced his staff from the Legislative Council Service. Mr. Burciaga also introduced the new staff that has been contracted to work for the commission. Ms. Bannon-Schneebeck and Mr. Chouinard are law students and will research. Ms. Smith will be the attorney who will work for the Commission.

Ms. Smith stated she is available for any research they may need.

Secretary Ortiz introduced his staff from the General Services Department.

## **6. BACKGROUND ON CIVIL RIGHTS IN NEW MEXICO**

Chair Bosson explained House Bill 5 that passed last session and created the Commission. Chair Bosson introduced Professor Browde who is a retired Professor at UNM, Retired Judge Linda Vanzi who sat on the Court of Appeals bench and is also a teacher at the law school, Mr. Schultz long time law school teacher who has previously clerked for the US Supreme Court.

Mr. Browde explained the main charge of the commission as outlined in paragraph "F" of House Bill 5. Mr. Browde stated that the other speakers have a lot of knowledge in different areas of civil rights law.

Mr. Browde reviewed a section of the federal law that began the Civil Rights Law in 42 U.S.C. Section 1983, which is part of a series of laws post-civil war era. The right to vote is among those sections.

Mr. Browde stated that in 1961 the Supreme Court elaborated on cases, but enforcement was always an issue. Some federal courts read the law as a common law right for a judicial remedy. In 1975, the Supreme Court ruled against the private attorneys general theory, that helped to ensure the suits would be brought forth by awarding reasonable attorney's fees.

Ms. Vanzi explained the state's constitution can provide greater protection than the federal constitution. For example, there is a religious rights clause and a victims' rights clause in the states constitution.

Mr. Schultz agreed with Ms. Vanzi's statement. The NM Constitution was written in 1911, others were not models for it. The NM Constitution could serve as a stand-alone document.

Mr. Browde cited language from a NM Supreme Court case (*Serna vs. Hodges*) "we are not bound to give the same meaning to the NM Constitution as the United States Supreme Court places on the United States Constitution. Even in construing provisions having wording that is

identical or substantially so unless such interpretation purport to restrict the liberties guaranteed the entire citizens under the Federal charter.” Whatever rights are protected under federal law a state may not fall below those.

Mr. Whitaker stated NM is unique, are there other states who have greater protections?

Mr. Browde stated it is mirrored in many other state constitutions. Some have all added to the bill of rights as things change. NM has a sex discrimination provision, there are victims’ rights. In 1976 it was stated that even if the provision reads the same as the federal law.

Ms. Vanzi stated there are many states that have interpreted their constitution in a variety of ways. The problem is enforcing the rights. They look at things as an injunctive relief.

Mr. Whitaker indicated that other states have attempted to do this and establish it and taken it a step further for violations.

Ms. Vanzi stated that not all other states have created a statute for the attorneys’ fees. This gives the legislature the ability to look at this.

Mr. Schultz stated the fundamental question is does this commission and the legislature will take notice of this in the NM Constitution. The relevant question is how NM chooses to view these rights and enforcement.

Mr. Baker states he and the staff have started the patchwork across the states that have the same laws. Courts have said there has to be a remedy. They will have that research done before the report.

Ms. Smith explained the law students have surveyed other states and are almost done.

Mr. Browde stated generally speaking when litigation ensues each party is responsible for their own attorney’s fees. A court rejected the private attorney general rule. There are laws that provide access to lawyers with the understanding that the remedy is critical to assure the rights are brought up. There are many layers to these cases. There is some irony to think that the legislature has extended to smaller provisions but not the rights provisions.

Mr. Baker asked if a state actor denies him his religious rights he cannot go to court however for another claim for injury he can.

Ms. Vanzi states that he couldn’t bring a claim against Section 1983, however an unfair trade practices claim could bring damages and attorneys’ fees. There has been some redress just not for compensation which leaves little incentive for these cases.

Mr. Browde indicated that there are those who feel their rights have been deprived however no remedy or attorneys’ fees can be recovered.

Ms. Stewart asked about the tort claims act and immunity for liability in both the state and federal law.

Mr. Browde explained the tort claims are limited. There is a cap on damages. The definition of law enforcement doesn't involve any jail or prison officials.

Mr. Baker asked if in the law review article there was a quote about the laboratories of democracy and the concept of variations in the states.

Mr. Schultz explained what one state does has no bearing of what the other states do. Some viewed the rights that would need judicial construction. The states have the opportunity through legislation to take steps.

Ms. Torres stated there is not a mechanism for monetary recovery, are they looking at putting that into the states' tort claims act.

Ms. Vanzi stated the commission is charged with looking at the constitution.

Mr. Schultz discussed a section in the tort claims act (NMSA41-4-4). If you are a state employee or actor as defined within the tort claims act a government entity is required to pay a settlement. Mr. Schultz gave the example where foster parents are recognized as state employees. The state of NM pays those out.

Ms. Torres stated the legislature would have to amend the provisions.

Ms. Stewart asked for clarification to the (NMSA 41-4-12) which defines a law enforcement officer.

Mr. Browde explained it is still limited with no damages or attorneys' fees.

Ms. Torres asked what would they work towards changing.

Mr. Browde explained the tort claims act amendments would cover non-tortious claims. So many of the bills of rights are those types of issues.

Mr. Schultz states a stand-alone statute is preferable.

Chair Bosson asked if they should use the tort claims act as a template or start over.

Mr. Schultz read the article and believes the tort claims act is not a good model. In fact, he would suggest they create a stand-alone act that models the federal sections 1983 and 1988.

Ms. Vanzi stated there is a federal tort claims act. Congress didn't add the constitutional rights into it. It would be ineffective without the Section 1983 provision added.

Ms. Stewart stated she would like it to mention relief for all types of law enforcement professions. She would like to know if they are taking the various occupations.

Chair Bosson stated it is written that way in the statute they are charged with.

Ms. Torres gave an example of a case involving a social worker.

Mr. Browde indicated that the federal definition of federal immunity was created by the US Supreme Court. One thing in the latest iteration, is that if you do not meet the standard of the qualified immunity the suit may not proceed. As it is currently constructed, it should be re-examined.

Chair Bosson stated the commission needs to be clear and make their own statement.

Ms. Torres asked for any ideas on punitive damages. It has always been used as a deterrent.

Mr. Browde explained in the statute charging the commission it was asked of them. He was recently involved in a case involving small damages. There are situations where the principles behind the use of punitive damages could be effective. There is a difference between actual damages and punitive damages.

Ms. Vanzi stated there are jury instructions for the jurors to avoid egregious conduct.

Mr. Schultz explained there is also a Section 1983 U.S. Supreme Court Case (*Smith vs. Wade*) which is based on all the same principals.

Mr. Kelin asked because these rights have not been litigated in the courts, what do they see as the appropriate source to determine the framers' intent.

Ms. Vanzi stated there is history of those cases. She gave an example of the right of religion section. The language is different in the federal and state act.

Mr. Browde explained situations change.

Mr. Kelin asked how do they speak to the public or the legislators about existing case law.

Mr. Schultz stated they could hold up the bill of rights and compare it to the NM Constitution.

Ms. Vanzi stated there is not a provision to utilize the state constitution.

Mr. Browde stated the responsibility this board has is immense.

Ms. Stewart asked to discuss fee shifting. Some countries use two way shifting. Is that an option or is it considered elsewhere?

Mr. Schultz discussed the unfair trade practices act that allows fees if the lawsuit was unfounded the consumer will end up having to pay. There are others that have restrictions.

Mr. Browde discussed the British fee shift.

Senator Neville asked about contingent fees.

Mr. Schultz explained there is fee shifting when you are the prevailing party.

Ms. Vanzi explained the courts look into reasonable attorney's fees.

Senator Neville explained they will need to look into smaller cities and public body entities.

Ms. Stewart asked what would violate the state constitution and not the federal constitution.

Ms. Vanzi discussed a case where a class of women were not given the opportunity to receive services. The NM Supreme Court stated the refusal of service was a violation of the state constitution.

Mr. Baker asked about the religion clauses. There could be a violation of state and not federal.

Mr. Schultz gave two examples. Section 6 is the right to bear arms, the NM constitution states it differently. If a city or county would regulate under the state constitution it would be stronger. The other example is that of religion.

Chair Bosson asked if there is anything they would want changed.

Mr. Schultz stated the judicial gloss of qualified immunity, the attorneys' fees restrictions that have been developed have proved to be workable.

Ms. Vanzi would like to see the state constitution get interpreted independently from the federal constitution.

Mr. Browde explained the sovereignty of states. He agrees with Ms. Vanzi.

Mr. Schultz explained that he disagrees with the enforcement mechanism.

Mr. Whitker asked if they could invite these guests back sometime with a more narrow focus.

Mr. Browde explained he is happy to but is not at liberty to give his position on matters of the commission recommendations. Ms. Vanzi and Mr. Schultz stated they are happy to return.

## **7. OTHER BUSINESS**

Ms. Smith mentioned she has been working with some Commission members on a form for Public Comment and how to handle them.

## **8. NEXT MEETING**

Chair Bosson explained the next meeting will be September 18, 2020 at 2:00 p.m.

Mr. Baker has lined up some speakers however it will need to be on a Friday due to scheduling. The meeting thereafter will be to discuss the fiscal impact on this subject as required by the statute. Commissioners agreed that the meeting schedule will be as follows: September 18, October 2 and October 16.

Discussions will need to cover claims and insurance settlements. New Mexico Municipal League, New Mexico Counties and Risk Management Department will all be involved.

Mr. Rodriguez would like to know which funds are specifically being affected when settlements are paid out.

## **9. ADJOURN**

With all business concluded the meeting adjourned at 4:21 p.m.

Signed and approved:

/s/Justice Bosson, Chair