

LOUISIANA STATE LAW INSTITUTE

THE MEETING OF THE COUNCIL

May 15 - 16, 2015

Friday, May 15, 2015

Persons Present:

Adams, Marguerite (Peggy) L.	Lonegrass, Melissa T.
Baiamonte, Joseph J.	Maloney, Marilyn
Bergstedt, Thomas	McAuliffe, J. Edward
Breard, L. Kent	Medlin, Kay C.
Burris, William J.	Mengis, Joseph W.
Carroll, Andrea	Morris, Glenn G.
Crawford, William E.	Norman, Rick J.
Crigler, James C.	Odinet, Christopher
Davidson, James J., III	Ottinger, Pat
Dawkins, Robert G.	Pohorelsky, Peter
Dimos, Jimmy N.	Richardson, Sally
Ellison, David M., Jr.	Riviere, Christopher H.
Farmer, Robb	Roberson, Lynette
Fiudo, Christine	Scalise, Ronald J., Jr.
Hamilton, Leo C.	Schonekas, McClain
Hayes, Thomas M., III	Shea, Joseph L., Jr.
Hebert, Christopher B.	Sole, Emmett C.
Hogan, Lila T.	Talley, Susan G.
Holdridge, Guy	Tate, George J.
Jewell, John Wayne	Thibeaux, Robert P.
Knighten, Arlene D.	Tucker, Zelda W.
Landry, Ron J.	Veith, Rebekka
Lavergne, Luke	White, H. Aubrey, III
Levy, H. Mark	Woodruff-White, Lisa
Little, F. A., Jr.	Ziober, John David

President James Crigler, Jr., opened the Friday session of the May 2015 Council meeting at 10:00 AM on Friday, May 15, 2015 at the Hotel Monteleone in New Orleans, LA. During the morning session, Professor Melissa T. Lonegrass, Reporter of the Mineral Law—Unsolicited Offers Committee, presented an interim report to the Law Institute Council.

Mineral Law-Unsolicited Offers

Professor Lonegrass began by providing background for the passage of SR 118 of the 2013 Legislative Session, which requested the Law Institute, in consultation with the director of the Louisiana Mineral Law Institute, to “study and make recommendations for regulations on unsolicited offers for the transfer, sale, or lease of mineral rights.” The Reporter acknowledged that it is a common and legitimate practice to initiate the purchase or lease of mineral rights by unsolicited contact, usually by mail, to invite the property owner to negotiate further. The focus of the study is limited to a specific type of predatory offer to purchase mineral rights.

The types of offers targeted by the committee involve deeds mailed to property owners (generally mass-mailed) accompanied by a bank draft or check made out to the owner, with a cover letter encouraging the owner to keep the payment and to execute the deed. The payments accompanying these mailings are intentionally designed to resemble royalty checks. In some cases, the sale of mineral rights may be effectuated by the mere cashing of the check. The deeds include language detrimental to the unsophisticated homeowner, such as omnibus property descriptions (i.e., transferring rights to all property owned by the transferor in the parish) and power of attorney provisions permitting the transferee to change property descriptions in the deed. The committee found that these offers encourage a fast and uninformed response from property owners who misunderstand the purpose of the mailing, involve a very low price as represented by the bank draft or check as compared to the market value of the minerals, and take advantage of unsophisticated property owners by more well-informed buyers.

The Reporter informed members that the Louisiana Attorney General had received about 15 complaints about this activity and that there were similar complaints filed with the attorneys general of Texas, Mississippi, Alabama, and Kansas. She also discussed the attempts by other states to address the problem. Texas laws, for example, drafted to address this problem have not been effective; the provisions are in the administrative code and attorneys and landowners are not familiar with them, they provide no right of rescission, and the remedy requires proof of the actual value of the minerals at the time of the sale.

A Council member asked about protections in current law against this problem. As discussed in the interim report, the committee found that the Louisiana Unfair Trade Practices Act may not be sufficient to guard against these abusive practices, and jurisprudence does not clearly invalidate these transactions.

A motion was made to have the committee's proposal apply to the lease of mineral rights as well as to sales. The motion was seconded and a voice vote was taken. The motion failed.

Professor Lonegrass then discussed features of the committee's working proposal; it was not before the Council for approval at this meeting. The committee's proposal would apply only to a "sale[s] of mineral rights by mail solicitation" (as defined in the proposal to address specific types of offers), preclude the seller from binding himself by merely accepting payment but not signing the deed, require that the act of transfer be made by either an authentic act or an act under private signature, require disclosures describing the transaction as a sale and providing for the right of rescission, provide an unconditional right of rescission within 60 days for transactions in which the disclosures were given, and, where the disclosures were not given, provide a right of rescission and right to damages for a preemptive period of three years. The proposal would also prohibit the use of omnibus property descriptions and power of attorney provisions in these types of solicitations.

A Council member asked whether notice is provided to third parties when there is a rescission of the sale. The Reporter responded that, where the disclosures were not provided in the deed, the third parties would be protected.

A Council member asked whether title would pass from the transferor to the transferee upon execution of the deed and whether the title would be transferred back in the event of rescission. The Reporter responded that rescission would be effective on transmission of the rescission. It was recommended that the committee consider suspending title to maintain clarity in the public records. Another member recommended that the right of rescission be

included in the deed for recordation. The member asked whether the rescission would appear in the record. The Reporter responded that the rescission would be effective when filed, that the Public Records Doctrine would apply, and that rescission would not affect the rights of third parties when disclosures are not included in the act of transfer.

Members made further suggestions for the committee's consideration, including solutions targeted at the transferors, such as a "landowners' bill of rights," special provisions for property subject to unitization or upon which there are active wells, regulating through licensure, excluding commercial parties as sellers, and giving the right to rescind to transferees.

Professor Lonegrass concluded her presentation at noon. The Council recessed for lunch.

LUNCH

Following lunch President Crigler called the meeting to order at 1:30 PM. He called on Judge Guy Holdridge, Bail Bond Procedure Revision Committee [New] Reporter. The Reporter began discussion of the Committee's preliminary response to SR 111 of 2013 dealing with revision of Louisiana's bail laws. That response is contained in the document 5.5.15- Law Institute Title 8 Bail Revised that was distributed prior to the meeting.

Bail Bond

After providing a brief background on the Committee's composition, its objectives, work to date and future objectives the Reporter initiated discussion, on page 3, of the proposal to revise Code of Criminal Procedure Article 311. It was moved and seconded to adopt the proposal as presented. The motion to adopt passed.

The adopted proposal reads as follows:

Art. 311. Definitions

In this Title:

- (1) Bail is the security given by a person to assure a defendant's appearance before the proper court whenever required.
- (2) An appearance is a personal appearance before the court or the court's designee, where the charges are pending.
- (3) A surrender is the detention of the defendant at the request of the surety by the officer originally charged with his detention on the original commitment. When the surety has requested the surrender of the defendant, the officer shall acknowledge the surrender by a certificate of surrender signed by him and delivered to the surety.
- (4) A constructive surrender is the detention of the defendant in another parish of the state of Louisiana or a foreign jurisdiction under all of the following circumstances:
 - (a) A warrant for arrest has been issued for the defendant in the jurisdiction in which the bond obligation is in place.
 - (b) The surety has provided proof of the defendant's current incarceration to the court in which the bond obligation is in place, the

prosecuting attorney, and the officer originally charged with the defendant's detention.

(c) The surety has paid to the officer the reasonable costs of returning the defendant to the jurisdiction where the warrant for arrest was issued.

The Reporter moved to the proposal, on page 4, to revise Code of Criminal Procedure Article 322. It was moved and seconded to amend the proposal by changing "proceeding" on lines 7 and 20 to "matter" and to adopt the proposal as amended. The motion to adopt passed.

The adopted proposal reads as follows:

Art. 322. Declaration of residence by defendant and surety; social security number; waiver of notice

A. The defendant and personal surety signing a bail bond shall write under their respective signatures the address at which each can be served, the mailing address, if different, and the last four digits of their social security number. The defendant and his counsel may, with the court's approval, by joint affidavit filed of record in the matter in which the bond was given, appoint his counsel as his agent to whom notice to appear can be sent. The appointment shall be conclusively presumed to continue until the defendant, with court approval, files of record an affidavit revoking or changing the appointment. The affidavit shall include the address to which notice to appear can be sent. A commercial surety shall place its proper mailing address and electronic address on the face of the power of attorney used to execute the bond. The agent or bondsman posting the bond shall place his proper mailing address under his signature. A bond forfeiture judgment shall not be denied or set aside because of the invalidity of the information required by this Article or for the failure to include the information required by the provisions of this Article.

B. Each address provided pursuant to Paragraph A of this Article shall be conclusively presumed to continue for all proceedings until the party providing the address changes it by filing a written declaration in the matter for which the bond was filed.

C. Except for the notice required by Article 344, by signing the bail bond, the defendant and his surety waive any right of notice to appear, including actual notice.

After discussion, on page 5, of the proposal to revise Code of Criminal Procedure Article 345 it was moved and seconded to amend Paragraph C, on line 22, by inserting "or the court" following "surety". The motion to amend passed.

After additional discussion it was moved to recommit Paragraph A, Paragraph B, Paragraph C, as amended, and Paragraph D. Discussion centered on whether the proposal also permits questioning the actual validity of the birth certificate and whether the proposal should expressly state, either in the text or in a comment, that R.S. 22:1585 governs the surrender of the defendant. The motion to recommit passed with the proviso that the Committee address the issues discussed.

It was moved and seconded to amend the proposal to revise Paragraph E by inserting "then" on page 6, line 20, following "defendant," and to adopt the proposal as amended. The proposal to adopt passed.

It was moved and seconded to adopt, as presented, the proposal to revise Paragraph F. The motion to adopt passed.

The adopted proposals read as follows:

Art. 345. Discharge of the bail bond obligation

* * *

E. Any time after the defendant's failure to appear and the issuance of the warrant of arrest, the surety may request that the officer originally charged with the detention of a defendant place the name of the defendant into the National Crime Information Center registry. The officer shall determine if the placement of the name is authorized by the rules governing National Crime Information Center registry within thirty days of the request. If not authorized, the officer shall provide notice to the surety of the reason for non-placement. If placement is authorized, the surety shall pay to that officer a fee of twenty-five dollars for processing the placement. If authorized and after payment of the twenty-five-dollar fee, the name of the defendant is removed from the National Crime Information Center registry without cause during the period provided for surrendering the defendant, the period for filing a rule to show cause under Article 349.2 shall be suspended until the name of the defendant is placed back in the registry.

F. In the case of any fee required under the provisions of this Article, the officer charged with the defendant's detention shall provide the surety with a receipt indicating the amount of the fee collected, the name of the defendant, the purpose of the fee collected, the name of the person from whom the fee was collected, information sufficient to identify any applicable bail bond, and the date and time the defendant was surrendered.

The Reporter discussed the proposal, on page 7, to revise Code of Criminal Procedure Article 349. It was moved and seconded to amend the proposal by deleting "forthwith" on line 4 and to adopt the proposal as amended. The motion to adopt passed.

The adopted proposal reads as follows:

Art. 349. Failure to appear; issuance of arrest warrant

If at the time fixed for appearance the defendant, who was properly noticed, fails to appear as required by the court, the court, on its own motion or on motion of the prosecuting attorney, shall immediately and issue a warrant for the arrest of the defendant.

It was moved and seconded to adopt, as presented, the proposal, on page 7 to revise Code of Criminal Procedure Article 349.1. The motion to adopt passed.

The adopted proposal reads as follows:

Art. 349.1. Notice of warrant of arrest

After a warrant for arrest is issued, the clerk of court shall, within sixty days, send a notice of warrant for arrest to the prosecuting attorney. The notice shall also be sent by United States mail or electronic means to the defendant, the bail agent or bondsman, if any, and the personal surety. Notice shall be sent by electronic means or certified mail to the commercial surety. All notices shall be sent to the addresses provided pursuant to Article 322 or an address registered with the Louisiana Department of Insurance. The notice to the commercial surety shall include the power of attorney number used to execute the bail bond. Failure to include the power of attorney number shall not affect the validity or enforcement of a resulting judgment. After sending the notice of warrant for arrest, the clerk of court shall execute a certificate that notice was sent and place the certificate in the record. Failure to send notice to the commercial surety within sixty days shall release the surety of all obligations under the bond.

After some discussion it was moved and seconded to adopt, as presented, the proposal, on page 7 to revise Code of Criminal Procedure Article 349.2. The motion to adopt passed.

The adopted proposal reads as follows:

Art. 349.2. Period for filing a rule to show cause

If the defendant fails to make an appearance and has not been surrendered or constructively surrendered within one hundred eighty days of the execution of the certificate that notice of warrant for arrest was sent, the prosecuting attorney may file a rule to show cause requesting that a bond forfeiture judgment be rendered. The rule to show cause shall be mailed to the defendant and served on all other parties against whom a judgment is sought. The rule to show cause shall be set for a contradictory hearing. The time period for filing a rule to show cause to obtain a judgment of bond forfeiture does not begin until after the notice of warrant for arrest is sent.

Following a brief discussion it was moved and seconded to adopt, as presented, the proposal, on page 8 to revise Code of Criminal Procedure Article 349.3. The motion to adopt passed.

The adopted proposal reads as follows:

Art. 349.3. Proof necessary at rule to show cause

A. The court at a contradictory hearing shall forfeit the bail bond and sign a judgment of bond forfeiture upon proof of all of the following:

- (1) The bail bond.
- (2) The power of attorney if any.
- (3) Notice to the defendant and the surety as required by Article 349.1.
- (4) Proof that more than one hundred eighty days have elapsed since the notice of warrant for arrest was sent.

B. The judgment of bond forfeiture shall be issued against the defendant and his sureties in solido for the full amount of the bail. A bail agent who represents the surety as an insurance agent shall not be solidarily liable for the judgment of bond forfeiture against the defendant and his sureties. In the event that a bail agent who represents the surety as an insurance agent is held solidarily liable, then that bail agent may request to be released from the judgment. However the release of the bail agent shall have no effect on the judgment decreeing the forfeiture of the bond against the defendant and his sureties.

C. The judgment shall include the address and the last four digits of the social security number for the defendant and the personal sureties. A judgment of bond forfeiture shall not be set aside because of the invalidity of the information required by the provisions of this Article or for the failure to include the information required by this Article.

The Reporter discussed the proposal, on page 8, to revise Code of Criminal Procedure Article 349.4. It was moved and seconded to adopt the proposal as presented. The motion to adopt passed.

The adopted proposal reads as follows:

Art. 349.4. Interruption of the period for obtaining a bond forfeiture judgment

An appearance by the defendant shall interrupt the period for obtaining a bond forfeiture judgment. An appearance by the defendant does not relieve the surety of its bond obligations.

The Reporter moved to the proposal, on page 9, to revise Code of Criminal Procedure Article 349.5. It was moved and seconded to adopt the proposal as presented. The motion to adopt passed. It was suggested that the Committee consider whether it should place a limit on the blanket exemption for armed services personnel. The Reporter noted that he would pose that question to the Committee.

The adopted proposal reads as follows:

Art. 349.5. Nonforfeiture situations

A. A judgment decreeing the forfeiture of a bail bond shall not be rendered if it is proven, at or prior to the hearing on a rule to show cause, that the defendant, principal on the bond, failed to appear in court because of any of the following:

(1) The defendant was serving in the armed forces of the United States.

(2) The defendant was a member of the Louisiana National Guard called to duty pursuant to R.S. 29:7.

(3) The defendant was prevented from appearing due to a state of emergency declared by the Governor.

B. There shall be a rebuttable presumption that the calling of the defendant to duty pursuant to R.S. 29:7 prevented the defendant, principal on the bond, from attending court.

Following a brief discussion it was moved and seconded to adopt, as presented, the proposal, on page 9 to revise Code of Criminal Procedure Article 349.6. The motion to adopt passed.

The adopted proposal reads as follows:

Art. 349.6. Notice of judgment

A. Notice of the signing of judgment of bond forfeiture shall be mailed by the clerk of court to the counsel of record for each party, and to each party not represented by counsel pursuant to Code of Civil Procedure Article 1913.

B. The clerk shall file a certificate in the record showing the date on which the notice of the signing of the judgment was mailed.

It was moved and seconded to adopt, as presented, the proposal, on page 9 to revise Code of Criminal Procedure Article 349.7. The motion to adopt passed.

The adopted proposal read as follows:

Art. 349.7. Recordation of judgment

A. The district attorney may cause the judgment to be recorded in every parish in which the recordation may be proper. Every such recordation shall be without cost, pursuant to R.S. 13:4521, and shall operate as a judicial mortgage against the defendant and all his sureties.

B. Prior to recordation, the district attorney shall verify the inclusion of information on the judgment, namely, the address and the last four digits of the social security number for the defendant and the personal sureties. Third parties may rely upon the accuracy of the information required by the provisions of this Article for purposes of distinguishing the identity of the defendant and his sureties. Any judgment of bond forfeiture containing inaccurate information required by the provisions of this Article shall be deemed ineffective as a judicial mortgage to third parties who rely upon that information.

It was moved and seconded to adopt, as presented, the proposal, on page 10 to revise Code of Criminal Procedure Article 349.8. The motion to adopt passed.

The adopted proposal reads as follows:

Art. 349.8. Appeals

The rights of appeal of a bond forfeiture judgment shall be governed by the Code of Civil Procedure Article 2081 et seq.

The Council reviewed the proposal, on page 10, to revise Code of Criminal Procedure Article 349.9. After some discussion it was moved and seconded to recommit the proposal and to request the Committee to consider revising the text to more clearly state when the rule to show cause may be filed. One suggestion was to insert "or a judgment has been rendered" on line ten following "elapsed".

The motion to recommit passed.

After discussing the proposal, on page 10, to revise R.S. 15:85 it was moved and seconded to preliminarily adopt the proposal but to request the Committee revise the text to better define when the rule to show cause may be filed and also those items that the prosecuting attorney must prove relative to time delays and satisfaction of the bond forfeiture judgment by payment. The motion to preliminarily adopt the proposal passed.

The adopted proposal reads as follows:

La R.S. 15:85. Failure to satisfy judgment of bond forfeiture

A. If a defendant fails to appear after EFFECTIVE DATE, and a judgment of bond forfeiture rendered against a commercial surety company has not been satisfied, nor has a suspensive appeal been timely perfected, the prosecuting attorney may file with the court, in the parish where the bond is forfeited, a rule to show cause why that commercial

surety company should not be prohibited from executing criminal bail bonds before the court issuing the judgment of bond forfeiture.

B. At the rule to show cause, the court may consider only issues which would interrupt the enforceability of the judgment. The court may issue an order enjoining the commercial surety company from posting criminal bail bonds before the court issuing the judgment of bond forfeiture if the judgment has not been satisfied and if the court finds all of the following:

(1) A defendant failed to appear after EFFECTIVE DATE and a judgment of bond forfeiture has been rendered against the commercial surety.

(2) Proper notice pursuant to Code of Criminal Procedure Article 349.6 has been mailed.

(3) The defendant has not been surrendered, constructively surrendered, nor appeared within one hundred eighty days of the execution of the certificate that notice of warrant for arrest was sent.

(4) The time delays for taking a suspensive appeal, as set forth in Code of Civil Procedure Article 2123, have run and no suspensive appeal has been taken.

(5) The judgment of bond forfeiture has not been satisfied by payment.

C. The burden of proof at the hearing shall be upon the commercial surety by a preponderance of evidence and shall be limited to documents contained in the official court record where the judgment was rendered. The surety company may use evidence not contained in the record to show that it did not receive notice of the signing of the judgment of bond forfeiture.

* * * *

It was moved and seconded to preliminarily adopt the proposal, on page 10, to revise R.S. 22:1441 and to request the Committee to consider revising it in a similar manner as requested in R.S.15:85 above. The motion to preliminarily adopt the proposal passed.

The adopted proposal reads as follows:

La R.S. 22:1441. Failure to timely satisfy claim under criminal bond contract

A. A prosecuting attorney may file with the office of the commissioner of insurance a rule to show cause if all the following are true:

(1) A defendant failed to appear after EFFECTIVE DATE and a judgment of bond forfeiture has been rendered against the commercial surety underwriter.

(2) Notice pursuant to Code of Criminal Procedure Article 349.6 has been mailed.

(3) All time delays for taking a suspensive appeal, as set forth in Code of Civil Procedure Article 2123, have run and no suspensive appeal has been taken.

(4) The defendant has neither been surrendered, constructively surrendered, nor appeared within one hundred eighty days of the execution of the certificate that notice of warrant for arrest was sent.

(5) More than one hundred eighty days has lapsed since the execution of the certificate that notice of warrant for arrest was sent.

(6) The judgment of bond forfeiture has not been satisfied by payment.

B. The prosecuting attorney shall attach adequate documentation to support his affidavit and submit it to the commissioner of insurance.

C. (1) Within thirty days of the filing of a rule to show cause by the prosecuting attorney with the commissioner of insurance, the commissioner of insurance shall notify the insurance company, the commercial surety, or Lloyd's Association, in writing, at the address of the home office of that organization by certified mail, setting a time, place, and date of the hearing, which shall not be more than sixty days from the date of receipt of notice from the prosecuting attorney. If after the hearing, the hearing officer finds that there is no just cause or legal reason for the surety's nonpayment, the commissioner shall take any action deemed necessary for collection of the amount owed, including suspension of the surety from doing business in the state of Louisiana.

(2) The commissioner shall order the commercial surety underwriter to immediately pay the judgment of bond forfeiture, if the commissioner finds that all of the following are true:

(a) A defendant failed to appear after EFFECTIVE DATE and a judgment of bond forfeiture has been rendered against the commercial surety underwriter.

(b) Notice pursuant to Code of Criminal Procedure Article 349.6 has been mailed.

(c) All time delays for taking a suspensive appeal, as set forth in Code of Civil Procedure Article 2123, have run and no suspensive appeal has been taken.

(d) The defendant has neither been surrendered, constructively surrendered, nor appeared within one hundred eighty days the execution of the certificate that notice of warrant for arrest was sent.

(e) More than one hundred eighty days have lapsed since the execution of the certificate that notice of warrant for arrest was sent.

(f) The judgment of bond forfeiture has not been satisfied by payment.

D. The burden of proof at the hearing shall be upon the commercial surety by a preponderance of evidence and shall be limited to documents contained in the official court record where the judgment was rendered. The surety company may use evidence not contained in the record to show that it did not receive notice of the signing of the judgment of bond forfeiture.

E. A commercial surety shall pay an administrative fine of five hundred dollars to the Department of Insurance for each hearing to show cause in which the commercial surety is a named party when the judgment has been paid after the issuance of a rule to show cause that meets the requirements of Subsection A of this Section.

There being no additional business the meeting adjourned at 3:30 PM.

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Saturday May 16, 2015

Persons Present:

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Holdridge, Guy
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Shea, Joseph L., Jr.
Sole, Emmett C.
Tate, George J.
Tucker, Zelda W.
White, H. Aubrey, III
Woodruff-White, Lisa
Ziober, John David
Zucker, Erika

President James C. Crigler, Jr. opened the Saturday session of the May 2015 Council meeting at 9:03 AM on May 16, 2015 at the Monteleone Hotel in New Orleans, LA. During today's session, Professor Luz Molina represented the Unpaid Wages Committee and presented a Revision of Louisiana's Wage Payment Act.

Revision of Louisiana's Wage Payment Act:

1. The Reporter began by introducing herself and giving the background of House Concurrent Resolution 76 of the 2012 Regular Session of the Legislature which asked the Law Institute to study all options, specifically lien rights, and make recommendations for legislation to provide an effective remedy for unpaid wages without requiring expensive legislation.
2. The Reporter told the Council that the resolution was originally assigned to the Security Devices Committee. That committee met several times on the issue and concluded that a general privilege on assets of the employer is not an effective means of protecting employees against employers who simply refuse to pay them. The success of the Private Works Act is not replicable to this case because often there is not an asset to which the

privilege will attach and the labor expended likely would not have a connection with assets of the employer. Also, with a general privilege, the employee would still have to file a civil suit to perfect the lien, arrange for the sheriff to seize assets, and then pursue the process through to a sheriff's sale which is costly. Additionally, even if we do not consider the fact that there may not be an asset to attach a lien to, we have noted that in those cases where the current Private Works Act does apply, and employees may not act in a timely manner to preserve their rights.

3. Therefore, the Law Institute created the Unpaid Wages Committee to consider alternatives to liens, such as administrative remedies, evidentiary presumptions, and a shifting of the burden of proof in civil actions. The Reporter told the Council that the Unpaid Wages Committee has met five times and discussed many alternatives and believes that the draft before the Council represents a fair process for both employers and employees. The overarching public policy is to get speedy payment for employees so they do not become a burden on society.

4. The Reporter explained that the changes proposed are not new. The changes follow the case law that has developed over the years and it follows the federal Fair Labor Standards Act where it is appropriate and consistent with state law. In particular, these changes attempt to make the law current, and in regards to the Fair Labor Standards Act, to pave the way for the courts, as increasingly they are being asked to decide these questions in the context of state litigation.

5. The Council first questioned why the term "employee" is not defined. The Reporter mentioned that you look to the definition of "independent contractor" in the law to determine the relationship. After much discussion, the Reporter agreed to have the committee discuss including a definition of "employee" and "independent contractor". The Reporter also agreed to review the term "public agency" within the definition of "employee" and make it consistent with other state law. Everyone agreed that this issue is especially problematic for low wage employees because of the manner in which the terms of employment are conveyed and how they are paid.

6. The Council next inquired about the resolution and the creation of a lien. A member briefly explained that the Security Devices Committee was tasked with this discussion, and that after much discussion, they agreed a lien was not the best solution. However, another member of the Council suggested that a lien might still be possible, the details of which might require a super-priority. The Council then asked the Reporter to report to them, the conclusions reached by the Security Devices Committee.

7. The Council also suggested that an administrative remedy could be recommended to the Legislature. The Reporter agreed to have the Committee explore administrative remedies, including those used in California and New York.

8. The next issue involves the recordkeeping element of the statute. The Reporter explained that employers have a recordkeeping obligation under existing law. The intent of including this requirement in the LWPA is to emphasize that the onus is on an employer to keep records because he is in the best position to keep such records. However, the Council was concerned about this applying to all employees when the FLSA only applies to hourly employees. The Council noted that this requirement is found in the Worker's Compensation section of the Title. The Council discussed the challenges with recordkeeping when employees work from home or

travel. The Reporter acknowledged that some employers may consider this a burden and may not do this now, but it is already required. The revisions are not importing the FLSA, but are adopting the recordkeeping requirements of R.S. 23:14 into the LWPA. The Council also would like the Committee to consider removing the requirement that an employee sign a written statement containing employer and wage information.

9. The Reporter explained to the Council that two pressing issues in this area of the law are: 1. who is in the best position to keep records and 2. how to get employers to pay the undisputed portion of the wages owed to an employee. The Committee tried to address these issues with the goal of keeping litigation to a minimum. The Council also questioned the policy decision of the Committee to combine recordkeeping with penalties which may impede the good faith defense.

10. The Council was not familiar with the lodestar method and asked the Reporter for more information. The Reporter explained that the lodestar method refers to a method of computing attorney fees whereby a court must multiply the number of hours reasonably spent on the case by a reasonable hourly rate. This figure can then be adjusted for factors known as multipliers which include contingency and the quality of the work performed.

11. The Reporter explained that the new concepts introduced in the draft are the applicability of the LWPA to people who are still employed, the stabilization of how to ascertain the number of hours worked by an employee, the stabilization of the good faith defense for employers, and incorporating the concept of joint employment.

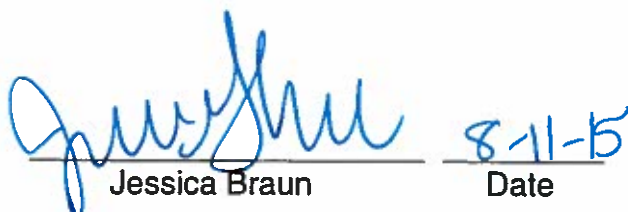
12. The Council also asked the Committee to revisit the application of the good faith defense if an employer pays an employee in cash and keeps a receipt.

13. The Council moved that the recommended changes be re-committed to the Unpaid Wages Committee for further consideration of the issues raised and directed the committee to articulate five or six policy issues correlated to the proposed changes, to be discussed at a future council meeting.

The Council adjourned at 11:00 AM.


Lynette Roberson Date 8/11/15


Joseph Baiamonte Date 8/11/15


Jessica Braun Date 8-11-15