

# LOUISIANA STATE LAW INSTITUTE

## THE MEETING OF THE COUNCIL

March 11-12, 2016

### Friday, March 11, 2016

#### Persons Present:

Adams, Marguerite (Peggy) L.	Leefe, Richard K.
Bergstedt, Thomas	Levy, H. Mark
Block, Matthew F.	Lonegrass, Melissa T.
Breard, L. Kent	Maloney, Marilyn
Chetta, Chloe	McIntyre, Edwin R., Jr.
Crawford, William E.	Medlin, Kay C.
Crigler, James C., Jr.	Miller, Gregory A.
Cromwell, L. David	Norman, Rick J.
Curry, Kevin C.	Odinet, Christopher
Davidson, James J., III	Philips, Harry "Skip", Jr.
Doguet, Andre	Pohorelsky, Peter
Foil, Frank	Popovich, Claire
Forrester, William R.	Riviere, Christopher H.
Hall, Keith	Robert, Deidre D.
Hebert, Aimee	Scalise, Ron J., Jr.
Garofalo, Raymond E., Jr.	Simien, Eulis, Jr.
Gasaway, Grace B.	Sole, Emmett C.
Gelpi, Jeffrey	Stuckey, James A.
Gilbert, James	Suprenant, Monica T.
Green, Rodger "Rory"	Talley, Susan G.
Gregorie, Isaac M. "Mack"	Thibeaux, Robert P.
Hamilton, Leo C.	Title, Peter S.
Haymon, Cordell H.	Vance, Shawn
Hebert, Christopher B.	Waller, Mallory Chatelain
Hester, Mary C.	Weems, Charles S., III
Hogan, Lila T.	Wilson, Evelyn L.
Holdridge, Guy	Ziober, John David
Kostelka, Robert "Bob" W.	

President David Ziober opened the Friday session of the March 2016 Council meeting at 10:00 AM on Friday, March 10, 2016 at the Hotel Monteleone in New Orleans, Louisiana. The President called on Mr. Charles S. Weems, III, Reporter of the Unconstitutional Statutes Committee, to present the Committee's biennial report to the legislature.

#### Unconstitutional Statutes Committee

The Reporter began his presentation of the Unconstitutional Statutes Committee's draft biennial report to the legislature by reminding the Council that it had already either approved or tentatively approved all of the recommendations contained in the report at its December 2015 meeting. The Reporter explained that after the Council's tentative approval of the recommendations concerning criminal matters, the recommendations were referred to the Law Institute's Criminal Code and Code of Criminal Procedure Committee for substantive consideration. That Committee reported its recommendations back to the Unconstitutional Statutes Committee, which incorporated them into its draft biennial report to the legislature being presented today.

After this explanation, the Reporter directed the Council's attention to the proposed recommendation to repeal Code of Criminal Procedure Article 412, on pages 6 and 7 of the materials. It was moved and seconded to adopt the recommendation as presented, and the motion passed with no objection. The Council then considered the proposed recommendation to amend Code of Criminal Procedure Article 413, on pages 7 and 8 of the materials. It was moved and seconded to adopt the recommendation as presented, and the motion passed with no objection. Similarly, it was moved and seconded to adopt the proposed recommendations to amend Paragraph B and to repeal Paragraph C of Code of Criminal Procedure Article 414, on page 8 of the materials, as presented, and the motion passed with no objection.

Next, the Council considered the proposed recommendation with respect to Code of Criminal Procedure Article 800, on pages 8 and 9 of the materials. The Reporter explained that at its December 2015 meeting, the Council adopted a tentative recommendation with respect to this article. However, when the Criminal Code and Code of Criminal Procedure Committee met to consider that tentative recommendation, it decided that further study of the Supreme Court's decision in *Witherspoon v. Illinois* and its implications on Louisiana law was warranted. It was then moved and seconded to recommit Code of Criminal Procedure Article 800 to the Law Institute's Criminal Code and Code of Criminal Procedure Committee, and the motion passed with no objection.

The Reporter then turned to the proposed recommendation with respect to R.S. 13:3715.1, on pages 13 through 17 of the materials. It was moved and seconded to adopt the proposed recommendation as presented, and the motion passed with no objection. The Council also considered the proposed recommendation with respect to R.S. 14:30, on pages 18 and 19 of the materials. The Reporter explained that when the Criminal Code and Code of Criminal Procedure Committee considered this provision, it decided that further study of the Supreme Court's decisions in *Miller v. Alabama* and *Montgomery v. Louisiana* was warranted. Additionally, the Criminal Code and Code of Criminal Procedure Committee expressed a preference for revising all of the juvenile offender penalty provisions in a comprehensive rather than piecemeal fashion. It was moved and seconded to recommit R.S. 14:30 to the Law Institute's Criminal Code and Code of Criminal Procedure Committee, and the motion passed with no objection. Next, the Council turned to the proposed recommendation to repeal Paragraph (D)(2) of R.S. 14:42, on pages 19 and 20 of the materials. The Reporter explained that at its December 2015 meeting, the Council adopted a tentative recommendation with respect to this provision, which upon review was adopted by the Law Institute's Criminal Code and Code of Criminal Procedure Committee. It was moved and seconded to adopt the recommendation as presented, and the motion passed with no objection.

With respect to the proposed recommendation concerning R.S. 14:44, on pages 20 and 21 of the materials, the Reporter explained that similar to R.S. 14:30, when the Criminal Code and Code of Criminal Procedure Committee considered this provision, it decided that further study of the Supreme Court's decisions in *Graham v. Florida* and *Montgomery v. Louisiana* was warranted. Additionally, the Criminal Code and Code of Criminal Procedure Committee expressed a preference for revising all of the juvenile offender penalty provisions in a comprehensive rather than piecemeal fashion. It was then moved and seconded to recommit R.S. 14:44 to the Law Institute's Criminal Code and Code of Criminal Procedure Committee, and the motion passed with no objection. Similarly, with respect to the proposed recommendations regarding R.S. 14:47, 48, and 49, on pages 21 through 23 of the materials, the Reporter explained that when the Criminal Code and Code of Criminal Procedure Committee considered these provisions, it decided that further study of the *State v. Defley* and *State v. Snyder* opinions and their implications on Louisiana defamation law was warranted. As a result, it was moved and seconded to recommit R.S. 14:47, 48, and 49 to the Law Institute's Criminal Code and Code of Criminal Procedure Committee, and the motion passed with no objection.

The Reporter then directed the Council's attention to the proposed recommendation to amend Paragraph (A)(1) and to repeal Paragraphs (B)(2) and (B)(3) of R.S. 14:49, on pages 24 through 27 of the materials. The Reporter explained that at its December 2015 meeting, the Council adopted tentative recommendations with

respect to this provision, which upon review were adopted by the Law Institute's Criminal Code and Code of Criminal Procedure Committee. It was moved and seconded to adopt the recommendation as presented, and the motion passed with no objection. Similarly, the Reporter explained that the Council's tentative recommendation to repeal R.S. 15:114, on pages 27 and 28 of the materials, was reviewed and ultimately adopted by the Law Institute's Criminal Code and Code of Criminal Procedure Committee. As a result, it was moved and seconded to adopt the recommendation as presented, and the motion passed with no objection. Finally, the Council considered the proposed recommendation to amend R.S. 40:1788, on page 35 of the materials. After the Reporter explained that at its December 2015 meeting, the Council adopted a tentative recommendation with respect to this provision, which was ultimately adopted by the Law Institute's Criminal Code and Code of Criminal Procedure Committee, it was moved and seconded to adopt the recommendation as presented, and the motion passed with no objection.

At this time, Mr. Weems concluded his presentation of materials from the Unconstitutional Statutes Committee.

### **Trust Code Committee**

At 10:30 a.m. the Reporter of the Trust Code Committee, Prof. Ronald J. Scalise, Jr., began his presentation to the March 11, 2016 meeting of the Council. He asked the members of the Council to turn to the first issue found in the document entitled, "Louisiana State Law Institute, Trust Code Committee, Prepared for the Meeting of the Council, March 11, 2016, New Orleans, Louisiana". The Reporter introduced R.S. 9:1725, as found on pages 1 and 2 of the document, and a member of the Council moved that the Statute be approved as shown. This motion was seconded and approved without opposition. Thus, R.S. 9:1725 and its comment were approved to read as follows:

#### § 1725. Definitions

Except when the context clearly indicates otherwise, as used in this Code:

\* \* \*

(3) "Person" means an individual, a corporation, a partnership, a limited liability company, an association, a joint stock company, a business trust, or two or more persons having a joint or common interest.

\* \* \*

#### Comment – 2016

This revision augments the definition of person to include limited liability companies.

The Reporter then introduced the second issue presented in the materials, R.S. 9:1972 and its comment. After a brief introduction, a member moved that the Statute and its comment be adopted as presented. This motion was seconded and passed without opposition. Revised Statute 9:1972 was approved to read as follows:

#### § 1972. Treatment of interest upon death of principal beneficiary

Upon a principal beneficiary's death, his interest vests in his heirs or legatees, subject to the trust; ~~provided, however, that the~~ Nevertheless, the trust instrument may stipulate provide otherwise by designating substitute principal

beneficiaries to the extent permitted by the following Sections of this Subpart and R.S. 9:1895.

Comment – 2016

This revision does not change the law. It encompasses minor semantic clarifications.

Next, the Reporter introduced R.S. 9:1973 and its comment. A member of the Council moved that the modifications to the Statute be approved as shown. The motion was seconded. A question from a member prompted a general discussion on the Statute and what the changes were intended to achieve. The Council then requested that Prof. Scalise transpose the prepositional phrase, "If the beneficiary has no descendants", as is found on lines 1 and 2 of page 3 of the materials, to the end of the sentence. Thus, R.S. 9:1973 and its comment were approved to read as follows:

§ 1973. Shifting interest in principal

~~A. The trust instrument may provide that the interest of either an original or a substitute principal beneficiary who dies intestate and without descendants during the term of the trust or at its termination vests in some other person or persons, each of whom shall be a substitute beneficiary.~~

~~B. (1) Except as to the legitime in trust, the trust instrument may provide that the interest of either an original or a substitute principal beneficiary who dies without descendants during the term of the trust or at its termination vests in some other person or persons, each of whom shall be a substitute beneficiary of an irrevocable trust vests in one or more of his descendants upon the death of the beneficiary either during the term of the trust or at its termination. The trust instrument may provide that the interest vests in another person if the beneficiary dies without descendants.~~

~~(2) With respect to the legitime in trust, the trust instrument may provide that the interest of an original or a substitute principal beneficiary vests in another person upon the death of the beneficiary either during the term of the trust or at its termination, only if the beneficiary dies intestate and without descendants.~~

~~C. B. The trust instrument may provide that the interest of a designated principal beneficiary of a revocable trust shifts to another person or persons, if the substitution occurs no later than the date when the trust becomes irrevocable.~~

(a) This revision reorganizes, modifies, and clarifies prior law. It expands prior law by enlarging the category of allowable parties to whom a principal interest can be shifted at the death of an original or substitute principal beneficiary. It allows for a settlor to provide that if, during the term of a trust or at its termination, a principal beneficiary dies with descendants, then his interest passes to one or more of the beneficiary's descendants. As under prior law, a settlor can shift to any other person the principal interest of a beneficiary who dies without descendants. If the legitime is affected, however, then shifting of principal is allowed only if the beneficiary dies intestate and without descendants.

(b) Subsections (A)(1) and (A)(2) apply both to testamentary trusts, which are always irrevocable, and to revocable inter vivos trusts after they become irrevocable. Subsection B applies to revocable trusts until they become irrevocable.

Professor Scalise then introduced R.S. 9:2092 and its comment to the Council. He explained the history of the Statute and its evolution. A member of the Council moved that the Statute be approved as shown in the materials. This motion was seconded. A member then addressed a question to the Reporter regarding what would qualify as "other property the title to which must be recorded to affect third parties". Another Council member suggested that the phrase "must be recorded", as used in the Statute, be changed to the phrase "filed for registry" wherever found. Another member spoke in favor of this suggestion. After a Council member spoke against the motion, it was withdrawn. The President revived the earlier motion to approve the Statute as presented in the material. The motion passed. Revised Statute 9:2092 and its comment were approved to read as follows:

§ 2092. Recordation of instruments

A. If at any time the trust property of either an inter vivos trust or a testamentary trust includes ~~immovables~~ immovable property or other property the title to which must be recorded in order to affect third ~~parties~~ persons, a trustee shall file the trust instrument, an extract of trust, or a copy of the trust instrument or extract of trust certified by the clerk of court for the parish in which the original trust instrument or extract of trust was filed, for record in each parish in which the property is located. Nevertheless, if the trust instrument contains a transfer of immovable property or other property the title to which must be recorded in order to affect third persons, a trustee shall file the trust instrument for record in the parish in which the property is located.

B. (1) For purposes of recording an extract of a trust instrument, such an extract shall be executed by either the settlor or the trustee and shall include all of the following:

- (a) The name of the trust, if any.
- (b) A statement as to whether the trust is revocable or irrevocable.
- (c) The name of each settlor.

(d) The name of each trustee and name or other description of the beneficiary or beneficiaries.

(e) The date of execution of the trust.

~~(f) If the trust instrument also contains a transfer of immovable property or other property to the trust, the title to which must be recorded in order to affect third persons, then the extract shall contain a brief legal description of the property. Any limitation or restriction on the power of the trustee to alienate, lease, or encumber immovable property contained in the trust instrument.~~

~~(g) Any limitation or restriction on the power of the trustee to sell, lease, or mortgage immovable property contained in the trust instrument.~~

(2) When an extract of trust is recorded pursuant to Subsection A of this Section, any limitation or restriction in the trust instrument on the power of the trustee to ~~sell, lease, or mortgage~~ alienate, lease, or encumber immovable property shall not be effective against third persons unless it is ~~noted or~~ recited in the extract of trust.

(3) The provisions of this Section authorizing the filing of an extract of the trust instrument or a clerk-certified copy of the trust instrument or extract of trust without a description of the property are remedial and shall be applied retroactively to any trust extract or clerk-certified copy of either the trust instrument or extract of trust theretofore filed for record which is in substantial compliance with the provisions of this Subsection, and such extract or clerk-certified copy shall affect third persons as of the date of recordation. If the extract of an inter vivos trust instrument or clerk-certified copy thereof is recorded, the failure of the trust instrument to be in the form required by R.S. 9:1752 shall not be effective against third ~~parties~~ persons, who shall be immune from claims based on the failure of the trust instrument to be in the form required by R.S. 9:1752.

#### Comment – 2016

This revision includes minor semantic changes and makes clear that if the trust instrument contains a conveyance of immovable property, then the trust instrument, rather than an extract of trust, must be filed.

Subsequently, the Reporter introduced R.S. 9:2262.2 and explained that the recommended changes were intended to have the Statute mirror R.S. 9:2092. A

member of the Council asked Prof. Scalise about the immunity provided by the Statute. After he answered this question and another one addressed to him, a motion was made to approve the Statute. The motion was seconded and passed. Thus, R.S. 9:2262.2 and its comment were approved to read as follows:

§ 2262.2. Recordation of instruments

A. If at any time the trust property of a foreign trust includes ~~an immovable~~ immovable property or other property in Louisiana the title to which must be recorded in order to affect third ~~parties~~ persons, a trustee shall file the trust instrument, an extract of trust, or a copy of the trust instrument or extract of trust certified by the clerk of court for the parish in which the original trust instrument or extract of trust was filed, for record in each parish in which the property is located. Nevertheless, if the trust instrument contains a transfer of immovable property or other property the title to which must be recorded in order to affect third persons, a trustee shall file the trust instrument for record in the parish in which the property is located.

B. (1) For purposes of recording an extract of a trust instrument, such an extract of a trust instrument either shall be in such form and contain such information as may be lawful under the law of the jurisdiction which the parties have expressly chosen to govern the trust, or shall be executed by either the settlor or the trustee and shall include all of the following:

(a) The name of the trust, if any.

(b) ~~The name of each settlor.~~ A statement as to whether the trust is revocable or irrevocable.

(c) The name of each settlor.

(d) ~~The name or other description of the beneficiary or beneficiaries.~~ The name of each trustee and name or other description of the beneficiary or beneficiaries.

(e) The date of execution of the trust instrument.

(f) ~~A statement whether the trust is revocable or irrevocable.~~ Any limitation or restriction on the power of the trustee to alienate, lease, or encumber immovable property contained in the trust instrument.

(g) ~~If the trust instrument also contains a transfer of immovable property or other property to the trust, the title to which must be recorded in order to affect~~

~~third persons, then the extract shall contain a brief legal description of the property. Any other provisions of the trust instrument as the party executing the extract deems useful.~~

~~(h) Any other provisions of the trust instrument as the party executing the extract deems useful.~~

~~(2) Unless the trust and abstract of trust recite or otherwise note any modification or restriction of the trustee's power or duties, the trustee shall have all of the powers and duties granted to trustees under the Louisiana Trust Code. When an extract of trust is recorded pursuant to Subsection A of this Section, any limitation or restriction in the trust instrument on the power of the trustee to alienate, lease, or encumber immovable property shall not be effective against third persons unless it is recited in the extract of trust.~~

(3) The provisions of this Section authorizing the filing of an extract of the trust instrument or a clerk-certified copy of the trust instrument or extract of trust without a description of the property are remedial and shall be applied retroactively to any trust extract or clerk-certified copy of either the trust instrument or extract of trust theretofore filed for record which is in substantial compliance with the provisions of this ~~Section~~ Subsection, and such extract or clerk-certified copy shall affect third persons as of the date of recordation. If the extract of an inter vivos trust instrument or clerk-certified copy thereof is recorded, the failure of the trust instrument to be in the form required by R.S. 9:2262.4 shall not be effective against third persons, who shall be immune from claims based on the failure of the trust instrument to be in the form required by R.S. 9:2262.4.

#### Comment – 2016

This revision makes clear that if the trust instrument contains a conveyance of immovable property, then the trust instrument, rather than an extract of trust, must be filed. It also includes a number of semantic changes and reorders of provisions of prior law to make them consistent with R.S. 9:2092.

Following this action, Prof. Scalise concluded his presentation with a brief overview of the Committee's current research.

President David Ziober then called on Professor Melissa T. Lonegrass, Reporter of the Mineral Law – Unsolicited Offers Committee, to present the Committee's proposed legislation for the 2016 Regular Session.



## **Mineral Law – Unsolicited Offers Committee**

The Reporter began her presentation by reminding the Council that she had previously presented the Committee's interim report on this subject, which included extensive background information, at the Council's May 2015 meeting. Before delving into the Committee's specific proposals, the Reporter then provided the Council with a brief summary of this background information, including the manner in which these unsolicited offers of mineral rights are made to landowners, as well as the aim of the Committee to limit its regulation of these transactions to the extent possible to only those that are particularly egregious and deceptive.

The Reporter then directed the Council's attention to proposed R.S. 9:2991.1, on pages 1 and 2 of the materials. The Reporter provided the Council with a general overview of the proposed legislation, including that the Committee's intent was to only regulate specific types of mail transactions, deemed sales of mineral rights by mail solicitation. The Reporter also explained that mineral leases would be excluded from the ambit of this legislation, that these transactions would be subject to a cooling off period of 60 days in the form of a right of rescission in favor of the seller, and that certain disclosures and penalties for failing to comply with those disclosures would be required. It was moved and seconded to adopt R.S. 9:2991.1 as presented, and the motion passed with no objection. The adopted proposal reads as follows:

### **§2991.1. Title**

**This Part shall be known and may be cited as the "Sale of Mineral Rights by Mail Solicitation Act."**

Next, the Council considered proposed R.S. 9:2991.2, on pages 2 and 3 of the materials. The Reporter explained that the Committee wanted to very narrowly tailor the definition of a sale of mineral rights by mail solicitation to those transactions that occurred via an offer through the mail that was accompanied by a form of payment. The proposed provision would also explicitly exclude mineral leases from the definition of a sale of mineral rights by mail solicitation. One Council member questioned whether mineral leases should, in fact, be included within the scope of the legislation, and in response the Reporter explained that as a practical matter, there does not seem to be as great of a potential for abuse as in sales of mineral rights. Another Council member suggested adding promise of payment to the definition of a sale of mineral rights by mail solicitation, even though as a practical matter this method has not yet been employed. It was moved and seconded to add "or promise of payment" after "payment" on line 26 of page 2, and after a great deal of discussion concerning whether this addition was overly broad such that it would encompass far too many legitimate transactions, the motion ultimately passed by a vote of 18 in favor and 14 opposed.

At this time, the Council recessed for lunch at noon.

## **LUNCH**

The Council resumed its meeting at 1:30 p.m., at which time Professor Melissa T. Lonegrass, Reporter of the Mineral Law – Unsolicited Offers Committee, resumed her presentation. Professor Lonegrass returned the Council's attention to proposed R.S. 9:2991.2, on pages 2 and 3 of the materials. After one Council member suggested limiting the scope of the persons protected by this legislation to natural persons only, a great deal of discussion ensued concerning smaller LLCs and other entities that would no longer receive protection from these types of deceptive transactions. It was moved and seconded to add "by a natural person" after "contracted" on line 25 of page 2, but the motion failed by a vote of 10 in favor and 22 opposed. The Council then debated whether to change "common carrier" to "commercial carrier" on line 26 of page 2, but after the Reporter explained that common carrier has a distinct meaning in the sales context, the Council ultimately decided to leave the language as is. It was then moved and seconded to adopt R.S. 9:2991.2 as amended, and the motion passed with no objection. The adopted proposal reads as follows:

### **§2991.2. Sale of mineral rights by mail solicitation defined**

For purposes of this Part, a sale of mineral rights by mail solicitation is the creation or transfer of a mineral servitude or mineral royalty, or the granting of an option, right of first refusal, or contract to create or to transfer a mineral servitude or mineral royalty, that is contracted pursuant to an offer that is received by the transferor through the mail or by common carrier and is accompanied by any form of payment or promise of payment. As used in this Part, the term "mineral rights" does not include a mineral lease.

Next, the Council considered proposed R.S. 9:2991.3, on page 3 of the materials. The Reporter explained that the Committee did not intend to regulate parties who engaged in some sort of meaningful negotiations with each other and later used the mail as their method of ultimately concluding the transaction. One Council member suggested adding "that included a meaningful exchange" after "contact" on line 17 of page 3, and after a motion was made and seconded to include that language in the provision, the motion passed with no objection. The Council then engaged in a great deal of discussion concerning the problem of proof as to whether some sort of meaningful exchange ever took place between the parties, thereby rendering a later rescission of the transaction ineffective because the transaction was never a prohibited transaction to begin with. After one Council member expressed concern with respect to the fact that the possibility that the transferor's title to the mineral rights would not be merchantable because it would be suggestive of litigation, the Council agreed to discuss the issue further when it considered proposed R.S. 9:2991.7. It was then moved and seconded to adopt R.S. 9:2991.3 as amended, and the motion passed with no objection. The adopted proposal reads as follows:

### **§ 2991.3. Exclusion of contracts initiated through personal contact**

This Part does not apply to a sale of mineral rights by mail solicitation contracted subsequent to a prior personal contact that included a meaningful exchange between the transferor and the transferee.

The Reporter then directed the Council's attention to proposed R.S. 9:2991.4, on pages 3 and 4 of the materials. The Reporter explained that the Committee wanted to ensure that the jurisprudential exception to the requirement that an act under private signature be signed by both parties, which states that the act under private signature need not be signed by a party who otherwise availed himself of the contract, would not apply in the context of sales of mineral rights by mail solicitation. One Council member suggested changing "act" to "action" on line 35 of page 3, and the Reporter accepted the change. It was moved and seconded to adopt R.S. 9:2991.4 as amended, and the motion passed with no objection. The adopted proposal reads as follows:

### **§ 2991.4. Form**

A sale of mineral rights by mail solicitation shall be made by authentic act or by act under private signature signed by the transferor. The acceptance of any form of payment by the transferor or any action whereby the transferor otherwise manifests assent to the sale shall not satisfy the requirement of the transferor's signature.

Next, the Council considered proposed R.S. 9:2991.5, on pages 4 and 5 of the materials. The Reporter briefly explained that the purpose of this section is to require certain disclosures to be made to the transferor that the transaction is a sale of valuable mineral rights subject to a 60-day cooling off period in the form of a right of rescission in favor of the transferor. A motion was made and seconded to replace "You may cancel this agreement" with "If you sign and return this agreement, you may cancel it" on line 19 of page 4, and the motion passed with no objection. Another Council member suggested changing "This" to "Your" on line 20 of page 4 and "The" to "Your" on line 22 of page 4, and the Reporter accepted both of these changes. The Council then engaged in discussion concerning how to protect third parties transacting with the

transferee from the transferor's exercise of this right of rescission, including issues with respect to recordation and postponing the effectiveness of the transaction. Council members also expressed concern with respect to the creation of uncertainty as a result of the addition of the "promise of payment" language in R.S. 9:2991.2. One Council member suggested changing "sign" to "signed" on line 22 of page 4, and another Council member suggested that "cancellation" be replaced with "mailing your notice" on line 23 of page 4. The Council agreed, and the Reporter accepted both of these changes. Another Council member then suggested replacing "A sale of mineral rights" with "An instrument evidencing a sale of mineral rights" on line 14 of page 4, and the Reporter accepted that change as well.

Another Council member expressed concern with the "notice of cancellation" language on line 20 of page 4, arguing that "of cancellation" should be deleted because otherwise, it suggests that there would be some sort of form notice included with the disclosure statement. The Reporter accepted the change, and the Council then engaged in a great deal of debate concerning whether to include such a form notice of rescission. The Reporter explained that the Committee's intent was to make it as easy as possible for the transferor to rescind the transaction by simply mailing a letter to the transferee stating that they do not wish to sell their mineral rights. Other Council members then expressed concern with respect to recordation issues and a preference for recording a form notice as opposed to a letter. After discussion continued with respect to which party should be required to record the notice of rescission, the Council agreed to address these issues when they considered R.S. 9:2991.7. It was then moved and seconded to adopt R.S. 9:2991.5 as amended, and the motion passed with no objection. The adopted proposal reads as follows:

#### **§ 2991.5. Required disclosure**

An instrument evidencing a sale of mineral rights by mail solicitation shall contain on the first page, in conspicuous and legible type that is not smaller than fourteen-point font and is in contrast by typography, layout, or color with any other printing on the act, the following disclosure, or one substantially similar, under the caption "The Seller's Right to Cancel":

"THIS IS A [SALE] [CONTRACT REQUIRING THE SALE] OF YOUR VALUABLE MINERAL RIGHTS. If you sign and return this agreement, you may cancel it by mailing a notice to the buyer. Your notice must say that you do not wish to transfer your mineral rights, and it must be mailed no later than 60 days after you signed the agreement. Your notice must be mailed to the following: [insert name and mailing address of the buyer]. Within 60 days of mailing your notice, you must return any payment you have received from the buyer, and the buyer must return your mineral rights and any royalties and other payments received since the sale."

The Reporter then directed the Council's attention to proposed R.S. 9:2991.6, on page 5 of the materials. One Council member suggested replacing "act of transfer" with "instrument evidencing a sale of mineral rights by mail solicitation" on lines 14 and 17 of page 5, and the Reporter accepted those changes. The Reporter also agreed to replace "a sale of mineral rights by mail solicitation" with "the agreement" on lines 15 and 18 of page 5. The Council then discussed the substance of Paragraph C, and several members questioned whether the transferor would get a second chance to rescind in the case of a preparatory contract when the time period for rescission on the preparatory contract has passed but the transfer subsequent to that preparatory contract would also qualify as a sale of mineral rights by mail solicitation. After discussion, it was moved and seconded to adopt R.S. 9:2991.6 as amended, and the motion passed with no objection.

After taking a brief break, the Council then considered proposed R.S. 9:2991.7, on page 6 of the materials. The Reporter explained that her Committee wanted the law of registry to apply in the context of sales of mineral rights by mail solicitation in order to

protect third persons contracting with the transferee as well as lessees making royalty or other payments. The Committee decided that third persons should be protected from rescission until notice of rescission is filed for registry, and lessees and others making payments should be protected from rescission until 60 days after those parties are provided with a certified copy of the notice of rescission. At this point, one Council member suggested deleting the third sentence of the provision, on lines 9 through 11 of page 6, arguing that a clever solicitor could get the contract selling mineral rights from the transferor and quickly trade it with a third person, thereby making the contract non-rescindable. Several Council members then engaged in a great deal of debate with respect to issues concerning this suggestion, including the merchantability of mineral rights, the benefits of protecting third persons, the need for a definition of third persons, the addition of a possible good faith exception, and the possibility of treating third persons who contract with the transferee differently depending on whether the required disclosures were made. A formal vote was then taken on the motion to delete the sentence that reads "Rescission may not impair the rights of any third person who acquired an interest in the mineral rights prior to the time the notice of rescission was filed for registry", and the motion passed with 13 in favor and 11 opposed.

However, the Council continued its discussion of whether third persons who acquire mineral rights from the transferee should be protected from the effects of rescission as a policy matter in all cases or under certain circumstances. Several suggestions were made, including that if the required disclosures are made, third persons take mineral rights from the transferee subject to the right of rescission for a certain period of time, after which the law of registry applies and the notice of rescission must be recorded in order to affect third persons. It was moved and seconded that a policy vote be taken with respect to this suggestion, and the motion passed with no objection. At this time, one Council member suggested deleting the second sentence of proposed R.S. 9:2991.7, on lines 8 and 9 of page 6, and replacing it with the following sentence: "If the instrument evidencing a sale of mineral rights by mail solicitation from the transferor contains the disclosure required by this Part, a third person acquiring an interest in mineral rights from the transferee is subject to the effect of a notice of rescission filed within ninety days from the date after the filing of the act of transfer." It was moved and seconded to adopt this amendment as suggested, and the motion passed with no objection.

It was then moved and seconded to reconsider the earlier motion to delete the third sentence of R.S. 9:2991.7, on lines 9 through 11 of page 6, and the motion passed with no objection. A motion was then made to restore the third sentence of R.S. 9:2991.7 but to amend the sentence to include prefatory language as follows: "In all other cases, rescission may not impair the rights of any third person who acquired an interest in the mineral rights prior to the time the notice of rescission was filed for registry." The motion to restore the earlier deleted third sentence of R.S. 9:2991.7, on lines 9 through 11 of page 6, as amended to include the introductory clause, was seconded and ultimately passed with no objection.

When another Council member suggested adding a sentence to the end of the disclosure statement provided in proposed R.S. 9:2991.5, on page 4 of the materials, the Council returned to a consideration of that provision. A motion was then made to add the following language to the end of proposed R.S. 9:2991.5, on line 25 of page 4: "You may lose important rights if you do not file your notice in the conveyance records of the parish where the property is located within 90 days after this agreement is filed in the conveyance records." The motion to amend proposed R.S. 9:2991.5 was seconded and ultimately passed with no objection.

At this time, the Friday session of the March 2016 Council meeting was adjourned.

## LOUISIANA STATE LAW INSTITUTE

### THE MEETING OF THE COUNCIL

March 11-12, 2016

#### Saturday, March 12, 2016

##### Persons Present:

Bergstedt, Thomas	Lonegrass, Melissa T.
Breard, L. Kent	Maloney, Marilyn
Chehardy, Susan	Medlin, Kay
Crawford, William E.	Miller, Gregory A.
Crigler, James C.	Norman, Rick J.
Cromwell, L. David	Scalise, Ronald J., Jr.
Curry, Kevin C.	Simien, Eulis, Jr.
Doguet, Andre	Sole, Emmett C.
Foil, Frank	Tate, George J.
Gregorie, Isaac M. "Mack"	Thibeaux, Robert P.
Hamilton, Leo C.	Waller, Mallory Chatelain
Haymon, Cordell H.	Wilson, Evelyn L.
Hester, Mary C.	Ziober, John David
Hogan, Lila T.	
Holdridge, Guy	
Kostelka, Robert "Bob" W.	
Levy, H. Mark	

President David Ziober opened the Saturday session of the March 2016 Council meeting at 9:00 AM on Saturday, March 11, 2016 at the Hotel Monteleone in New Orleans, Louisiana. The President called on Professor Melissa T. Lonegrass, Reporter of the Mineral Law – Unsolicited Offers Committee, to continue her presentation of the Committee's proposed legislation for the 2016 Regular Session.

##### Mineral Law – Unsolicited Offers Committee

The Reporter continued her presentation from the day before with proposed R.S. 9:2991.7, on page 6 of the materials, by reminding the Council of the revisions that they had already made to the provision. The Reporter addressed the Council's concern with respect to the filing of the notice of rescission, and particularly the manner in which the notice of rescission would be indexed as it relates to third party rights, by proposing the addition of a sentence that would require the notice of rescission to contain the names of both the transferor and the transferee. It was moved and seconded that the following language be inserted between the sentences on line 11 of page 6: "A notice of rescission is without effect as to a third person unless it contains the name of the transferee and the transferor", and the motion passed with no objection.

At this time, the Council returned to the previous suggestion that a form notice of rescission be provided along with the required disclosures in R.S. 9:2991.5, on page 4 of the materials. After a great deal of discussion, during which several Council members expressed their preference for a pre-prepared form notice of rescission as an option for the transferor to use in order to rescind the sale of mineral rights by mail solicitation, it was moved that a form notice of rescission be drafted to include the name of the

transferee, the name of the transferor, and a property description of the mineral rights subject to the transfer. It was also moved that the Council defer to the Reporter, the members of her Mineral Law – Unsolicited Offers Committee, and the Coordinating Committee, who would be granted the authority to draft this pre-prepared form notice of rescission. These motions were both seconded and ultimately passed with one objection.

Next, the Reporter explained to the Council that at its May 2015 meeting, discussions occurred with respect to the issue of “third person” corporate entities related to the transferee contracting with the transferee with respect to mineral rights that had been transferred by the transferor. In light of this discussion, the Committee drafted Comment (b) to attempt to address these types of situations under the corporate veil-piercing theory, but concerns were raised that perhaps that theory would not actually apply in these types of situations. For that reason, the Reporter suggested adding the following language to proposed R.S. 9:2991.7: “For purposes of this Section, a third person does not include a person who controls, is controlled by, or is under common control with the transferee.” However, this suggestion caused a great deal of debate among Council members, who expressed concern over the narrowness of this suggested language, particularly concerning its apparent lack of applicability to agents of the transferee. Several Council members suggested introducing some sort of good faith requirement here, but others argued that because good faith has different meanings in different concepts and is entirely foreign in the context of the public records doctrine, perhaps it would be better to leave the issue to be decided by the law of registry and, to the extent necessary, jurisprudentially by corporate veil-piercing and other related theories. Ultimately, all of the Council members were opposed to the motion to amend R.S. 9:2991.7 to include the language suggested by the Reporter.

Next, the Reporter addressed an earlier mentioned issue that from the perspective of the transferor, there seems to be a problem with respect to security of title as it relates to the potential ineffectiveness of a notice of rescission. As a result, the Reporter suggested adding the following language to proposed R.S. 9:2991.7: “The ineffectiveness of a notice of rescission may not be asserted against a third person acquiring rights from the transferor unless the transferee commences an action against the transferor and files a notice of lis pendens within 6 months after the notice of rescission is filed for registry.” After it was moved and seconded to adopt this amendment, the Council then engaged in a great deal of discussion concerning the time period within which the action must be commenced and the notice of lis pendens must be filed. One Council member suggested making this time period 30 or 90 days rather than 6 months, and another Council member questioned whether the time period would be peremptive or prescriptive. A substitute motion was made and seconded that the time period in the Reporter’s suggested amendment be shortened from 6 months to 90 days, but that motion failed with 7 in favor and 14 opposed. Other Council members then questioned how the transferee would know that the notice of rescission had been recorded in order to trigger the time period for the commencement of the action and the filing of the notice of lis pendens. At this point, the question was called, and the Reporter expressed that because she did not feel confident that her suggested language would protect against a completely fraudulent notice of rescission without further discussion by the Council. As a result, she withdrew her motion to amend.

The Reporter then explained that the last sentence of proposed R.S. 9:2991.7 was designed to deal with a particular problem in that the Mineral Law – Unsolicited Offers Committee wanted to ensure that parties making payments were given actual notice of the rescission of a sale of mineral rights by mail solicitation. The Reporter suggested that as a result of the revisions that had been made to proposed R.S. 9:2991.7, this sentence, beginning on line 11 of page 6 of the materials, should be separated into its own section. It was then moved and seconded to remove the prefatory language “In any case,” from the sentence and to move the sentence, which would begin with “Rescission”, into its own section. It was also moved and seconded to delete “lessee or other” on line 12 of page 5 as well as “to an owner” on lines 12 and 13 of the same page, and both of these motions passed with no objection. At this time, it was moved and seconded to adopt proposed R.S. 9:2991.7 as amended, as well as the new provision that had been created, and the motion passed with no objection. The adopted proposal reads as follows:

**§ 2991.7. Rescission; method of making**

Rescission of a sale of mineral rights by mail solicitation must be made by written notice to the transferee and is effective between the parties when the notice of rescission is transmitted. If the instrument evidencing a sale of mineral rights by mail solicitation from the transferor contains the disclosure required by this Part, a third person acquiring an interest in mineral rights from the transferee is subject to the effect of a notice of rescission filed within ninety days from the date after the filing of the act of transfer. In all other cases, rescission may not impair the rights of any third person who acquired an interest in the mineral rights prior to the time the notice of rescission was filed for registry. A notice of rescission is without effect as to a third person unless it contains the name of the transferee and the transferor.

**§ 2991.7A. Rescission; parties obligated to make payments**

Rescission shall not be effective against a party obligated to make or in fact making royalty or other payments until sixty days after that party is furnished with a certified copy of the notice of rescission.

The Council then turned to proposed R.S. 9:2991.8, on pages 6 and 7 of the materials. The Reporter explained that the Committee's intent in drafting this provision was to restore the parties to their original positions before the sale of mineral rights by mail solicitation took place. Several Council members then questioned whether the last sentences of Paragraphs A and B, on lines 2 through 4 and 8 and 9 of page 7, were necessary, and the Council engaged in a great deal of debate concerning whether to retain or delete these sentences. A motion was made to delete the last sentence of Paragraph B, on lines 8 and 9 of page 7, but to retain the last sentence of Paragraph A, on lines 2 through 4 of page 7, and replace "damages" with "return of the payments" on line 3 of that page. That motion was seconded and ultimately passed with no objection. Next, the Council considered Paragraph C of the provision, and a motion was made to add language that would allow a court to award attorney fees and court costs to the prevailing party in a legal action for return of the payments as provided in Paragraphs A and B, but because there was no second on the motion, the motion died. A Council member then moved to reconsider the earlier deletion of the last sentence of Paragraph B, on lines 8 and 9 of page 7, but that motion failed with only 2 members in favor of reconsideration. At this time, it was moved and seconded to adopt R.S. 9:2991.8 as amended, and the motion passed with no objection. The adopted proposal reads as follows:

**§ 2991.8. Effects of rescission**

A. A transferor who exercises the right to rescind under this Part shall return to the transferee within sixty days after rescission any payments made by the transferee. A transferor's failure to return such payments gives rise to a cause of action for return of the payments but does not prevent rescission.

B. A transferee against whom the right to rescind is exercised under this Part shall pay to the transferor within sixty days after rescission any royalties and other payments received by the transferee plus interest on those royalties and other payments from the date received by the transferee.

C. When the act of transfer does not contain the disclosure required by this Part, a transferee against whom the right to rescind is exercised shall be liable for attorney fees and court costs. In addition to restoring any royalties or other payments due to the transferor, a court may further award as damages an amount up to twice the sum of royalties and other payments received by the transferee.

Next, the Reporter directed the Council's attention to proposed R.S. 9:2991.9, on pages 7 and 8 of the materials. After one Council member questioned why mandatory arbitration clauses were not included in this list of prohibited provisions, the Reporter explained that because the prevailing view by the Supreme Court of the United States is that state laws purporting to circumvent the Federal Arbitration Act are preempted,

the Committee decided that inclusion of such a provision would likely be considered unconstitutional. Another Council member suggested deleting "with respect to modifications of the act of transfer" from line 10 of page 8, arguing that limiting this prohibition just to modifications of the act of transfer seems too narrow. After discussion of a few alternatives, it was moved and seconded to amend the provision by deleting this language from line 10 of page 8, and the motion passed with no objection. With respect to Paragraph (5) of the provision, after another Council member questioned whether the Committee intended to permit the transferee to give the transferor more time to return any payments made, the Reporter accepted the member's suggestion to add "of the transferee" after "obligations" on line 12 of page 8. It was then moved and seconded to adopt R.S. 9:2991.9 as amended, and the motion passed with no objection. The adopted proposal reads as follows:

**§ 2991.9. Prohibited terms**

The following provisions if included in or accompanying a sale of mineral rights by mail solicitation shall be absolutely null:

(1) A provision requiring the agreement to be governed or interpreted by the laws of another jurisdiction or requiring a suit to be brought in a forum or jurisdiction outside of this state.

(2) A provision stipulating any venue to the extent inconsistent with the applicable provisions of the Code of Civil Procedure.

(3) A provision requiring the transferor to indemnify the transferee for any loss related to the transferor's right to rescind.

(4) A provision authorizing the transferee to act as a mandatary of the transferor.

(5) A provision that seeks to exclude, limit, waive, or otherwise modify the obligations of the transferee described in this Part.

The Reporter then turned to proposed R.S. 9:2991.10, on page 8 of the materials. It was moved and seconded to adopt R.S. 9:2991.10 as presented, and the motion passed with no objection. The adopted proposal reads as follows:

**§ 2991.10. Reservation**

Nothing in this Part shall be construed to limit any other remedies or grounds for rescission provided by law.

Finally, the Reporter directed the Council's attention to R.S. 9:2991.2, which it had adopted the day before, on pages 2 and 3 of the materials. The Reporter explained that because the Council added "or promise of payment" to the definition of a sale of mineral rights by mail solicitation, the provision no longer acts as a limitation but rather creates uncertainty in that this definition potentially applies to all sales. For that reason, the Reporter requested that the Council reconsider its earlier decision to add the "or promise of payment" language to R.S. 9:2991.2. It was moved and seconded to reconsider the addition of "or promise of payment" on line 26 of page 2, and the motion passed with no objection. It was then moved and seconded to delete "or promise of payment" from line 26 of page 2, and a substitute motion was made and seconded to instead delete "and is accompanied by any form of payment or promise of payment" from line 26 of page 2. A formal vote was taken on the substitute motion, which failed with only 1 member in favor and the rest opposed. A formal vote was then taken on the original motion to delete "or promise of payment" from line 26 of page 2, and that motion passed with no objection. The adopted proposal reads as follows:

**§2991.2. Sale of mineral rights by mail solicitation defined**

For purposes of this Part, a sale of mineral rights by mail solicitation is the creation or transfer of a mineral servitude or mineral royalty, or the granting of an option, right of first refusal, or contract to create or to transfer a mineral servitude or mineral royalty, that is



contracted pursuant to an offer that is received by the transferor through the mail or by common carrier and is accompanied by any form of payment. As used in this Part, the term "mineral rights" does not include a mineral lease.

At this time, Professor Lonegrass concluded her presentation of materials from the Mineral Law – Unsolicited Offers Committee.

President David Ziober then called on Judge Robert Morrison, III, Co-Chair of the Code of Criminal Procedure Committee, and Judge Guy Holdridge, Acting Reporter of the Code of Criminal Procedure Committee, to present a status report with respect to the Committee's postconviction relief project.

### **Code of Criminal Procedure Committee**

The Co-Chair and Acting Reporter began their presentation by providing the Council with background information concerning the postconviction relief project, including the Louisiana Supreme Court's involvement in the project dating back to 2013. The Acting Reporter explained that although the original intent was for noncapital applications for postconviction relief to be governed by the Code of Criminal Procedure and capital applications for postconviction relief to be governed by Louisiana Supreme Court Rule, the Code of Criminal Procedure Committee ultimately decided to propose legislation with respect to both capital and noncapital postconviction relief.

The Acting Reporter then directed the Council's attention to proposed Article 927.14, on page 10 of the materials, dealing with repetitive applications for postconviction relief. The Acting Reporter explained to the Council that district courts are receiving hundreds of applications for postconviction relief on a regular basis with no manner of determining whether these applications have merit. Additionally, appellate courts are receiving mandamus requests to force district court judges to rule on these applications for postconviction relief, resulting in an inundation of the court system. As a result, the Reporter explained that the Committee and its newly formed Postconviction Relief Subcommittee are discussing the implementation of a new requirement that would allow a defendant to file one application for postconviction relief as of right, after which the defendant must file a motion for leave of court to file a new application for postconviction relief. The Reporter also explained that this motion for leave of court would require the defendant to use a form that would clearly and concisely state any new grounds that the defendant has for obtaining postconviction relief.

At this time, Judge Morrison and Judge Holdridge concluded their presentation of the postconviction relief status report from the Code of Criminal Procedure Committee, and there being no additional business, the March 2016 Council meeting was adjourned.

  
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Mallory Chatelain Waller      10/4/2016  
Date

  
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Claire Popovich      10/4/2016  
Date