

LOUISIANA STATE LAW INSTITUTE

THE MEETING OF THE COUNCIL

October 13-14 2017

Friday, October 13, 2017

Persons Present:

Adams, E. Pete	Jewell, John Wayne
Adams, Marguerite (Peggy) L.	Knighten, Ariene D.
Amond, Kristen D.	Kostelka, Robert "Bob" W.
Amy, Jeanne L.	Lavergne, Luke
Blanchard-Romanach, Kyle	Lawrence, Quintillis Kenyatta
Block, Matthew F.	Little, F. A., Jr.
Boudreaux, Bernard E., Jr.	Lovett, John
Braun, Jessica	McIntyre, Edwin R., Jr.
Breard, L. Kent	Medlin, Kay C.
Carroll, Andrea	Miller, Gregory A.
Castle, Marilyn	Morris, Glenn G.
Castille, Preston J., Jr.	Morrison, Robert
Chehardy, Susan	Nichols, Doug
Clark, Colin	Norman, Rick J.
Crigler, James C.	Park, Jee
Cromwell, L. David	Riviere, Christopher H.
Davidson, James J., III	Ryan, Graham H.
Di Giulio, John E.	Scalise, Ronald J., Jr.
Dimos, Jimmy N.	Sole, Emmett
Domingue, Billy J.	Talley, Susan G.
Forrester, William R., Jr.	Tate, George J.
Freel, Angelique	Thibeaux, Robert P.
Garrett, J. David	Title, Peter S.
Gasaway, Grace B.	Tucker, Zelda W.
Gregorie, Isaac M. "Mack"	Waller, Mallory
Grotsky, Barry H.	Wilson, Evelyn
Griffin, Piper D.	Woodruff-White, Lisa
Hamilton, Leo C.	Ziober, John David
Hargrove, Joseph L., Jr.	
Hogan, Lila T.	
Holdridge, Guy	

President David Ziober called the October 2017 Council meeting to order at 10:00 a.m. on Friday, October 13, 2017. He welcomed the Council back to New Orleans and thanked the Chief Justice, Associate Justices, Judicial Administrator, and staff of the Louisiana Supreme Court for their hospitality in allowing the Law Institute to use their facilities. He also recognized Council member Cordell Hayman, who was recently named the 2017 Golden Deeds award winner honoring his outstanding commitment to community service. After asking the Council members to briefly introduce themselves, the President then called on Professor Ronald J. Scalise, Jr., Reporter of the Trust Code Committee, to begin his presentation of materials.

Trust Code Committee

Professor Scalise began his presentation by explaining to the Council that the materials before them today represented relatively minor amendments to the Trust Code on two discrete topics, recordation of trust instruments and extracts and deferred vesting of principal. The Reporter also recognized the members of his Committee for their dedicated work in not only proposing these amendments, but also comprehensively reviewing the provisions of the Trust Code on allocation of principal and income. He then directed the Council's attention to R.S. 9:2011, on page 1 of the materials, and explained that the proposed revision to this provision was intended to clarify an issue related to the deferred vesting of a principal beneficiary with respect to revocable trusts. Professor Scalise provided the Council with a brief overview of general principles of Louisiana trust law with respect to this issue, namely that there must be a vested interest in a principal beneficiary subject to a few exceptions, such as this provision and the provisions on class trusts. The Reporter then explained that R.S. 9:2011 is intended to allow a settlor to create a revocable trust that becomes irrevocable upon his death, at which time principal will vest in the beneficiaries he has named. Professor Scalise provided the example of a father who creates a revocable trust that becomes irrevocable at the time of his death and names his children at the time of his death as the principal beneficiaries.

The Reporter also explained that Civil Code Article 1521, a reference to which is included in R.S. 9:2011 on line 10 of page 1 of the materials, is the provision on vulgar substitutions or short-term survivorship and permits the imposition of a condition that the beneficiary of a trust survive the settlor for a maximum of six months. As a result, the vesting of the principal beneficiary under R.S. 9:2011 could be delayed by six months from the date of the settlor's death. Professor Scalise then explained that a clever Committee member suggested that the last sentence of existing R.S. 9:2011 is drafted in such a way as to allow a revocable trust to become irrevocable prior to the death of the settlor but to nevertheless delay the vesting of the principal beneficiary until six months after the death of the settlor. He provided the example of a father who creates a revocable trust that names his children at the time of his death as the principal beneficiaries, provided they survive him for six months. The trust then becomes irrevocable the next day, and the father lives for fifty more years, such that the vesting of principal is delayed fifty years and six months from the time the trust becomes irrevocable, rather than six months from the time the trust becomes irrevocable as intended by R.S. 9:2011. The Reporter then explained to the Council that the proposed revision on lines 8 and 9 of page 1 of the materials is intended to provide clarification with respect to this issue, and it was moved and seconded to adopt R.S. 9:2011 as presented. The motion passed with no objection, and the adopted proposal reads as follows:

R.S. 9:2011. General rule

A revocable trust instrument need not designate the beneficiaries upon the creation of the trust but may instead provide a method whereby they are determined at a later date, but no later than the date when the trust becomes irrevocable. A beneficiary thus determined may be a person who is not in being when the trust is created, as long as he is in being when the beneficiaries are determined. If beneficiaries are thus determined, any provision in this Code that refers to persons in existence at the creation of the trust shall be deemed to refer to persons in existence at the time when the beneficiaries are determined under the trust instrument. If the trust becomes irrevocable upon the death of the settlor, the ~~The~~ interest of the beneficiary may be conditioned upon the beneficiary surviving the settlor for a period of time permitted by Civil Code Article 1521.

Next, Professor Scalise asked the Council to consider the proposed revisions to R.S. 9:2092, beginning on page 2 of the materials. He reminded Council members that just last year the Trust Code Committee had proposed revisions to this very provision to clean up a series of previous amendments suggested by various interest groups rather than the Committee itself. For example, the Reporter explained that under the Louisiana Trust and Estates Act of 1938, the trust instrument itself was required to be recorded when the trust contained immovable property. R.S. 9:2092 was then enacted into the Trust Code in 1964 and was later amended in 1995 to first permit the recordation of an extract of trust for purposes of protecting privacy interests. Subsection B was also added in 1995 as a recitation of the information that must be contained in the trust extract, including the name of the trust, settlor, trustee, beneficiary, and other relevant information. R.S. 9:2092 was then amended in 2003, 2004, 2012, and 2015 before the Trust Code Committee clarified the language in 2016 and also agreed to review the provision in its entirety. Professor Scalise then noted that during its review of R.S. 9:2092, the Committee considered reverting to the 1964 requirement of recording the trust instrument itself before ultimately settling upon the proposed revisions included on pages 2 and 3 of the materials.

The Reporter then explained that Subsection A of R.S. 9:2092 provides that if the trust contains immovable property, either the trust instrument itself or an extract of trust must be recorded, and Subsection B provides the information that must be provided in a trust extract. He also explained that Subsection C of the provision is somewhat controversial in that it serves as an exception to the public records doctrine by providing affirmative protections in favor of third persons who rely upon information contained in a recorded trust extract that is inconsistent with the provisions of the trust instrument itself. Nevertheless, the Reporter noted that Subsection C is simply a redraft of existing Paragraphs (B)(2) and (3), which have been included in the Trust Code since 1995.

At this time, it was moved and seconded to adopt the proposed revisions to R.S. 9:2092. One Council member questioned whether Subsection C prohibited third persons from challenging the trust on the basis of form. Another Council member noted that Subsection A provides for the recordation of the trust instrument, a trust extract, or a copy of each certified by the clerk of court but questioned whether a copy certified by someone other than the clerk of court could also be recorded. The Council member then provided the example of a situation in which both the trustee and the settlor lost the trust instrument but the notary had a certified copy, and the Reporter responded that in such a situation, the parties would likely record a trust extract rather than a copy of the trust instrument for purposes of protecting privacy interests. Next, another Council member expressed her concern with respect to the requirement in Paragraph (B)(4), on line 16 of page 2 of the materials, that a trust extract contain the address of each trustee. The Council member explained that this revision would be problematic to the extent that the provision would now require modification of the trust extract every time a trustee's address changed, particularly with respect to corporate trustees. She also explained that the other information required by Subsection B is generally static, such as the name of the trust, a statement as to whether the trust is revocable or irrevocable, the name of the settlor, and the name of the trustee, and that although the names of the beneficiaries can change, at least some description of them is required.

The Council member then suggested that perhaps the revision requiring a trust extract to provide the address of each trustee should be qualified by "at the time of execution of the trust." Professor Scalise responded by recognizing that the trustee's address could certainly change but noting that other information required to be provided in the trust extract could also change, including the names of the beneficiaries or even the name of the trustee. As a result, he expressed concern with respect to qualifying that the address provided in the trust extract pursuant to Paragraph (B)(4) should be the address at the time of execution of the trust, particularly in light of the possible interpretation that other information with no such qualification might be subject to some sort of continuing

obligation with respect to modification of the trust extract. As a compromise, the Reporter then offered to draft a Comment explaining that Paragraph (B)(4) simply requires the recorded trust extract to include the address of the trustee at the time of execution of the trust, such that there is no continuing obligation to modify the trust extract with respect to the information required by Subsection B, and the Council agreed.

Next, another Council member questioned why the name or other description of the beneficiaries is required to be provided in the trust extract pursuant to Paragraph (B)(4), on lines 16 and 17 of page 2 of the materials, and he explained that this requirement does not make sense for several reasons. For example, he noted that beneficiaries can change, particularly in the context of revocable trusts where the intent of the settlor changes, and that describing beneficiaries is difficult unless the provisions of the trust instrument itself are reproduced in full. The Council member also explained that other jurisdictions have certificates of trust, which are similar to extracts of trust but do not require the names of the beneficiaries to be provided, and he suggested that for these reasons, perhaps this requirement should be deleted from Subsection B. The Reporter disagreed, noting that providing the names of the beneficiaries had been required by Subsection B since 1995 and explaining that the beneficiaries are the parties who are most likely to raise any issues with respect to the trustee's interactions with third persons as to the property in trust because ultimately, this property will belong to them. The Council member then questioned whether the requirement concerning the name of the trustee under Paragraph (B)(4) applies to the trustee at the time of execution of the trust or the trustee at the time of recordation of the trust extract, explaining that the trustee could change in the interim. The Reporter responded that he would be happy to address this concern in the previously agreed upon Comment, and the Council member agreed. It was then moved and seconded to remove "name or other description of the beneficiary or beneficiaries" from Paragraph (B)(4) of R.S. 9:2092, on lines 16 and 17 of page 2, but the motion failed with only a few votes in favor.

The Council member also questioned the substance of proposed Comment (c) to R.S. 9:2092, on page 4 of the materials. He explained that although Comment (c) provides that "the jurisprudence is clear that this Section does not apply when a settlor creates a testamentary trust and immovable property is transferred to the trust by donation mortis causa" and suggests that a testamentary trust containing immovable property does not need to be recorded, the text of R.S. 9:2092(A), on page 2 of the materials, states that if the trust property of a testamentary trust includes immovables, it must be recorded. The Reporter explained that most of the language in Subsection A is existing law and that the jurisprudence clearly provides that if a testamentary trust contains a transfer of immovable property, that transfer takes place by operation of law such that a testamentary trust does not need to be recorded in the conveyance records unless the trust later acquires immovable property. The Council member then questioned whether the result would be different if the trust contained immovable property at the time of the judgment of possession, but the Reporter responded that in such a case, the trust would not be required to be recorded. Other Council members agreed with the Reporter, expressing concern with respect to the dangers of requiring a testamentary trust to be recorded. After further discussion, during which the Council member reiterated his concern that the text of R.S. 9:2092(A) seems to require recordation of a testamentary trust whereas Comment (c) to the provision states that recordation of a testamentary trust is not required, the Reporter ultimately noted that Comment (c) was simply intended to explain current law and existing jurisprudence.

Another Council member then suggested splitting the provisions of Paragraph (B)(4), on lines 16 and 17 of page 2 of the materials, into separate Paragraphs, one requiring the trust extract to contain the name and address of each trustee, and the other requiring the trust extract to contain the name or other description of the beneficiary or beneficiaries, and the Reporter accepted

this change. The Council member then suggested that perhaps the language in Subsection C, on lines 19 and 20 on page 3, should be revised, expressing concern with respect to the manner in which this language was currently drafted. Another Council member agreed and suggested replacing ", and failure of the trust to" with "and a trust that does not" on line 19 and deleting "shall not be effective as to a third person" on line 20, but Professor Scalise explained that this suggestion would alter the meaning of the provision. He also explained that a third person will be protected with respect to an otherwise invalid trust that fails to comply with the form requirements of R.S. 9:1752, such as a trust that fails to meet the requirements of an act under private signature duly acknowledged. One Council member then suggested replacing "shall not be effective as to" with "cannot be asserted against" on line 20 of page 3, and another Council member suggested deleting "shall not be effective as to a third person" on the same line and replacing ", and" with "regardless of the" on line 19 of the same page. After the Reporter expressed concern with respect to both of these alternative suggestions and explained that he had intentionally drafted this provision as narrowly as possible because it provides affirmative protections to third persons, one Council member suggested replacing "and failure of the trust" with "even if the trust fails" on line 19 of page 3 and deleting "shall not be effective as to a third person" on line 20 of the same page.

The Council then engaged in a great deal of discussion with respect to the intended meaning of proposed R.S. 9:2092(C), particularly with respect to the issue of whether an heir who was omitted from a trust could invalidate the trust based on the failure of the trust to comply with the form requirements imposed by R.S. 9:1752. Because the language of Subsection C as drafted provides that such failure "shall not be effective as to a third person," Council members disagreed as to whether the proposed revision represents a change in the law with respect to this issue, such that an omitted heir who could have invalidated the trust under current law now could not do so. One Council member explained that the intent of the proposed language in Subsection C was to provide that the nullity of the trust cannot be asserted against a third person who acquires property from the trust, but that a third person, such as a creditor of the settlor, could nevertheless attack the validity of the trust. The Reporter then questioned whether the language on lines 3 and 4 of page 3 of the materials providing that a third person "shall not be required to further examine the trust instrument or to ascertain its compliance with R.S. 9:1752, the failure of which shall not be effective against third parties" should be restored. As an alternative, one Council member suggested replacing "shall not be effective as to" with "cannot be asserted to the prejudice of" on line 20 of page 3. It was then moved and seconded to amend Subsection C of R.S. 9:2092 in this manner, and the motion passed with no objection.

The Council then continued its discussion of the proposed revisions to R.S. 9:2092 in general. One Council member noted that as a practical matter, in the event that the trust instrument is recorded in one parish and the trust contains immovable property located in several other parishes, the trust extract will be recorded in each of those other parishes. The Council member then questioned whether a title attorney who relies upon information contained in the recorded trust extract naming three beneficiaries when there are really four would be able to rely upon that information, and the Reporter responded in the affirmative. However, Professor Scalise also noted that rather than relying exclusively upon information contained in the trust extract, title attorneys should consult the trust instrument itself, particularly since current law and proposed Subsection C do not provide protection to third persons with respect to every issue. One Council member then suggested moving "contained in the trust instrument" at the end of line 20 of page 1 to appear after "restriction" on line 19 of the same page, and the Reporter accepted this change. It was then moved and seconded to adopt R.S. 9:2092 as amended, and the motion passed with no objection. The adopted proposal reads as follows:

R.S. 9:2092. Recordation of instruments

A. ~~If at any time the trust property of either an inter vivos trust or a testamentary trust includes immovables or other property the title to which must be recorded in order to affect third persons, a settlor or a trustee shall file for registry in each parish in which an immovable is located, 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 parties, 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~~ 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)~~ (1) The name of the trust, if any.

~~(b)~~ (2) A statement as to whether the trust is revocable or irrevocable.

~~(c)~~ (3) The name of each settlor.

~~(d)~~ (4) The name and address of each trustee, and

(5) The name or other description of the beneficiary or beneficiaries.

~~(e)~~ (6) The date of execution of the trust.

~~(f)~~ (7) Any limitation or restriction contained in the trust instrument on the power of the a trustee to alienate, lease, or encumber an immovable property ~~contained in the trust instrument.~~

~~(2) A third person relying upon the information contained in a recorded extract of trust as provided in Subsection B shall be entitled to rely upon the representations in the extract and shall not be required to further examine the trust instrument or to ascertain its compliance with R.S. 9:1752, the failure of which shall not be effective against third parties. 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 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, 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.~~

C. When an extract of trust is recorded pursuant to Subsection A of this Section, a third person may rely upon the provisions in the extract, and failure of the trust to comply with the form requirements imposed by R.S. 9:1752 cannot be asserted to the prejudice of a third person. Any limitations or restrictions on the trustee's power to alienate, lease, or encumber immovables not evidenced by the extract shall not be effective as to a third person.

The Reporter then directed the Council's attention to page 5 of the materials and explained that R.S. 9:2262.2 is the foreign trust counterpart to R.S. 9:2092. As a result, he explained that the revisions the Council had just approved with respect to R.S. 9:2092 should also be made in R.S. 9:2262.2. It was moved and seconded to incorporate all applicable amendments to R.S. 9:2092 but to otherwise adopt the proposed revisions to R.S. 9:2262.2 as presented, and the motion passed with no objection. The adopted proposal reads as follows:

R.S. 9:2262.2. Recordation of instruments

~~A. If at any time the trust property of a foreign trust includes immovables or other property in Louisiana the title to which must be recorded in order to affect third persons, a settlor or a trustee shall file for registry in each parish in which an immovable is located, 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 An extract of a trust instrument either shall either be in such the form and contain such the information as may be lawful required under the law of the jurisdiction which that the parties have expressly chosen to govern the trust, or shall or be executed by either the settlor or the trustee and shall include all of the following:~~

~~(a) (1) The name of the trust, if any.~~

~~(b) (2) A statement as to whether the trust is revocable or irrevocable.~~

~~(c) (3) The name of each settlor.~~

~~(d) (4) The name and address of each trustee, and~~

~~(5) The name or other description of the beneficiary or beneficiaries.~~

~~(e) (6) The date of execution of the trust.~~

~~(f) (7) Any limitation or restriction contained in the trust instrument on the power of the a trustee to alienate, lease, or encumber an immovable property contained in the trust instrument.~~

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

~~(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 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 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.~~

C. When an extract of trust is recorded pursuant to Subsection A of this Section, a third person may rely upon the provisions in the extract, and failure of the trust to comply with the form requirements imposed by R.S. 9:2262.4 cannot be asserted to the prejudice of a third person. Any limitations or restrictions on the trustee's power to alienate, lease, or encumber immovables not evidenced by the extract shall not be effective as to a third person.

At this time, Professor Scalise concluded his presentation on behalf of the Trust Code Committee, and the President called on Ms. Mallory Waller to present a staff report in response to House Concurrent Resolution No. 36 of the 2017 Regular Session.

"d/Deaf" Presentation

Ms. Waller began her presentation by explaining that the report before the Council had been revised based on suggestions made during the September 2017 Council meeting. She reminded Council members that this report had been drafted in response to House Concurrent Resolution No. 36, which urged and requested the Law Institute to study the prospective use of the term "d/Deaf" throughout Louisiana law. She also explained that according to the resolution, the term "d/Deaf" has emerged as an inclusive means of referring to two distinct groups of individuals within the deaf community: those who self-identify as "deaf" and those who self-identify as "Deaf." Ms. Waller then provided the Council with background information concerning Acts 2017, No. 146, which was enacted during the 2017 Regular Session to amend terminology concerning members of the deaf community by replacing "hearing-impaired" with "deaf or hard of hearing" throughout Louisiana law. She also explained that this legislation was sponsored by the author of the resolution, who suggested during legislative testimony that in addition to these changes, Louisiana should also incorporate the term "d/Deaf" as a means of inclusively referring to members of the deaf community, particularly since this use of the term was being studied in other states across the country.

Ms. Waller then noted that although one state had enacted legislation during its most recent legislative session that changed terminology with respect to members of the deaf community, it did so in a way that was almost identical to the changes made by Louisiana – namely, by replacing "hearing-impaired" with "deaf or hard of hearing" throughout its statutory provisions. She also noted that only two states use the term "d/Deaf" in their administrative provisions, and only

one of these states uses the term in a way that defines the differences between "deaf" and "Deaf" individuals. Ms. Waller then explained these differences by noting that individuals who self-identify as "deaf" typically consider their hearing loss solely in medical terms, associate with hearing persons as opposed to other members of the deaf community, and, as a general rule, are persons who lost their hearing due to an accident, illness, or trauma. In contrast, individuals who self-identify as "Deaf" typically consider themselves to be members of the deaf community, have life experiences that are shaped by deaf culture, and, as a general rule, are persons who were born deaf and attended deaf schools. She also explained that although research revealed slight differences in the meanings of these terms, all sources agree that a person's decision to self-identify as "deaf" or "Deaf" is a personal one based on their unique circumstances and several factors, including hearing status, communication preferences, and cultural orientation.

Ms. Waller then explained that previously, the report concerning whether to incorporate the term "d/Deaf" throughout Louisiana law had been drafted in a way that simply provided suggestions for the legislature's consideration but did not make specific recommendations with respect to developing an inclusive means of referring to "deaf" and "Deaf" individuals. She reminded the Council that during its September 2017 meeting, several Council members expressed a preference for recommending against replacing existing terminology with the term "d/Deaf" for numerous reasons. For example, Ms. Waller explained that as indicated by the author of the resolution during legislative testimony, slashes are not generally used when drafting statutory provisions, and partial words containing slashes, such as "d/Deaf," are not used at all. She next explained that the Council had also discussed several provisions of Louisiana law in which existing terminology should not be changed, such as Civil Code Article 1580.1, providing that a notarial testament shall only be executed by a person who has been legally declared physically deaf. Ms. Waller then reminded Council members that several existing statutory provisions also contain the names of schools, associations, institutes, registries, and funds, none of which should be changed unless the names of these entities, registries, and funds are also changed. Additionally, she explained that during the Council's last meeting, concern was also expressed regarding the inadvertent creation of legal distinctions among "deaf," "Deaf," and "d/Deaf" individuals and the undesirable consequences that could potentially result in the event that existing terminology is not replaced consistently throughout Louisiana law.

At this time, Ms. Waller directed the Council's attention to page 4 of the materials and explained that in light of the concerns expressed during the September 2017 meeting, the report had been revised in accordance with the Council's policy decision to recommend against replacing existing terminology with "d/Deaf" throughout Louisiana law. She also noted that the revised report still contains an alternative approach for developing an inclusive means of referring to "deaf" and "Deaf" individuals, namely to enact one or more statutory provisions stating that unless the context clearly indicates otherwise, each of the terms "deaf" and "Deaf" are intended to refer to both "deaf" and "Deaf" individuals. Ms. Waller then reminded Council members that this language was suggested during legislative testimony as a more efficient means of inclusively referring to members of the deaf community, and that Louisiana currently employs this methodology in its Codes and Revised Statutes by providing that, with respect to gender and number, use of one gender includes the others, and use of the singular includes the plural. Ms. Waller also noted that another suggestion that remains in the revised report for the legislature's consideration is to define the terms "deaf" and "Deaf" in a way that provides guidance and clarity with respect to the distinctions that have emerged within the deaf community between these two groups of individuals. She then directed the Council's attention to page 5 of the revised report, which contains proposed definitions based on the information contained in House Concurrent Resolution No. 36 and related legislative testimony, as well as several examples of definitions that are

presently included in the statutory and administrative compilations of other states.

Additionally, Ms. Waller explained that the revised report still includes a suggestion that the legislature consider adopting a policy statement explaining that the legislature recognizes that the language used to refer to persons with disabilities shapes and reflects societal attitudes and perceptions and that, as a result, the legislature remains committed to reviewing and evaluating this sort of terminology. Ms. Waller then informed the Council that the report's conclusion, on page 7 of the materials, had been revised to reflect the changes that had been made in light of the policy decision made by the Council during its September 2017 meeting, and she thanked members for all of their excellent suggestions. It was then moved and seconded to adopt the revised report as presented.

One Council member suggested changing "solely" to "primarily" in the definition of "deaf" on line 15 of page 5 of the materials for purposes of consistency with the definition of "Deaf" on line 20 of the same page, and Ms. Waller agreed. The Council member also expressed concern with respect to the fact that the definition of the term "Deaf" as drafted includes the term "deaf" and therefore suggested replacing "deaf" with "without the ability to hear," and the Council agreed. Council members then engaged in a great deal of discussion with respect to whether "Deaf" individuals are always considered a subset of "deaf" individuals in that, in order to be a member of the deaf community and culture, an individual must also be physically deaf. One Council member then questioned whether there are any existing legal distinctions with respect to "deaf" as opposed to "Deaf" individuals, and Ms. Waller responded that there were not. Another Council member reiterated that this very concern was one of the reasons why the Council ultimately decided to recommend against incorporating the term "d/Deaf" throughout Louisiana law. The President then questioned whether the proposed definitions on page 5 of the materials would act as a substitute for the provision stating that unless the context indicates otherwise, each of the terms "deaf" and "Deaf" are intended to refer to both "deaf" and "Deaf" individuals, and Ms. Waller explained that these suggestions were intended to be adopted together if the legislature so desires.

Ms. Waller then explained that the suggested definitions on pages 5 and 6 of the materials were intended to provide clarity and guidance rather than create ambiguity, and, in light of this discussion, she questioned whether these definitions should simply be removed from the revised report. One Council member expressed concern with respect to deleting these suggested definitions altogether and also noted that the word "generally" is included in both of the proposed definitions on lines 14 through 22 of page 5 of the materials. Other Council members suggested rearranging the revised report to include the language on lines 28 through 30 of page 5 in the "unless the context clearly indicates otherwise" provision on page 4 and to retain the proposed definitions on lines 14 through 22 of page 5 as alternatives for the legislature's consideration, and the Council agreed with this course of action. The President then asked where such a provision would be enacted in Louisiana law, and Ms. Waller responded by explaining that Title 1 of the Revised Statutes currently includes other provisions on statutory interpretation but that this decision should ultimately be made by the legislature. It was then moved and seconded to adopt the revised report as amended, and the motion passed with no objection.

Ms. Waller then concluded her presentation, at which time the President called on Judge Robert Morrison, III, Co-Chairman of the Code of Criminal Procedure Committee, to begin his presentation of materials.

Code of Criminal Procedure Committee

Judge Morrison began his presentation by directing the Council's attention to the draft report in response to Senate Concurrent Resolution No. 16 of the 2015 Regular Session. The Co-Chairman explained that this resolution directed the Law Institute to establish a working group to study current law relative to marijuana and to make recommendations to protect public safety, hold marijuana offenders accountable, and control costs to the criminal justice system arising out of prosecution of marijuana offenses. He also informed the Council that after the resolution was enrolled during the 2015 Regular Session, a series of bills were ultimately enacted during the 2015, 2016, and 2017 Regular Sessions, all of which amended existing provisions of Louisiana law to reduce the penalties imposed for possession of marijuana and other marijuana offenses and to provide exemptions from arrest and prosecution for persons lawfully in possession of medical marijuana.

Judge Morrison then explained that after studying this recent legislation, the Committee had determined that the policy decisions reflected in these bills were consistent with Senate Concurrent Resolution No. 16, and that these legislative changes reflected a delicate balance of interests that should not be upset. As a result, the Co-Chairman explained that the Committee ultimately concluded that no additional revisions with respect to existing provisions governing marijuana offenses should be recommended at this time. It was then moved and seconded to adopt the report in response to Senate Concurrent Resolution No. 16 as presented, and the motion passed with no objection.

Judge Morrison next asked the Council to turn to the draft report in response to Senate Concurrent Resolution No. 97 of the 2013 Regular Session, and he asked Judge Guy Holdridge, Acting Reporter of the Code of Criminal Procedure Committee, to come forward to present this report. Judge Holdridge began his presentation by explaining that this resolution urged and requested the Law Institute to study and make recommendations relative to the issue of whether the Code of Criminal Procedure should contain responsive verdicts for the crime of aggravated incest. The Acting Reporter also explained that during the 2014 Regular Session, the year after this resolution was enrolled, the legislature enacted two bills to repeal the crime of aggravated incest under R.S. 14:78.1 and to instead incorporate the elements and penalties of this crime into the provisions of R.S. 14:89.1(A)(2) on aggravated crime against nature. However, in conjunction with this change, the legislature also provided that a conviction for a violation of R.S. 14:89.1(A)(2) shall be the same as a conviction for the previous crime of aggravated incest under R.S. 14:78.1. As a result, the Committee determined that an amendment to Code of Criminal Procedure Article 814 to provide responsive verdicts for the crime of aggravated crime against nature under R.S. 14:89.1(A)(2) should be submitted to the legislature for its consideration.

Judge Holdridge then directed the Council's attention to pages 3 and 4 of the draft report and explained that the Committee had proposed responsive verdicts for two separate offenses, aggravated crime against nature under R.S. 14:89.1(A)(2) and aggravated crime against nature under R.S. 14:89.1(A)(2) when the victim is under the age of thirteen years old. The Acting Reporter explained that different penalties are imposed for the crime of aggravated crime against nature under R.S. 14:89.1(A)(2) based on the age of the victim, as well as that under the United States Supreme Court's decision in *Apprendi v. New Jersey*, the age of the victim must be treated as an essential element of an offense and proven beyond a reasonable doubt to the finder of fact on the issue of guilt or innocence. Judge Holdridge also explained that the Committee had determined that at least one lesser included offense, attempted aggravated crime against nature as defined by R.S. 14:89.1(A)(2), should be included as a responsive verdict, but that whether to include other "lesser included" offenses

that are "means" of committing aggravated crime against nature under R.S. 14:89.1(A)(2), such as sexual battery, should ultimately be decided by the legislature.

It was then moved and seconded to adopt the draft report in response to Senate Concurrent Resolution No. 97 as presented. One Council member questioned how the bracketed language on lines 33 and 34 of page 3 and lines 1 and 2 of page 4 would be applied as a practical matter with respect to these "lesser included" offenses listed in R.S. 14:89.1(A)(2)(b). The Acting Reporter and other members of the Council explained that in such cases, evidence concerning the commission of one of these offenses must be presented, in which case the penalty imposed by the judge concerning a guilty verdict would simply be the penalty for that particular offense. The Council member then expressed concern with respect to the open-endedness of responsive verdicts for these sorts of offenses, and other Council members explained that in such situations, the indictment should specifically list each of these offenses but that regardless, the district attorney would request that certain responsive verdicts with respect to these offenses be included, and if defendants were found guilty of them, the penalties for those specific offenses would apply.

Another Council member then questioned whether the Law Institute would be proposing legislation to amend Code of Criminal Procedure Article 814 to include responsive verdicts for aggravated crime against nature under R.S. 14:89.1(A)(2) as provided on pages 3 and 4 of the report. The staff attorney responded by explaining that the Committee considered the possibility that a proposal to amend Code of Criminal Procedure Article 815, which provides for responsive verdicts in general, may be submitted during the 2018 Regular Session. As a result, the Committee decided to submit a report in lieu of proposed legislation recommending the adoption of responsive verdicts in Article 814 in the event that Article 815 is not amended by the legislature. Another Council member then questioned whether any existing language with respect to responsive verdicts was being deleted, and the staff attorney responded in the negative after explaining that the proposed responsive verdicts on pages 3 and 4 of the report were additions to Article 814. The Acting Reporter also clarified that under current law, the only responsive verdicts that presently apply to the crime of aggravated crime against nature are the general responsive verdicts provided by Article 815. At this time, a vote was taken on the motion to adopt the draft report as presented, and the motion passed with no objection.

Judge Holdridge then yielded the floor to the President, who announced that the Council would recess for lunch, during which time there would be a meeting of the Membership and Nominating Committee.

LUNCH

After lunch, the President called on the Co-Chairman of the Code of Criminal Procedure Committee, Judge Robert Morrison, III, to resume the Committee's presentation of materials.

Code of Criminal Procedure Committee

Judge Morrison resumed his presentation on behalf of the Code of Criminal Procedure Committee by directing the Council's attention to the draft forms that had been prepared with respect to applications for postconviction relief. He provided the Council with a few preliminary remarks concerning the Committee's efforts in revising the substantive provisions of the Code of Criminal Procedure on postconviction relief, and he thanked Acting Reporter Judge Guy Holdridge, Committee member Judge Susan Chehardy, Subcommittee member Doug Nichols, and staff attorney Mallory Waller for their work in revising the form applications for postconviction relief. He then called on Acting Reporter Judge Guy Holdridge to present these forms on behalf of the Committee.

Judge Holdridge began his presentation by explaining that the Code of Criminal Procedure currently provides that all applicants for postconviction relief must use the uniform application approved by the Louisiana Supreme Court and that these proposed forms would therefore be submitted to the Court for its approval. The Acting Reporter then explained that the purpose of the proposed forms is to streamline the postconviction relief process by requiring all pertinent information to be provided upfront so that district court judges can quickly review applications to separate claims that have merit from those that do not. He also noted that the forms were drafted to facilitate their use by both applicants and judges, particularly with respect to the judgments that are included in both the First and Second or Subsequent Uniform Application for Postconviction Relief forms. Judge Holdridge then explained that the Code of Criminal Procedure Committee was still drafting its proposed revisions to the substantive postconviction relief articles but that when those provisions are ultimately adopted, these forms will need to be revised to be made consistent with changes in substantive law and may even be included in the articles themselves. He also informed the Council that all of the stakeholders serving on the Committee, including representatives of the district attorneys, attorney general, defense lawyers, district court judges, and appellate court judges, had reached a consensus with respect to these forms as drafted.

At this time, one Council member questioned whether the forms were going to be available in electronic format, to which Committee member Judge Susan Chehardy responded that a pilot program had been started at Angola with respect to the electronic filing of applications for postconviction relief as well as electronic submission of inmates' appellate records. She explained that although this program was new and had not yet been made available with respect to other penitentiaries, the Louisiana Supreme Court provided Angola with a printer for purposes of printing inmates' appellate records, and applications for postconviction relief were now being electronically filed in the Fourth and Fifth Circuits and at the Louisiana Supreme Court. She also explained that this pilot program was a volunteer effort and that revising the postconviction relief forms was the next logical step in the process of streamlining applications for postconviction relief, along with training inmate counsel as to advising inmates on how to complete these forms.

Judge Holdridge then directed the Council's attention to the first page of the First Uniform Application for Postconviction Relief ("First Application Form"), and it was moved and seconded to adopt the form. Judge Holdridge then explained that the first box on the first page of this form simply provided citations to current law, which prompted one Council member to question whether inmates have access to a Code of Criminal Procedure and whether it would be easier to simply provide a link in the form itself. The Acting Reporter responded that inmates at Angola do not have access to computers, but they do have a library as well as access to inmate counsel to assist them in completing the forms. One Council member then questioned the necessity of the statement that the form does not modify the law, and another Council member responded that this language was included to ensure that applicants are not confused with respect to the fact that nothing in the form is intended to change any substantive requirements under current law.

The Council then considered the third box on the first page of the First Application Form, which Judge Holdridge explained provided instructions with respect to when use of this form would be improper. One Council member suggested changing "of" to "or" after "term" and before "condition," and the Acting Reporter accepted this change. Another Council member suggested changing "should" to "shall" in the last line of this box, and after discussion, the Council ultimately agreed to change "should" to "must" and also to change "shall" to "must" throughout the form. Another Council member questioned whether each of these instructions should be drafted in the third person as opposed to the second person, which prompted the Council to discuss whether the form should use "you" or "the applicant" throughout. After a great deal of debate with respect

to this issue, Council members ultimately concluded that "you" should be consistently used in place of "the applicant" as applicable throughout the form, and the Acting Reporter agreed to make this change as well.

The Council next considered the General Instructions box of the First Application Form. One Council member suggested changing "If this form is not used," with "You must use this form or" in Instruction No. 1, and the Acting Reporter agreed. Another Council member then expressed concern with respect to the "and could return it to the applicant" language in the same instruction. After discussing the fact that the Committee did not want to prevent access to courts, as well as issues pertaining to whether judges should have the discretion to accept a non-conforming application that uses the form but is missing minor information as opposed to a non-conforming application that does not use the form at all, the Council ultimately decided to delete this phrase from Instruction No. 1. One Council member suggested changing "the applicant must use the form" to "you must use this form" in the last sentence of Instruction No. 1, and Judge Holdridge accepted this change. Another Council member suggested replacing "a challenge to any convictions" with "all claims for relief" in Instruction No. 4, and the Acting Reporter agreed. The Acting Reporter also agreed to replace the second to last sentence of Instruction No. 2, concerning the attachment of additional pages for purposes of stating facts that support claims for relief, with the following language: "You may attach additional pages stating the facts that support your claims for relief." Another Council member then questioned whether the statement concerning the necessity of lengthy citations of authorities or legal arguments should be included, to which a Subcommittee member responded by explaining that this language was necessary in light of requirements that apply with respect to the preservation of federal habeas corpus claims.

Judge Holdridge then explained the Required Attachment and application information boxes on the first and second pages of the First Application Form. One Council member suggested replacing "annexed" with "attached" in the Required Attachment box, and the Acting Reporter accepted this change. He also explained the Claims for Relief Instructions box as well as the box at the top of the third page of the form, and for purposes of illustration, he provided the Council with an example of facts that might be relevant to a claim for postconviction relief based on ineffective assistance of counsel. Judge Holdridge next explained the Signature, Affidavit, and Judgment boxes of the First Application Form, which prompted one Council member to note that "Applicant" should not be changed in any of these boxes. One Council member suggested changing "forgoing" to "foregoing" in the Judgment box, and the Acting Reporter accepted this change. The Acting Reporter also agreed to add "or in addition to" after "in lieu of" and before "written reasons" in the same box. Another Council member questioned why the judge could not order a contradictory hearing as provided in the Uniform Motion to Correct an Illegal Sentence, to which Judge Holdridge responded that the State must first be given an opportunity to respond because this is an initial application for postconviction relief rather than some sort of motion. A vote was then taken on the motion to adopt the First Application Form as amended, and the motion passed with no objection.

Judge Holdridge then asked the Council to turn to the Second or Subsequent Uniform Application for Postconviction Relief ("Subsequent Application Form") and explained that this form is similar to the form that had just been approved by the Council, except that an applicant is entitled to one application for postconviction relief and therefore must justify his right to file a second or subsequent application. The Acting Reporter then explained that usually, the justification for filing a second or subsequent application for postconviction relief is based on the discovery of new facts, in which case the applicant should provide that information to the judge. It was then moved and seconded to adopt the form, and the Council first agreed that any changes made with respect to the First Application Form should also be replicated in the Subsequent Application Form where applicable.

One Council member then questioned why Instruction No. 3 in the Second or Subsequent Application Instructions Box on the first page of the Subsequent Application Form included a reference to the First Application Form. Several Council members expressed concern with respect to the availability of the First Application Form and suggested that perhaps these instructions should simply be reproduced on the Subsequent Application Form. Judge Holdridge explained that the Committee's intent was to be as efficient as possible while also ensuring that each of these forms looked different and could easily be recognized, but a motion was nevertheless made and seconded to replicate the General Instructions box from the First Application Form on the Subsequent Application Form after the Second or Subsequent Application Instructions box, and the motion passed with no objection. Another Council member then suggested replacing "Is this the same case in this application?" with "Is this the same case challenged in this application" on the second and third pages of the Subsequent Application Form, and the Acting Reporter accepted this change. A vote was then taken on the motion to adopt the Subsequent Application Form as amended, and the motion passed with no objection.

Judge Holdridge then directed the Council's attention to the final form under consideration, the Uniform Motion to Correct an Illegal Sentence ("Illegal Sentence Form"). He first thanked Colin Clark of the Attorney General's Office and Jee Park of the Innocence Project in New Orleans for all of their hard work in drafting this form. It was moved and seconded to adopt the form, and the Council agreed to incorporate all applicable changes made with respect to the First and Subsequent Application Forms into the Illegal Sentence Form. One Council member then questioned why this form did not contain an affidavit like the other forms, and Subcommittee member Colin Clark responded by explaining that although the other forms were applications, this form was a motion, and as a result, an affidavit is not required. Another Council member then suggested moving "in the designated box" in Instruction No. 1 in the General Instructions box on the first page of the Illegal Sentence Form to appear after "indicate" rather than at the end of the sentence, and the Acting Reporter accepted this change. A vote was then taken on the motion to adopt the Illegal Sentence Form as amended, and the motion passed with no objection.

At this time, Judge Holdridge concluded his presentation by explaining that these forms would now be submitted to the Louisiana Supreme Court for its approval. The President then called on Mr. Emmett C. Sole, Chairman of the Membership and Nominating Committee, to make a brief presentation on behalf of the Committee.

Membership and Nominating Committee

Mr. Sole began by informing the Council that the Membership and Nominating Committee had met during lunch and was planning to make its recommendations for nominations during the December Council meeting. He then asked Council members to submit suggestions for the Committee's consideration with respect to dedicated individuals who would be good additions to the Council, specifically practicing lawyers representing both sides of the litigation bar. Mr. Sole then concluded his presentation, and the Friday session of the October 2017 Council meeting was adjourned.

LOUISIANA STATE LAW INSTITUTE

THE MEETING OF THE COUNCIL

October 13-14, 2017

Saturday, October 14, 2017

Persons Present:

Braun, Jessica	Lovett, John
Breard, L. Kent	McIntyre, Edwin R., Jr.
Castille, Preston J., Jr.	Molina, Luz
Cromwell, L. David	Norman, Rick J.
Dimos, Jimmy N.	Riviere, Christopher H.
Domingue, Billy J.	Sole, Emmett C.
Garrett, J. David	Talley, Susan G.
Gregorie, Isaac M. "Mack"	Tate, George J.
Hamilton, Leo C.	Thibeaux, Robert P.
Hogan, Lila T.	Title, Peter S.
Hogan, Thomas J., Jr.	Tucker, Zelda
Jewell, John Wayne	Waller, Mallory
Knighten, Arlene D.	Woodruff-White, Lisa
Kostelka, Robert "Bob" W.	Ziober, John David
Lavergne, Luke	Zucker, Erika A.

President John David Ziober opened the Saturday session of the October 2017 Council meeting at 9:00 AM on October 14, 2017 at the Louisiana Supreme Court in New Orleans. During today's session, Professor Luz Molina represented the Unpaid Wages Committee and presented a revision of Louisiana's Wage Payment Act.

Unpaid Wages Committee

The Reporter began by briefly reminding the Council of the legislative directive to provide an effective remedy for unpaid wages without requiring expensive litigation.

The Reporter immediately turned the Council's attention to proposed R.S. 23:631(H) which was previously recommitted to the Committee for further exploration regarding proving receipt of a demand for payment of wages owed. The Reporter explained that Louisiana Supreme Court jurisprudence along with the rules of evidence provide enough guidance to practitioners. The Council briefly wondered if an email or text could satisfy the requirement that the demand be made in writing and it was noted that no formalities are required. Thereafter, R.S. 23:631(H) was adopted as proposed.

The Reporter next directed the Council to recommitted R.S. 23:631(K) and explained that because the Council was concerned with the proposed fine, the Committee changed the language from mandatory to permissive and changed it from a fine to a civil penalty. The Council commented that the failure to maintain records is not related to whether wages are due, but the Reporter reasoned that without the records, there is no way to know the exact amount

due. They are very interrelated and present law already requires records to be maintained. This is not a new obligation for employers.

The Council again wondered if this language authorizes employees to pursue a claim for the failure to maintain records even if wages are not owed. The Reporter stated that the intent of the proposal is for the employer to be punished for the failure to maintain records which adversely affects an employee seeking wages due. After more discussion, the Reporter agreed to take this Subsection back to the Committee for clarification that an independent action for the failure to maintain records is not authorized.

The Reporter asked the Council to turn their attention to proposed R.S. 23:632(B)(2) after quickly reminding them that R.S. 23:632(A) and (B)(1) have previously been approved. Regarding the exclusion of a good faith defense if employees are not properly classified, the Reporter accepted the deletion of the word "any" as a qualifier of the term "evidence" to avoid the argument that this provision could supersede the Code of Evidence on what is admissible. The Council also expressed concern with the term "due diligence." The Reporter explained that this language is intended to give a nod to employers who seek counsel prior to classification. After discussion, the Council changed the term to "efforts to determine".

Members were again concerned about the uncertainty in the law surrounding independent contractors, the lack of a definition for independent contractor, and what the term "classification" really means. The Reporter pointed out that the definition of "employee" excludes independent contractors and was taken from the test used by the Workforce Commission in their investigations. Finally, after much discussion, the Council adopted the following:

(2) If the good faith defense is based on the issue of whether a person is properly classified as an employee, the court shall consider evidence of the employer's efforts to determine the proper classification.

In presenting proposed R.S. 23:632(B)(3), the Reporter reminded the Council that it is important for employers to be held accountable if they fail to perform their obligations to respond and pay any undisputed wages owed. Employers need encouragement to raise defenses such as classification at the time of demand and not just as a way to skirt penalty wages at the end of the litigation. The Reporter also reiterated that requiring a receipt for payments in cash adds much needed protection for low wage workers. Without further discussion, this provision was adopted as presented.

Next, the Reporter asked the Council to begin a policy discussion as a way of offering guidance to the Committee. The issue arises from the fact that the Committee has proposed, and the Council has approved, the creation of a remedy for a current employee to seek wages due. The question for discussion is: "When should penalty wages be due to a current employee and how are they calculated?". The Council mentioned interruption of prescription, limiting the availability of penalty wages until the termination of employment, and the likelihood for success at the legislature. The Reporter thanked the Council for their feedback and agreed to work on resolving this issue at the Committee level and present it to the Council again later.

At this time, the Reporter concluded her presentation, and the October 2017 Council meeting was then adjourned.

J. Braun 5-4-18
Jessica Braun Date

M. Waller 5/4/2018
Mallory Waller Date