

LOUISIANA STATE LAW INSTITUTE

THE MEETING OF THE COUNCIL

March 17-18, 2017

Friday, March 17, 2017

Persons Present:

Bergstedt, Thomas
Boudreaux, Bernard E., Jr.
Braun, Jessica
Breard, L. Kent
Carter, James
Crawford, William E.
Crigler, James C., Jr.
Cromwell, L. David
Curry, Kevin C.
Curry, Robert L., III
Davidson, James J., III
Dawkins, Robert G.
Domingue, Billy J.
Ferg, Jon
Forrester, William R.
Garofalo, Raymond E., Jr.
Gasaway, Grace B.
Gregorie, Isaac M. "Mack"
Gremillion, Ryan
Griffin, Piper D.
Hamilton, Leo C.
Hayes, Thomas M., III
Haymon, Cordell H.
Hester, Mary C.
Hogan, Lila T.
Hurwitz, Joel
Johnson, Pamela Taylor
Knighten, Arlene D.

Kostelka, Robert "Bob" W.
Lawrence, Quintillis Kenyatta
Levy, H. Mark
Lonegrass, Melissa T.
Lovett, John
McIntyre, Edwin R., Jr.
Meyer, David D.
Morris, Glenn G.
Morvant, Camille A.
Norman, Rick J.
Odinet, Christopher
O'Quin, Elizabeth
Pohorelsky, Peter
Scalise, Ronald J., Jr.
Sharp, Carl Van
Stuckey, James A.
Surprenant, Monica T.
Talley, Susan G.
Tate, George J.
Thibeaux, Robert P.
Title, Peter S.
Trahan, J. Randall
Vance, Shawn
Waller, Mallory Chatelain
Weems, Charles S., III
White, H. Aubrey, III
Ziober, John David

President John David Ziober opened the Friday session of the March 2017 Council meeting at the Lod Cook Alumni Center in Baton Rouge, LA at 10:00 AM. During today's session, Professor Christopher K. Odinet represented the Common Interest Ownership Regimes Committee, Mrs. Martha Morgan represented the Childhood Addiction to Pornography Task Force, Professor Ronald J. Scalise, Jr. represented the Successions and Donations Committee, and Mr. William R. Forrester, Jr. represented the Code of Civil Procedure Committee. President Ziober first introduced Professor Odinet to begin his presentation on the Planned Community Act: Creation, Amendment, and Termination of the Community.

Common Interest Ownership Regimes Committee

The Reporter commenced with reminding the Council that in accordance with the directive in Senate Concurrent Resolution No. 104 of the 2014 Regular Session of the Legislature the Council has previously reviewed parts of this material at their meetings in August and November of 2016.

Directing the Council to page 18 of the materials, the Reporter began the discussion of new material with Section 2.12 regarding the termination of planned communities. He described the voting threshold and the language to protect lenders in Subsection A. The Council considered the ability to lower the threshold and cast votes in person or by written agreement. With a motion and second to adopt, Subsection A was approved as presented.

Professor Odinet mentioned that Subsection B of Section 2.12 mirrors the formula required to amend the declaration and it was approved without discussion. In Subsection C, the Council asked the Reporter to use the same language regarding filing for registry used elsewhere in the materials and he readily agreed. The Council also briefly mentioned the effect on third parties relative to the filing and the proposal was adopted.

Shifting to Subsection D of Section 2.12, the Reporter noted that the proposal provides for the powers of the association while final termination is pending. A member was concerned that the language may imply that the association will be terminated along with the planned community. The Reporter consented to adding a comment for further clarification that the association is a distinct nonprofit corporation which will also need to be dissolved in accordance with applicable law. As the conversation continued, the Council and the Reporter also agreed to consolidate the language relative to the right to use and liability surrounding the common areas. The final issue raised in Subsection D regards the term "title". The Council directed the Reporter to further investigate the relationship between title, ownership, and lease and report back to them at the next presentation. With all that in mind, the following was adopted:

2.12 Termination of Planned Community

D. A termination agreement may provide for the transfer of the common areas and limited common areas. In the event the termination agreement so provides, the association, on behalf of the lot owners, may contract for the transfer of common areas and limited common areas in a planned community, but the contract is not binding on the lot owners until the termination agreement is approved and filed for registry pursuant to Subsections A, B, and C of this Section. Until all such transfers have occurred and the proceeds have been distributed, the association continues in existence with all powers it had before termination. Proceeds of the transfer, if any, shall be distributed to lot owners and holders of security rights in accordance with Subsection G of this Section. Unless otherwise specified in the termination agreement, as long as the association holds title to the common areas and limited common areas, the lot owners and their successors continue to have the right to use and enjoy such areas in accordance with their intended purpose and remain liable for all assessments and other obligations imposed on lot owners by this Part or the declaration.

In Subsection E of this Section, the Reporter reiterated that the association will not terminate just because the planned community terminates. The effect of terminating the planned community is that the real rights contained in the declaration will no longer exist. He then reassured the Council that he will properly address the term "title" as used in this Subsection and as it relates to Subsection D and bring that issue back to the Council. With that understanding, Subsection E was approved and Subsection F was adopted without discussion.

Moving to Subsection G of Section 2.12, the Council voiced concern that the uniform language is unclear. Therefore, during the discussion, the Council rewrote the subsection and the following was adopted:

2.12 Termination of Planned Community

G. The interest of each lot owner as provided in Subsection F of this Section is the fraction or percentage of common expense liabilities allocated in Section 2.3 before the transfer, unless the declaration otherwise provides.

However, the Council was yet again disturbed by the notion of "lot owner" as it relates to ownership as a real right and the rights of a lessee. The Council suggested defining the term "lot owner" and looking to the Private Works Act for inspiration. The Reporter agreed to come back to the Council on this issue.

Professor Odinet next presented Subsection 2.12(H). This provision protects creditors by allowing them to require the association to exclude from the planned community foreclosed upon withdrawable immovable property. In accordance with the requirements in Section 2.2, the lot owners do have notice that withdrawable immovable property is included in the planned community. The Council questioned the intent to cover only mortgage foreclosures and not privileges or other judgments against the property absent a mortgage. The Council also debated limiting this right to the same time frame the developer has to add immovable property. The Reporter agreed to take this Subsection back to the Committee to address the distinction between conventional and nonconventional mortgages and timing.

The last Section presented today was 2.13(A) relative to the rights of secured parties. The declaration may allow creditors to approve of certain actions of lot owners or the association. The Reporter explained that he would like to recommit Paragraph (iii) of this Subsection and revisit it after the Committee completes the work relative to insurance in the management materials. The Council explored a few examples related to Paragraphs (i) and (ii) and approved the proposal as written.

When the Reporter next presents to the Council he will resume with Subsection 2.13(B).

President John David Ziober introduced Mrs. Martha Morgan, the Facilitator of the Childhood Addiction to Pornography Task Force, to present a report for submission to the legislature in response to House Concurrent Resolution No. 12 of the 2011 Regular Session of the Legislature.

Childhood Addiction to Pornography Task Force

Mrs. Morgan explained that HCR No. 12 of the 2011 Regular Session of the Legislature tasked the Louisiana State Law Institute with appointing and convening a task force to evaluate Louisiana's existing laws, programs, and services that address childhood addiction to pornography and to report its findings and recommendations.

After careful review of the existing laws and programs regarding this matter, the Task Force's recommendations mainly focus on educating both children and parents. To that end, the Task Force specifically recommends the following:

1. Recognize and label childhood exposure to sexually explicit material as a public health hazard and begin a statewide public service campaign.
2. Institute a school curriculum requirement and an educational program similar to D.A.R.E. to address this issue in classrooms for children of the appropriate age.
3. Focus on parental education by continuing the Attorney General's Cyber Crimes Unit programs and posting educational information at public locations such as health clinics and libraries.
4. Seek technological solutions from service providers.

5. Require age verification to enter websites containing such material.
6. Require all public free Wi-Fi to block adult content.

Having received a motion and second to adopt the report, the Council voted to approve submission to the legislature.

President John David Ziober next introduced Professor Ronald J. Scalise, Jr. to represent the Successions and Donations Committee and present comments to the previously approved materials regarding inventory and detailed descriptive lists in the independent administration of successions.

Successions and Donations Committee

Professor Scalise explained the three comments and having received a motion and second, the Council approved them without discussion.

At this time, the President called on Mr. L. David Cromwell to present a memorial in honor of Professor A.N. Yiannopoulos. The Council unanimously voted to adopt this memorial, a copy of which is attached, and requested that the memorial be sent to the family members of Professor Yiannopoulos.

The Council then recessed for lunch.

LUNCH

After lunch, the President called on Mr. William R. Forrester, Jr., Reporter of the Code of Civil Procedure Committee, to begin his presentation of materials to the Council.

Code of Civil Procedure Committee

Mr. Forrester began his presentation by directing the Council's attention to the 2017 Continuous Revision materials, specifically the issue of adding a reference to limited liability companies in the Code of Civil Procedure articles on mandamus and quo warranto, on pages 1 and 2 of the materials. The Reporter explained that despite case law holding that these provisions apply to limited liability companies, the articles refer only to corporations because they were enacted prior to the existence of limited liability companies. As a result, the Committee proposes to include an express reference to both corporations and limited liability companies in the provisions on mandamus and quo warranto. It was moved and seconded to adopt the proposed changes to Article 3861, at which time one Council member suggested adding "member or" before "manager" on line 8 of page 1. Another Council member then expressed concern with respect to the distinction between member- and manager-managed LLCs and whether this change would create issues in the case of manager-managed LLCs, where members act more like a corporation's shareholders rather than its officers. However, the Council ultimately agreed that this provision simply permits the writ of mandamus to be taken in the event that a member or manager of an LLC has the requisite duty to perform, so the Reporter accepted the suggested change. The motion to adopt Article 3861 as amended then passed with no objection, and the adopted proposal reads as follows:

Article 3861. Definition

Mandamus is a writ directing a public officer, ~~or~~ a corporation or an officer thereof, or a limited liability company or a member or manager thereof, to perform any of the duties set forth in Articles 3863 and 3864.

The Council then considered the proposed changes to Article 3864, on pages 1 and 2 of the materials. After the Reporter also agreed to add "member or" before

"manager" on lines 30 and 40 of page 1, it was moved and seconded to adopt Article 3864 as amended. The motion passed with no objection, and the adopted proposal reads as follows:

**Article 3864. Mandamus against corporation or corporate officer;
limited liability company or member or manager**

A. A writ of mandamus may be directed to a corporation or an officer thereof to compel either of the following:

(1) The holding of an election or the performance of other duties required by the ~~corporate charter~~ corporation's articles of incorporation or bylaws, or as prescribed by law; ~~or~~

(2) The recognition of the rights of its the corporation's members or shareholders.

B. A writ of mandamus may be directed to a limited liability company or a member or manager thereof to compel either of the following:

(1) The holding of an election or the performance of other duties required by the limited liability company's articles of organization or operating agreement, or as prescribed by law.

(2) The recognition of the rights of the limited liability company's members.

Next, a motion was made and seconded to adopt the proposed changes to Articles 3901 and 3902, on page 2 of the materials, as presented, and the motion passed with no objection. The adopted proposals read as follows:

Article 3901. Definition

Quo warranto is a writ directing an individual to show by what authority he claims or holds public office, or office in a corporation or limited liability company, or directing a corporation or limited liability company to show by what authority it exercises certain powers. Its purpose is to prevent usurpation of office or of powers.

Article 3902. Judgment

When the court finds that a person is holding or claiming office without authority, the judgment shall forbid him to do so. It may declare who is entitled to the office and may direct an election when necessary.

When the court finds that a corporation or limited liability company is exceeding its powers, the judgment shall prohibit it from doing so.

The Reporter then asked the Council to turn to the issue of suits pending in Louisiana and federal or foreign court, on page 9 of the materials. He explained that due to confusion among members of both the bar and the bench with respect to whether the proper procedure under Article 532 is a motion to stay or an exception of lis pendens, the Committee proposed changing the title of the provision. Additionally, the Committee also proposed clarifying in Article 925 that an exception of lis pendens is filed pursuant to Article 531 rather than Article 532. It was moved and seconded to adopt the proposed changes to Articles 532 and 925 as presented, and after a question and brief discussion concerning the fact that Articles 531 and 532 are separate provisions within the same Chapter, the motion passed with no objection. The adopted proposals read as follows:

Article 532. Suits Motions to stay in suits pending in Louisiana and federal or foreign court

When a suit is brought in a Louisiana court while another is pending in a court of another state or of the United States on the same transaction or occurrence, between the same parties in the same capacities, on motion of the defendant or on its own motion, the court may stay all proceedings in the second suit until the first has been discontinued or final judgment has been rendered.

Article 925. Objections raised by declinatory exception; waiver

A. The objections which may be raised through the declinatory exception include but are not limited to the following:

* * *

(3) Lis pendens under Article 531.

* * *

Comments – 2017

Subparagraph (A)(3) of this Article was amended to clarify that, although Article 532 appears in Chapter 3 of Book I of Title II, entitled “Lis Pendens,” the declinatory exception of lis pendens may be raised only under Article 531. Article 532 permits the court to stay the proceedings of a second suit pending resolution of the first suit but does not permit the court to dismiss the second suit by granting an exception of lis pendens.

The Reporter then asked the Council to consider the Committee’s proposed report in response to HCR 114 of the 2016 Regular Session, relative to rules of discovery. He explained to the Council that this resolution urged and requested the Law Institute to study the laws regarding the rules of discovery in Louisiana, including the discoverability of expert reports, surveillance of parties, and witness statements. He also informed the Council that the resolution had been converted from House Bill No. 1065 of the 2016 Regular Session, which was proposed by Representative Robby Carter to eliminate the work product protection, require the production of surveillance material within a 90-day time period, and require the production of all reports prepared by experts, regardless of whether the expert is expected to testify at trial. The Reporter then suggested that the Council consider each of these issues separately, and he began with the Committee’s response concerning the issue of non-party witness statements, on pages 1-4 of the materials.

The Reporter explained that currently, Article 1424 provides that both parties and non-party witnesses have an absolute right to obtain their own statements concerning the subject matter of an action. Nevertheless, a party does not have the right to directly obtain the statement of non-party witnesses, but must instead rely on the witness to first request a copy of his own statement, which can then be provided by the witness to the interested party. The Reporter also explained that Texas has expanded their discovery provisions to create an exception to the work product privilege for all witness statements and that the Committee agreed that perhaps Louisiana should follow suit. However, this sparked a great deal of debate among Council members, with some arguing that a party’s attorney or insurance adjuster who does the work of taking these statements should not have to provide them to opposing counsel, and others arguing that such an expansion would even the playing field for plaintiffs and defendants during discovery and would prevent one party from “hiding the ball” from the other. The Reporter also informed the Council that another concern that arose during the Committee’s discussions was similar to the facts of *Ogea v. Jacobs*, a Louisiana Supreme Court case included in the materials, in that an innocent non-party witness could give a statement at the time of an incident and then could be subpoenaed to appear at the trial years later to be ambushed and embarrassed on cross-examination when he simply cannot remember what he said in the statement given years earlier.

Nevertheless, several Council members expressed serious concern with respect to making such a huge change to Louisiana's rules of discovery when, as of now, only one state throughout the country has made such a change. Others questioned whether the positions of both plaintiffs and defendants were equally represented during these discussions at the Committee level and how the taking of a statement and line of questioning of a witness would ever not reflect the thoughts and mental impressions of an attorney such that the statement should be protected as work product. On the other hand, Council members discussed the immeasurable value of having access to a statement taken contemporaneously at the time of the incident, which is often the most reliable account of the truth, and of preventing the hiding or disposing of statements negative to one party's case when those statements are taken by a representative for that party. One Council member suggested that as an alternative, perhaps the provision should mandate informing a non-party witness that he has the right to obtain any statement made by him concerning the subject matter of an action. Another Council member advocated against making all non-party witness statements discoverable when the Federal Rule and 49 other states have not yet done so, to which another Council member added that when Texas did adopt this rule, perhaps they did so in connection with the enactment of their sweeping tort reform legislation. As a result, the Council ultimately concluded that with respect to the issue of non-party witness statements, the report should be amended to reflect that no change to Article 1424 and the work product protection is recommended at this time, and all members were in favor of this policy decision over one objection.

Next, the Reporter asked the Council to consider issues pertaining to the discoverability of surveillance material, on pages 4-6 of the materials. The Reporter explained that Representative Carter had expressed concern with respect to the jurisprudential rule requiring the production of surveillance material by one party to another only after the party in possession of such material has taken the deposition of the requesting party. He explained that attorneys are apparently taking advantage of this rule by responding to the requesting party stating that they are in possession of surveillance material but are exercising their right to take the requesting party's deposition before producing such material. The attorneys are then allowing the discovery period to lapse without ever noticing the deposition but are nevertheless introducing the surveillance material as rebuttal evidence upon cross-examination of the requesting party at trial. The Reporter explained to the Council that this problem is further exacerbated by the fact that, at least in a few courts, the judge's pretrial order requires each party to list all evidence to be used at trial except rebuttal evidence, which is how this surveillance material is being used.

Nevertheless, the Reporter informed the Council that the Committee rejected House Bill No. 1065's approach of requiring surveillance material to be produced within 90 days of a request for such material, citing as support for this decision the facts that the existing discovery timelines are much shorter and that trial judges are provided with ample authority to manage these types of issues in their pretrial orders or upon motion or objection by a party at trial. The Reporter also explained that the best practice in these types of situations would be to request the surveillance material, and upon receiving a response stating that the opposing party is in possession of such material but would like to take the requesting party's deposition first under the jurisprudential rule, the requesting party should provide his availability and follow up with a motion to compel in the event that the responding party never notices his deposition. After this explanation and a brief discussion of the issues involved, it was moved and seconded to adopt the report with respect to the issue of surveillance material as presented, and the motion passed with no objection.

Finally, the Reporter asked the Council to consider the Committee's proposed response to the issue of non-testifying expert reports, on pages 6-7 of the materials. The Reporter explained that Louisiana's discovery law treats testifying experts much differently than consulting experts in that typically, only the reports of experts who are expected to testify at trial are discoverable. Nevertheless, House Bill No. 1065 purported to address yet another situation in which clever attorneys are "hiding the ball" from the opposing party in its proposal to subject all expert reports to discovery,

regardless of whether the expert is expected to testify at trial. The Reporter explained that attorneys are apparently manipulating the rule that only the reports of testifying experts must be produced by allowing their consulting experts to do all of the work behind the scenes, including drafting a report, which, if favorable, is passed along to the testifying expert, but, if not favorable, is simply never disclosed. Either way, the consulting expert's report is never required to be produced because the testifying expert himself did not write it.

However, the Committee ultimately concluded that under current Code of Civil Procedure provisions, specifically Article 1425(B), the testifying expert's report must contain the basis and reasons for all opinions to be expressed, as well as the data or other information considered by the expert in forming the opinions. As a result, the Committee determined that if a testifying expert considered a consulting expert's report in forming his own opinions to be expressed at the trial, such consulting expert's report would constitute "other information" that must be disclosed. It was then moved and seconded to adopt the Committee's suggested response with respect to the issue of non-testifying expert reports as presented. After one Council member suggested that the reference to Article 1424(B) on page 7 of the materials should be corrected to Article 1425(B), the motion to adopt the report with respect to this issue passed with no objection. A motion was then made and seconded to adopt the report as a whole, with amendments to reflect the Council's discussions with respect to the first issue of the discoverability of non-party witness statements, and that motion also passed with no objection.

The Reporter then asked the Council to return to the 2017 Continuous Revision materials to consider issues pertaining to default, beginning on page 23 of the materials. The Reporter explained that due to the inconsistency with which the terminology "default judgment," "judgment by default," "judgment of default," and other similar phrases are used throughout the Code of Civil Procedure, as well as the confusion that results from this inconsistent use, the Committee proposes several clarifications throughout the Code. First, the Council considered the proposed changes to Article 1701, on page 23 of the materials and on page 1 of the handout that was distributed during lunch. The Reporter explained that in addition to changing the terminology to "preliminary default" throughout this provision, the Committee also proposed clarifying that the defendant must fail to file an answer or other pleading within the time prescribed by law or by the court. It was then moved and seconded to adopt Article 1701 as presented on page 1 of the handout, at which time one Council member questioned whether these changes were actually necessary. Other Council members responded that because the same terminology was being used for both preliminary default and final default judgment, members of the bar and the bench have expressed their confusion and frustration. After further debate about why these changes were necessary, and after a question by another Council member as to whether the preliminary default procedure should simply be removed entirely, the motion to adopt Article 1701 as presented in the handout passed over one objection. The adopted proposal reads as follows:

Article 1701. ~~Judgment by~~ Preliminary default

A. If a defendant in the principal or incidental demand fails to answer or file other pleadings within the time prescribed by law or by the court, ~~judgment by default~~ a preliminary default may be entered against him. The ~~judgment~~ preliminary default may be obtained by oral motion in open court or by written motion mailed to the court, either of which shall be entered in the minutes of the court, but the ~~judgment~~ preliminary default shall consist merely of an entry in the minutes.

B. When a defendant in an action for divorce under Civil Code Article 103(1), by sworn affidavit, acknowledges receipt of a certified copy of the petition and waives formal citation, service of process, all legal delays, notice of trial, and appearance at trial, a ~~judgment of~~ preliminary default may be entered against the defendant the day on which the affidavit is filed. The affidavit of the defendant may be prepared or

notarized by any notary public. The ~~judgment~~ preliminary default may be obtained by oral motion in open court or by written motion mailed to the court, either of which shall be entered in the minutes of the court, but the ~~judgment~~ preliminary default shall consist merely of an entry in the minutes. Notice of the signing entry of the ~~final judgment as provided in Article 1013~~ preliminary default is not required.

Comments – 2017

(a) This Article has been amended to substitute “preliminary default” for “judgment of default” and “judgment by default” to make the article more easily understood and to make the terminology consistent within the article and with other related articles. A preliminary default is not a judgment. A final judgment confirming a preliminary default is now referred to as a “final default judgment.” These amendments are intended to be stylistic only.

(b) The first sentence of Paragraph A of this Article has also been amended to provide that a preliminary default can be entered if the defendant “fails to answer or file other pleadings within the time prescribed by law or by the court.”

The Council then considered the proposed changes to Article 1702, on pages 23-25 of the materials. It was moved and seconded to adopt the changes to Article 1702 as presented, at which time one Council member questioned the meaning of the addition of the sentence in Paragraph E, on lines 44-46 of page 24. Another Council member explained that Civil Code Article 103(5) permits a divorce to be granted on the basis that a protective order or injunction for domestic violence was issued during the marriage, in which case when the plaintiff submits his affidavit as required during the procedure for default, he should also be required to submit a certified copy of the underlying protective order or injunction. At this time, the motion to adopt Article 1702 as presented passed over one objection, and the adopted proposal reads as follows:

Article 1702. Confirmation of preliminary default judgment

A. A ~~judgment of~~ preliminary default must be confirmed by proof of the demand that is sufficient to establish a prima facie case and that is admitted on the record prior to ~~confirmation~~ the entry of a final default judgment. The court may permit documentary evidence to be filed in the record in any electronically stored format authorized by the local rules of the district court or approved by the clerk of the district court for receipt of evidence. If no answer or other pleading is filed timely, this confirmation may be made after two days, exclusive of holidays, from the entry of the ~~judgment of~~ preliminary default. When a ~~judgment of~~ preliminary default has been entered against a party that is in default after having made an appearance of record in the case, notice of the date of the entry of the ~~judgment of~~ preliminary default must be sent by certified mail by the party obtaining the ~~judgment of~~ preliminary default to counsel of record for the party in default, or if there is no counsel of record, to the party in default, at least seven days, exclusive of holidays, before confirmation of the ~~judgment of~~ preliminary default.

B.(1) When a demand is based upon a conventional obligation, affidavits and exhibits annexed thereto which contain facts sufficient to establish a prima facie case shall be admissible, self-authenticating, and sufficient proof of such demand. The court may, under the circumstances of the case, require additional evidence in the form of oral testimony before entering a final default judgment.

(2) When a demand is based upon a delictual obligation, the testimony of the plaintiff with corroborating evidence, which may be by affidavits and exhibits annexed thereto which contain facts sufficient to

establish a prima facie case, shall be admissible, self-authenticating, and sufficient proof of such demand. The court may, under the circumstances of the case, require additional evidence in the form of oral testimony before entering a final default judgment.

* * *

C. In those proceedings in which the sum due is on an open account or a promissory note, other negotiable instrument, or other conventional obligation, or a deficiency judgment derived therefrom, including those proceedings in which one or more mortgages, pledges, or other security for the open account, promissory note, negotiable instrument, conventional obligation, or deficiency judgment derived therefrom is sought to be enforced, maintained, or recognized, or in which the amount sought is that authorized by R.S. 9:2782 for a check dishonored for nonsufficient funds, a hearing in open court shall not be required unless the judge, in his discretion, directs that such a hearing be held. The plaintiff shall submit to the court the proof required by law and the original and not less than one copy of the proposed final default judgment. The judge shall, within seventy-two hours of receipt of such submission from the clerk of court, sign the proposed final default judgment or direct that a hearing be held. The clerk of court shall certify that no answer or other pleading has been filed by the defendant. The minute clerk shall make an entry showing the dates of receipt of proof, review of the record, and rendition of the final default judgment. A certified copy of the signed final default judgment shall be sent to the plaintiff by the clerk of court, and notice of the signing of the final default judgment shall be given as provided in Article 1913.

* * *

E. Notwithstanding any other provisions of law to the contrary, when the demand is for divorce under Civil Code Article 103(1) or (5), whether or not the demand contains a claim for relief incidental or ancillary thereto, a hearing in open court shall not be required unless the judge, in his discretion, directs that a hearing be held. The plaintiff shall submit to the court an affidavit specifically attesting to and testifying as to the truth of all of the factual allegations contained in the petition, the original and not less than one copy of the proposed final judgment, and a certification which shall indicate the type of service made on the defendant, the date of service, the date a preliminary default was entered, and a certification by the clerk that the record was examined by the clerk, including the date of the examination, and a statement that no answer or other opposition pleading has been filed. If the demand is for divorce under Civil Code Article 103(5), a certified copy of the protective order or injunction rendered after a contradictory hearing or consent decree shall also be submitted to the court. If no answer or other pleading has been filed by the defendant, the judge shall, after two days, exclusive of holidays, of entry of a preliminary default, review the affidavit, proposed final default judgment, and certification, render and sign the proposed final default judgment, or direct that a hearing be held. The minutes shall reflect rendition and signing of the final default judgment.

Comments – 2017

(a) This Article has been amended to substitute “preliminary default” for “judgment of default” and “judgment by default” to make the article more easily understood and to make the terminology consistent within the article and with other related articles. A final judgment confirming a preliminary default is now referred to as a “final default judgment.” These amendments are intended to be stylistic only.

(b) Paragraph E of this Article has been amended to provide that, when a demand for divorce is made under Civil Code Article 103(5), a

certified copy of the protective order or injunction rendered after a contradictory hearing or consent decree as required by that Article shall be submitted to the court in addition to the affidavit of the plaintiff.

Next, the Reporter directed the Council's attention to the proposed changes to Article 1702.1, on pages 25 and 26 of the materials. He explained that "the motion" was changed to "a written motion" on line 24 of page 25 to clarify that a written motion for confirmation of preliminary default is required only if the plaintiff is seeking the confirmation without a hearing in open court; otherwise, the motion can be made orally. One Council member then questioned why the language regarding the attachment of a demand letter and return receipt, if required, had not been deleted, since this language is somewhat antiquated in that the filing of the suit itself would constitute a demand for these purposes. It was then moved and seconded to amend lines 29 through 32 of page 25 to state that the attorney shall certify the fact that the required number of days have elapsed since demand was made upon the defendant, and the motion passed with no objection. The Council also directed the Reporter to prepare a Comment stating that the filing of the suit will constitute a demand for purposes of this provision, and the Reporter agreed. Another Council member then suggested adding "within the time prescribed by law or by the court" to the end of Paragraph B, on line 37 of page 25, and the Reporter accepted that change as well. The motion to adopt Article 1702.1 as amended then passed with no objection, and the adopted proposal reads as follows:

Article 1702.1. Confirmation of preliminary default judgment without hearing in open court; required information; certifications

A. When the plaintiff seeks to confirm a preliminary default judgment without appearing for a hearing in open court as provided in Article 1702(B)(1) and (C), along with any proof required by law, he or his attorney shall include in an itemized form with the a written motion for confirmation of preliminary default and proposed final default judgment a certification that the suit is on an open account, promissory note, or other negotiable instrument, on a conventional obligation, or on a check dishonored for nonsufficient funds, and that the necessary invoices and affidavit, note and affidavit, or check or certified reproduction thereof are attached. If attorney fees are sought under R.S. 9:2781 or 2782, the attorney shall certify that fact and ~~that a copy of the demand letter and if required, the return receipt showing the date received by the debtor are attached and~~ the fact that the number of days required by R.S. 9:2781(A) or 2782(A), respectively, have elapsed ~~before suit was filed~~ since demand was made upon the defendant.

B. The certification shall indicate the type of service made on the defendant, the date of service, and the date a preliminary default was entered, and shall also include a certification by the clerk that the record was examined by the clerk, including therein the date of the examination and a statement that no answer or other ~~opposition~~ pleading has been filed within the time prescribed by law or by the court.

Comments – 2017

(a) This Article has been amended to substitute "preliminary default" for "default judgment" to make the article more easily understood and to make the terminology consistent within the article and with other related articles. A final judgment confirming a preliminary default is now referred to as a "final default judgment." These amendments are intended to be stylistic only.

(b) Paragraph A of this Article has been amended to clarify that a written motion for confirmation of preliminary default is required only if the plaintiff is seeking the confirmation without hearing in open court as provided in Article 1702(B)(1) and (C).

(c) The filing of the suit constitutes a demand made upon the defendant for the purposes of Paragraph A of this Article.

The Council then considered the proposed changes to Articles 1703 and 1704, on pages 26 and 27 of the materials. Motions were made and seconded to adopt the changes to these provisions as presented, and these motions passed with no objection. The adopted proposals read as follows:

Article 1703. Scope of judgment

A ~~judgment by default~~ final default judgment shall not be different in kind from that demanded in the petition. The amount of damages awarded shall be the amount proven to be properly due as a remedy.

Comments – 2017

This Article has been amended to substitute “final default judgment” for “judgment by default” to make the article more easily understood and to make the terminology consistent with other related articles. A “judgment of default” or “judgment by default” is now referred to as a “preliminary default.” This amendment is intended to be stylistic only.

Article 1704. Confirmation of ~~judgment by~~ preliminary default in suits against the state or a political subdivision

A. Notwithstanding any other provision of law to the contrary, prior to confirmation of a ~~judgment of~~ preliminary default against the state or any of its departments, offices, boards, commissions, agencies, or instrumentalities, a certified copy of the minute entry constituting the ~~judgment~~ preliminary default entered pursuant to Article 1701, together with a certified copy of the petition or other demand, shall be sent by the plaintiff or his counsel to the attorney general by registered or certified mail, or shall be served by the sheriff personally upon the attorney general or the first assistant attorney general at the office of the attorney general.

If the minute entry and the petition are served on the attorney general by mail, the person mailing such items shall execute and file in the record an affidavit stating that these items have been enclosed in an envelope properly addressed to the attorney general with sufficient postage affixed, and stating the date on which such envelope was deposited in the United States mails. In addition the return receipt shall be attached to the affidavit which was filed in the record.

B. If no answer or other pleading is filed during the fifteen days immediately following the date on which the attorney general or the first assistant attorney general received notice of the preliminary default as provided in Subsection A of this Section, a ~~judgment by~~ preliminary default entered against the state or any of its departments, offices, boards, commissions, agencies, or instrumentalities may be confirmed by proof as required by Article 1702.

C. Notwithstanding any other provision of law to the contrary, prior to confirmation of a ~~judgment of~~ preliminary default against a political subdivision of the state or any of its departments, offices, boards, commissions, agencies, or instrumentalities, a certified copy of the minute entry constituting the ~~judgment~~ preliminary default entered pursuant to Article 1701, together with a certified copy of the petition or other demand, shall be sent by the plaintiff or his counsel by registered or certified mail to the proper agent or person for service of process at the office of that agent or person. The person mailing such items shall execute and file in the record an affidavit stating that these items have been enclosed in an envelope properly addressed to the proper agent or person for service of process, with sufficient postage affixed, and stating the date on which

such envelope was deposited in the United States mails. In addition the return receipt shall be attached to the affidavit which was filed in the record.

D. If no answer or other pleading is filed during the fifteen days immediately following the date on which the agent or person for service of process received notice of the preliminary default as provided in Paragraph C of this Article, a ~~judgment by~~ preliminary default entered against the political subdivision of the state or any of its departments, offices, boards, commissions, agencies, or instrumentalities may be confirmed by proof as required by Article 1702.

Comments – 2017

This Article has been amended to substitute “preliminary default” for “judgment of default” and “judgment by default” to make the article more easily understood and to make the terminology consistent within the article and with other related articles. A final judgment confirming a preliminary default is now referred to as a “final default judgment.” These amendments are intended to be stylistic only.

Next, the Council considered the proposed changes to Article 194, on page 27 of the materials. One Council member questioned whether the signing of a final default judgment granting or confirming a preliminary default should really be excepted from the orders and judgments that a district judge can sign in chambers, which sparked a great deal of discussion among Council members. During this discussion, one Council member suggested that perhaps the final default judgment must be signed in open court rather than in chambers because, according to the case law, it is the signing of the final judgment, rather than its rendition, that precludes the defendant from subsequently filing an answer or other pleading. As a result, the timing of the signing of a final default judgment is more important than it otherwise would be for any other type of judgment, which may perhaps explain why it must be done in open court. Nevertheless, a motion was ultimately made and seconded to recommit Article 194 for further study by the Committee, and this motion to recommit passed with no objection.

The Reporter then directed the Council’s attention to the proposed changes to Articles 928 and 1002, on pages 27 and 28 of the materials. It was moved and seconded to adopt the proposed changes to these provisions as presented, and the motion passed with no objection. The adopted proposals read as follows:

Article 928. Time of pleading exceptions

A. The declinatory exception and the dilatory exception shall be pleaded prior to or in the answer and, prior to or along with the filing of any pleading seeking relief other than entry or removal of the name of an attorney as counsel of record, extension of time within which to plead, security for costs, or dissolution of an attachment issued on the ground of the nonresidence of the defendant, and in any event, prior to the ~~confirmation~~ signing of a final default judgment. When both exceptions are pleaded, they shall be filed at the same time, and may be incorporated in the same pleading. When filed at the same time or in the same pleading, these exceptions need not be pleaded in the alternative or in a particular order.

B. The peremptory exception may be pleaded at any stage of the proceeding in the trial court prior to a submission of the case for a decision and may be filed with the declinatory exception or with the dilatory exception, or both.

Comments – 2017

Paragraph A of this Article has been amended to substitute "signing of a final default judgment" for "confirmation of a default judgment" to make the article more easily understood and to make the terminology consistent with other related articles. Pursuant to Article 1002, the defendant may file an answer or other pleading at any time prior to the actual signing of the final default judgment. See *Martin v. Martin*, 680 So. 2d 759 (La. App. 1st Cir. 1996).

Article 1002. Answer or other pleading filed prior to confirmation signing of final default judgment

Notwithstanding the provisions of Article 1001, the defendant may file his answer or other pleading at any time prior to ~~confirmation~~ signing of a final default judgment against him.

Comments – 2017

This Article has been amended to clarify that the defendant may file an answer or other pleading at any time prior to the actual signing of the final default judgment. See *Martin v. Martin*, 680 So. 2d 759 (La. App. 1st Cir. 1996).

Next, the Council turned to the proposed changes to Article 1471, on pages 28 and 29 of the materials, and the Reporter explained that since the materials were prepared, some debate has arisen with respect to whether the discovery sanction against a defendant for failing to comply with a discovery order should be the rendition of a preliminary default or of a final default judgment. He explained that under the Federal Rules, this discovery sanction is treated as a final default judgment, which is consistent with our provision's sanction of dismissing the action in the event that the plaintiff fails to comply with a discovery order. Nevertheless, according to the case law the plaintiff must establish a prima facie case even if a discovery sanction is entered against the defendant pursuant to this provision, which suggests that perhaps the provision should refer to a preliminary default rather than a final default judgment. However, the Reporter suggested that Article 1701 defines a preliminary default as being entered if a defendant fails to answer or file other pleadings within a certain time period, not if a defendant fails to comply with a discovery order under this provision. In response to these concerns, one Council member suggested amending the provision to read "or rendering a final default judgment against the disobedient party upon presentation of proof as required by Article 1702." Nevertheless, a motion was made and seconded to recommit Article 1471 for further study by the Committee, and that motion ultimately passed by a vote of 18 to 15.

The Reporter then asked the Council to consider the proposed changes to Article 1843, on page 29 of the materials, and explained that he would like to make a change in the Comment, on lines 15-16 of page 29, by substituting "is nothing more than an entry in the minutes prior to the rendition of a final default judgment and" for "as its name implies, is a preliminary step toward the rendition of a final default judgment but". It was moved and seconded to adopt the proposed changes to Article 1843 as amended, and the motion passed with no objection. The adopted proposal reads as follows:

Article 1843. Judgment-by Final default judgment

A final default judgment ~~by default~~ is that which is rendered against a defendant who fails to plead within the time prescribed by law.

Comments – 2017

This Article has been amended to substitute "final default judgment" for "judgment by default" to make the article more easily

understood and to make the terminology consistent with other related articles. A final default judgment is different from a preliminary default, which is nothing more than an entry in the minutes prior to the rendition of a final default judgment and is not itself a judgment.

Next, the Council considered the proposed changes to Article 1913, on page 29 of the materials and on page 2 of the handout. The Reporter explained that he suggested removing the proposed “and who filed no answer or other pleading” clauses from both Paragraphs B and C of the provision, as shown on page 2 of the handout, and it was moved and seconded to adopt the changes as presented. However, one Council member suggested that these clauses are not repetitive or redundant under Paragraph B. He explained that in the event that a defendant has filed something in court, the notice of the signing of the final default judgment should not be required to be served through the sheriff again under Paragraph B since the defendant’s appearance clearly indicates that he received the initial notice. At this time, a motion was made to recommit Article 1913 for further study by the Committee, but that motion failed for lack of a second. A substitute motion was then made and seconded to consider the changes to Article 1913 as proposed on page 29 of the materials, and that motion passed with no objection.

The Council then continued to discuss whether the “and who filed no answer or other pleading” language should be retained in both Paragraphs B and C, or whether it should be retained only in Paragraph B and removed from Paragraph C. After a great deal of debate, a motion was again made to recommit Article 1913 for further study by the Committee, and this motion was seconded and ultimately passed over a few objections. Nevertheless, one Council member pointed out that if this provision is recommitted with no changes, the “default judgment” terminology would remain inconsistent with the changes being proposed in the rest of these provisions. At this time, a motion to reconsider solely for the purposes of adding “final” before “default judgment” in Paragraphs B and C was made and seconded, and the motion passed with no objection. It was then moved and seconded to add “final” before “default judgment” on lines 26 and 32 on page 29 as indicated in the materials and to adopt Article 1913 as amended, and this motion also passed with no objection. The adopted proposal reads as follows:

Article 1913. Notice of judgment

* * *

B. Notice of the signing of a final default judgment against a defendant on whom citation was not served personally, or on whom citation was served through the secretary of state, and who filed no exceptions or answer, shall be served on the defendant by the sheriff, by either personal or domiciliary service, or in the case of a defendant originally served through the secretary of state, by service on the secretary of state.

C. Notice of the signing of a final default judgment against a defendant on whom citation was served personally, and who filed no exceptions or answer, shall be mailed by the clerk of court to the defendant at the address where personal service was obtained or to the last known address of the defendant.

* * *

Comments – 2017

This Article has been amended to substitute “final default judgment” for “default judgment” to make the article more easily understood and to make the terminology consistent with other related articles. A “judgment of default” or “judgment by default” is now referred to

as a “preliminary default.” These amendments are intended to be stylistic only.

Next, the Council considered the proposed changes to Articles 2002 and 5095, on page 30 of the materials. Motions were made and seconded to adopt these provisions as presented, and both motions passed with no objection. Similarly, motions were made and seconded to adopt the proposed changes to R.S. 13:3205 and 26:1316 and 1316.1, on pages 30 through 32, as presented, and these motions also passed with no objection. The adopted proposals read as follows:

Article 2002. Annulment for vices of form; time for action

A. A final judgment shall be annulled if it is rendered:

* * *

(2) Against a defendant who has not been served with process as required by law and who has not waived objection to jurisdiction, or against whom a valid final default judgment ~~by default~~ has not been taken.

* * *

Comments – 2017

Subparagraph (A)(2) of this Article has been amended to substitute “final default judgment” for “judgment by default” to make the article more easily understood and to make the terminology consistent with other related articles. This amendment is intended to be stylistic only.

Article 5095. Same; defense of action

The attorney at law appointed by the court to represent a defendant shall use reasonable diligence to inquire of the defendant, and to determine from other available sources, what defense, if any, the defendant may have, and what evidence is available in support thereof.

Except in an executory proceeding, the attorney may except to the petition, shall file an answer or other pleading in time to prevent a final default judgment from being rendered, may plead therein any affirmative defense available, may prosecute an appeal from an adverse judgment, and generally has the same duty, responsibility, and authority in defending the action or proceeding as if he had been retained as counsel for the defendant.

Comments – 2017

This Article has been amended to substitute “final default judgment” for “default judgment” to make the article more easily understood and to make the terminology consistent with other related articles. This amendment is intended to be stylistic only.

R.S. 13:3205. Default judgment; hearings; proof of service of process

No preliminary default or final default judgment can be rendered against the defendant and no hearing may be held on a contradictory motion, rule to show cause, or other summary proceeding, except for actions pursuant to R.S. 46:2131 et seq., until thirty days after the filing in the record of the affidavit of the individual who either:

* * *

Comments – 2017

This Section has been amended to substitute “preliminary default or final default judgment” for “default judgment” to make the provision more easily understood and to make the terminology consistent with related articles in the Code of Civil Procedure. These amendments are intended to be stylistic only.

R.S. 23:1316. Answer or other pleading, failure to file; ~~judgment by~~ preliminary default

If a defendant in the principal or incidental demand fails to answer or file other pleadings within the time prescribed by law or the time extended by the workers' compensation judge, and upon proof of proper service having been made, ~~judgment by~~ preliminary default may be entered against him. The ~~judgment~~ preliminary default shall be obtained by written motion.

Comments – 2017

This Section has been amended to substitute “preliminary default” for “judgment by default” to make the provision more easily understood and to make the terminology consistent with related articles in the Code of Civil Procedure. A final judgment confirming a preliminary default is now referred to as a “final default judgment.” These amendments are intended to be stylistic only.

R.S. 23:1316.1. Confirmation of ~~judgment by~~ preliminary default

A. A ~~judgment by~~ preliminary default on behalf of any party at interest must be confirmed by proof of the demand sufficient to establish a prima facie case. If no answer or other pleading is filed timely, this confirmation may be made after two days, exclusive of holidays, from the entry of the ~~judgment of~~ preliminary default.

* * *

Comments – 2017

Paragraph A of this Section has been amended to substitute “preliminary default” for “judgment by default” and “judgment of default” to make the provision more easily understood and to make the terminology consistent with related articles in the Code of Civil Procedure. A final judgment confirming a preliminary default is now referred to as a “final default judgment.” These amendments are intended to be stylistic only.

The Council then considered Articles 4904 and 4921, on pages 32 and 33 of the materials. The Reporter explained that these provisions apply to default judgments in parish and city and justice of the peace courts, wherein the entry of a preliminary default is not necessary prior to the rendition of a final default judgment. As a result, a motion was made and seconded to replace “prior default” with “preliminary default” on line 25 of page 32 and on line 10 of page 33 and to adopt Articles 4904 and 4921 as amended, and the motion passed with no objection. The adopted proposals read as follows:

Article 4904. Judgment by default in parish and city courts

A. In suits in a parish court or a city court, if the defendant fails to answer timely, or if he fails to appear at the trial, and the plaintiff proves

his case, a final judgment in favor of plaintiff may be rendered. No prior preliminary default is necessary.

* * *

Article 4921. Judgment by default; justice of the peace courts; district courts with concurrent jurisdiction

A. If the defendant fails to answer timely, or if he fails to appear at the trial, and the plaintiff proves his case, a final judgment in favor of plaintiff may be rendered. No prior preliminary default is necessary.

* * *

The Council then considered Article 284, on page 32 of the materials. One Council member explained that because this provision concerns clerks of district courts, the terminology used in previous articles with respect to preliminary defaults and final default judgments should be used here as well. As a result, a motion was made and seconded to replace "judgments by default or by confession" with "final default judgments or judgments by confession" on lines 11 and 12 of page 32 and to adopt Article 284 as amended, and the motion passed over one objection. The adopted proposal reads as follows:

Article 284. Judicial powers of district court clerk

The clerk of a district court may render, confirm, and sign final default judgments ~~by default~~ or judgments by confession in cases where the jurisdiction of the court is concurrent with that of justices of the peace, as provided in Article 5011.

Finally, the Council turned to R.S. 9:4841, on page 34 of the materials, and a motion was made and seconded to replace "judgment of default" with "final default judgment" on line 20 of page 34. However, after a great deal of discussion by Council members with respect to whether "preliminary default" or "final default judgment" should be used, the Council ultimately concluded that because this provision is part of the Private Works Act, this issue should be referred to the Committee currently tasked with revising those provisions. As a result, a substitute motion was made and seconded to recommit this provision for consideration by the Security Devices Committee, and the motion passed with no objection.

At this time, Mr. Forrester yielded the floor to the President, who reminded the Council that the 75th Annual Banquet would take place in the Noland/Laborde Ballroom of the Lod Cook Alumni Center at 6:30 p.m. that night. The Friday session of the March 2017 Council meeting was then adjourned.

BANQUET

During the Annual Banquet on Friday, March 17, 2017, Dean Thomas C. Galligan, Jr. of the LSU Paul M. Hebert Law Center presented a speech entitled "The Most Interesting Lawyer in the World," a copy of which is attached.

LOUISIANA STATE LAW INSTITUTE

THE MEETING OF THE COUNCIL

March 17-18, 2017

Saturday, March 18, 2017

Persons Present:

Amy, Jeanne L.
Bergstedt, Thomas
Breard, L. Kent
Burris, William J.
Crawford, William E.
Crigler, James C.
Cromwell, L. David
Curry, Robert L., III
Dawkins, Robert G.
Dimos, Jimmy N.
Edmonson, Michael
Forrester, William R., Jr.
Garofalo, Raymond E., Jr.
Hamilton, Leo C.
Hayes, Thomas M., III
Hogan, Lila T.
Knighten, Arlene D.
Kostelka, Robert "Bob" W.
Kunkel, Nick
Levy, H. Mark

Lovett, John
McIntyre, Edwin R., Jr.
Morvant, Camille A.
Norman, Rick J.
Scalise, Ronald J., Jr.
Sharp, Carl Van
Talley, Susan G.
Tate, George J.
Thibeaux, Kelly O.
Thibeaux, Robert P.
Trahan, J. Randall
Waller, Mallory Chatelain
Weems, Charles S., III
White, H. Aubrey, III
Woodruff-White, Lisa
Ziober, John David

President David Ziober called the Saturday session of the March 2017 Council meeting to order at 9:05 a.m. and announced that Mr. William R. Forrester, Jr. would begin the morning by continuing his presentation of materials from the Code of Civil Procedure Committee.

Code of Civil Procedure Committee

Mr. Forrester greeted the Council members and suggested that they begin by considering Article 4921.1, on page 33 of the materials. He explained that in light of the changes approved by the Council yesterday throughout the Code of Civil Procedure and specifically with respect to Article 4921, "final" should be added prior to "default judgment" on lines 42 and 46 of page 33. It was moved and seconded to adopt Article 4921.1 as amended, and the motion passed with no objection. The adopted proposal reads as follows:

Article 4921.1. Demand for trial; abandonment; applicability

* * *

C.(1) Notwithstanding the provisions of Paragraph A of this Article, the justice of the peace or clerk may set the matter for trial upon filing of a petition. The date, time, and location of the trial shall be contained in the citation. The first scheduled trial date shall be not more than forty-five days, nor less than ten days, from the service of the citation. If the

defendant appears, he need not file an answer unless ordered to do so by the court. If a defendant who has been served with citation fails to appear at the time and place specified in the citation, the judge may enter a final default judgment for the plaintiff in the amount proved to be due. If the plaintiff does not appear, the judge may enter an order dismissing the action without prejudice.

(2) If a matter has been set for trial pursuant to Paragraph (1) of this Article, no final default judgment shall be rendered prior to the trial date.

Next, the Council turned to the proposed changes to Article 853, on page 16 of the materials. The Reporter explained that since these materials were prepared, an issue had arisen that may require review of both this provision and Article 966 on motions for summary judgment. As a result, he explained that any changes to this provision would be deferred until both the Code of Civil Procedure Committee and the Summary Judgment Subcommittee could review the issue.

The Council then considered the proposed changes to Articles 253.3 and 3955, on page 19 of the materials. It was moved and seconded to adopt both of these provisions as presented, and the motion passed with no objection. The adopted proposals read as follows:

Article 253.3. Duty judge exceptions; authority to hear certain matters

A. In any case assigned pursuant to Article 253.1, a duty judge shall only hear and sign orders or judgments for the following:

* * *

(4) Uncontested cases in which all parties other than the plaintiff are represented by ~~a curator ad hoc~~ an attorney appointed by the court.

* * *

Comments – 2017

The purpose of the amendment to Subparagraph (A)(4) of this Article was to align the provision with Article 5091 by replacing “a curator ad hoc” with “an attorney appointed by the court.”

Article 3955. Service of petition

A. When a petition for divorce is filed in accordance with Civil Code Article 102, service of the petition shall be requested on the defendant within ninety days of the filing of the petition.

B. If the defendant is an absentee, the request for appointment of ~~a curator ad hoc~~ an attorney to represent the absentee defendant within ninety days of commencement of the action constitutes compliance with the requirements of Paragraph A of this Article.

C. The defendant may expressly waive the requirements of Paragraph A of this Article by any written waiver. The requirement provided by Paragraph A of this Article shall be expressly waived by a defendant unless the defendant files, in accordance with the provisions of Article 928, a declinatory exception of insufficiency of service of process specifically alleging the failure to timely request service of the petition, in which case, after due proceedings, the action shall be dismissed.

D. If not waived, a request for service of citation upon the defendant shall be considered timely if requested on the defendant within

the time period provided by this Article, notwithstanding insufficient or erroneous service.

Comments – 2017

The purpose of the amendment to Paragraph B of this Article is to align the provision with Article 5091 by replacing “curator ad hoc” with “attorney to represent the absentee defendant.”

Finally, the Council considered the proposed redesignation of Article 1067 to Article 1041, on page 22 of the materials. The Reporter explained that since this provision applies to incidental demands in general but appears in the Section on reconvention specifically, the provision should be redesignated. It was then moved and seconded to adopt the redesignation of Article 1067 as Article 1041, and the motion passed with no objection. The adopted proposal reads as follows:

Article ~~1067~~ 1041. When prescribed incidental or third party demand is not barred

An incidental demand is not barred by prescription or peremption if it was not barred at the time the main demand was filed and is filed within ninety days of date of service of main demand or in the case of a third party defendant within ninety days from service of process of the third party demand.

At this time, Mr. Forrester concluded his presentation to the Council, and the President called on Mr. Michael S. Evanson, Facilitator of the Electronic Signatures Study Group, to present the Study Group’s draft and interim reports to the legislature.

Electronic Signatures Study Group

Mr. Evanson first introduced himself to the Council, giving a brief overview of his educational and professional background and how he came to be involved with the Law Institute. After pointing out that he is not a lawyer, Mr. Evanson mentioned that he serves as the Chief Information Officer for the Louisiana Supreme Court, a position he has held for just under five years. He noted that, between his time with the LASC and his prior private sector employment, his work experience in the field of information technology totals decades.

Mr. Evanson then turned his attention to his tenure as Facilitator of the Electronic Signatures Study Group. He began by recapping the initial formation of the Group, making reference to a pair of resolutions: SCR 6 of the 2013 Regular Session, and HCR 218 of the 2015 Regular Session. The Facilitator summarized each of these resolutions briefly for the Council. In particular, he noted that 2013 SCR 6 requested an examination of the feasibility of requiring clerks to accept electronically signed documents. 2015 HCR 218, he explained, requested the same with respect to allowing the use of technology to execute notarizations when the signor is not in the notary’s physical presence. Mr. Evanson specified that the Study Group was formed in response to these resolutions, and that its members represented a number of related interests including the clerks of court, secretaries of state, and the notaries’ and bankers’ associations.

The Facilitator next provided the Council with an overview of each of the Study Group’s four meetings. He stated that, after spending the first meeting reviewing 2013 SCR 6 to gain an understanding of what, exactly, was being requested of them, the Study Group delved into the substance of the issue in its second meeting. At its third meeting, Mr. Evanson explained, the Group pinned down the goals of its electronic signatures legislation. The Study Group finalized its proposed language at its fourth meeting, before then turning its attention to 2015 HCR 218 and the topic of Electronic Notary law.

Throughout this process, Mr. Evanson explained, the Study Group quickly recognized the importance of distinguishing between three distinct, yet related, concepts: electronically filed documents, electronically signed documents, and digitally signed documents. The Facilitator noted that, in order to define these concepts, the

Study Group reviewed other states' laws. He then gave a brief definition of each. First explaining that electronically filed documents are simply documents transmitted electronically and in electronic form, he emphasized that electronically signed documents differ in that they may be in electronic or physical form. The defining characteristic of an electronically signed document, the Facilitator clarified, is that it contains a signature that was attached electronically. Thus, the impetus of 2013 SCR 6, Mr. Evanson reasoned, is an evaluation of the acceptance by clerks of documents for filing that have been electronically signed, not acceptance of electronic filings. He then noted the wholly different nature of digitally signed documents. A digital signature, he explained, is not a "signature" in the traditional sense, but rather a type of certificate by which one can discern whether a document has been altered or modified.

This prompted a Council member to ask Mr. Evanson for an example of each type of document. With respect to electronically filed documents, the Facilitator reiterated that this simply referred to a document that had been transmitted electronically, such as a fax or a document attached to an email. Emphasizing once again the distinction between electronic filing and electronic signatures, Mr. Evanson listed as an example of the latter a printed copy of an online form that had been signed by the signor having typed their name into a provided space. An example of a digitally signed document, he explained, would be one that had been taken to an encryption company for certification and with respect to which the company had created a public key and a private key allowing for determination of whether the document had been modified.

Another Council member asked whether it would be possible to have a document that was both electronically *and* digitally signed; the Facilitator replied in the affirmative.

Mr. Evanson then turned to the Study Group's conclusions as set out in its proposed report to the Legislature. First, he noted that the Study Group agreed that there currently exists in Louisiana sufficient law to authorize the use and acceptance of electronic signatures on documents. He further noted the Group's conclusion that requiring acceptance of electronically signed documents by clerks in Louisiana is indeed feasible, though no significant cost savings would result from such a mandate. Additionally, the Facilitator pointed out the Study Group's determination that an implementation phase for such a scheme would be desirable. Lastly, he explained that the Study Group had also concluded that it would be unreasonable to require acceptance of digitally signed documents.

A motion was made and seconded to adopt the report of the Study Group subject to an additional review of the legislation proposed therein. The motion passed with no objection.

Finally, the Facilitator turned to the proposed addition to Code of Civil Procedure Article 253, set out on page 5 of the report. He noted that the addition would represent only a minor change and would have no effect on any form or filing requirements already provided by current law.

One Council member brought up federal court rules allowing for filing of documents with the signor's typed name following a "/s" without any additional, non-typed signature; the Facilitator stated that this was an example of precisely what was contemplated by the proposed legislation.

In response to a question as to what might constitute an "other document" aside from a pleading, the Council noted that the proposed legislation would also apply, for example, to an affidavit in support of a motion for summary judgment.

Another Council member suggested that the proposed language "A filing officer, or any of his respective officers, deputies, or employees," should be replaced with "The clerk" so as to match other such references in Article 253. After agreeing upon this modification, it was moved and seconded to adopt the addition to Article 253, and all voted in favor. As adopted, the addition reads as follows:

Art. 253. Pleadings, documents, and exhibits to be filed with clerk

* * *

E. The clerk shall not refuse to accept for filing any pleading or other document signed by electronic signature, as defined by R.S. 9:2602, and executed in connection with court proceedings, solely on the ground that it was signed by electronic signature.

Comments – 2018

Paragraph E is new; however, nothing in this provision is intended to abrogate any specific legislation requiring that certain documents be signed by other than electronic means.

After a motion to include this legislation as part of the Code of Civil Procedure bill was made, seconded, and passed without objection, it was noted that the Study Group's report to the Legislature recommended consultation with the Clerks of Court Association regarding a potential delayed effective date prior to enacting the above provision. Ultimately, after consulting the Association, the decision was made to include the addition in the Code of Civil Procedure bill, to take effect January 1, 2018.

Mr. Evanson then shifted attention to the topic of electronic notarization. Pointing out that an examination of Virginia's electronic notary law was specifically requested by 2015 HCR 218, he noted that Virginia was one of a number of states whose law in this area the Study Group reviewed. He explained that existing provisions regarding electronic notarization were relatively consistent from state to state. Notably, he mentioned, each state the Study Group looked at required that electronic notarization could only be accomplished by a person already certified as a notary; likewise, each state required input from the Secretary of State in setting out acceptable technologies. In response to a Council member's question regarding how someone could serve as a notary without being physically present for execution of the relevant document, Mr. Evanson listed certain teleconferencing platforms as examples of technologies approved in the aforementioned states. Despite these similarities, Mr. Evanson pointed out that the Study Group recognized the unique role of notaries under Louisiana's Civil Law tradition and accordingly recommended in its interim report to the Legislature that the issue of electronic notarization be studied further.

After Mr. Evanson's presentation, the President called on Mr. Robert P. Thibaux to present materials on behalf of the Lease of Movables Act Committee.

Lease of Movables Act Committee

Mr. Thibaux began his presentation with a memoriam for the recently deceased A.N. "Thanassi" Yiannopoulos, acknowledging and expressing gratitude for the myriad contributions of both Professor Yiannopoulos and his contemporary Saul Litvinoff to the Louisiana Civil Law.

He then turned attention to the Lease of Movables Act Committee. Mr. Thibaux noted that the topic presently being considered is the modernization of the Lease of Movables Act. Such an undertaking, he explained, requires an examination of the Uniform Commercial Code—in particular, UCC Article 2A, which governs commercial leases. The Reporter pointed out that Louisiana, owing to its Civilian roots, is the only state that has not adopted UCC Articles 2 and 2A. In addition, he observed that UCC-2A is considered flawed and unclear in many respects, and further highlighted that this notion was specifically recognized when Louisiana previously declined to adopt Articles 2 and 2A in 1990.

Moving to the heart of the matter, Mr. Thibaux set out that the primary focus of his presentation to the Council was the general incompatibility of UCC Articles 2 and 2A with Louisiana's Civil Law scheme. Because the UCC assumes a common law backdrop, he explained, the Civil Code's treatment of nominate contracts renders much of Article 2A superfluous and contradictory. The Reporter noted that, on this basis, the Committee had reached the conclusion that UCC-2A ought not be adopted in Louisiana, as the inevitably necessary reconciliation with the Civil Code would negate any gains in uniformity.

Recognizing that Louisiana's adoption of a "civilian consistent" version of UCC Article 9 was, in his opinion, a huge success for Louisiana's commercial law, and that the Committee's overarching goal is to ensure commercial certainty and economic predictability for practitioners in Louisiana, the Reporter noted that the decision facing the Council was whether to approve the Committee's decision to nevertheless reject UCC-2A. Noting that the goal of each is to enhance uniformity and predictability, one Council member wondered whether the same logic behind adopting UCC-9 would apply equally to UCC-2A. Another Council member answered that this was not the case for two reasons: First, UCC-2A is not drafted with nearly the precision and clarity as UCC-9, and second, there exists no real national concern over Louisiana law in this area as there did with UCC-9.

The President noted that the Committee that had previously decided against adopting UCC-2A had provided essentially the same reasoning as Mr. Thibeaux. A motion to adopt the LMA Committee's report recommending against the adoption of UCC-2A was made and seconded. The motion passed without objection.

Mr. Thibeaux then concluded his presentation, and the March 2017 Council meeting was adjourned.

 4-27-17
Jessica Braun Date

 4/27/2017
Mallory Waller Date

 4/27/17
Nick Kunkel Date

LOUISIANA STATE LAW INSTITUTE

RESOLUTION DEDICATED TO THE MEMORY OF PROFESSOR A. N. YIANNPOULOS

We pause today in remembrance and celebration of the life of Athanassios Nicholas Yiannopoulos, distinguished professor of law and long-time member of this Council, whose contributions to the law of Louisiana in general, and to the workings of this Institute in particular, elude any attempt at adequate description.

Born in 1928 in Thessaloniki, Greece, young Thanassi Yiannopoulos was an adolescent at the outbreak of the Second World War. Suffering, as he later described, the "ignominy of Fascist occupation, as well as famine," he joined the youth resistance movement in his country at the age of only 15. After the war, he earned a diploma in law from the University of Thessaloniki and entered the army for training as an infantry reserve officer and interpreter, serving as military secretary to the commander-in-chief, King Paul, at the time of his discharge in 1953. While in the army, he secured a Fulbright scholarship and, three days after his discharge, departed for the United States. His studies at the University of Chicago earned him the degree of Master of Comparative Law in 1954, followed by the degrees of L.L.M. and J.S.D. from the University of California at Berkeley. Afterward, he taught and continued his education at the University of Cologne in Germany, obtaining yet another doctoral degree in 1960. It was during this time that Dean William Prosser of the Berkeley law faculty recommended him for a position as an associate professor of law at Louisiana State University. Professor Yiannopoulos ultimately accepted this invitation in 1958, while laboring, as he would later assert, under the error that Baton Rouge was a suburb of New Orleans. I have it on first-hand authority, related to me one evening when I was privileged to be his dinner guest at his usual table at Commander's Palace, that the motivating cause for his acceptance of the offer was that Dean Prosser had convinced him that the climate in Louisiana is not nearly so cold as in Chicago or Cologne.

Once installed at LSU in what he initially thought would be only a temporary position, Professor Yiannopoulos began the colossal work for which he is chiefly known - the revision and modernization of the Louisiana Civil Code of 1870. This Council appointed him as Reporter and Coordinator for Program and Research in 1965. He published his treatise on personal servitudes, the first Louisiana civil law treatise, in 1968. Finding the 1870 Code to be "irrelevant, out of touch with reality, and suspended in a vacuum," he then embarked upon a systematic revision of the Civil Code title on personal servitudes, which was enacted in 1977, followed by revisions of all other titles within Book II of the Civil Code. Over the ensuing decades, both during his tenure at LSU and after joining the law faculty of Tulane University in 1979, he served as reporter for innumerable other revisions, including the preliminary title of the Civil Code and the titles and chapters bearing on natural and juridical persons, domicile, absent persons, ownership in indivision, quasi-contracts, rents and annuities, loan, representation and mandate, respite, deposit and sequestration, occupancy and possession, and prescription. At the time of his death on February 1, 2017, he was actively pursuing two remaining

projects for the revision of the law of aleatory contracts and the Civil Code title on the signification of terms.

Renowned as he was for the modernization of the Louisiana Civil Code, his accomplishments were by no means limited to his work in this state. He assisted in drafting the Estonian Civil Code and was appointed to serve as an advisor for the codification of the Russian Civil Code. He was a noted expert in the fields of admiralty law and comparative law. In recognition of his cultural achievements, Greece honored him with the Gold Cross of the Order of the Phoenix. The Archbishop of Australia presented him with the Gold Cross of the Order of Saint Andreas. He was a member of the International Academy of Comparative Law (The Hague) and of the American Law Institute.

Affectionately known to generations of students as "Yippy" and to his friends as "Thanassi," he had a personality that immediately consumed the full capacity of any room he entered. Though a resident of the United States for most of his life, he proudly brandished a brash Greek accent that served as his personal and professional trademark. Yet his command of the English language was as formidable as that of any native English speaker. Indeed, he was adept in several languages; this polyglot was the translator of the Law Institute's translation of the first volume of Aubry and Rau's civil law treatise from French into English.¹

As might be expected, Professor Yiannopoulos was a prolific writer. In addition to three volumes of the Louisiana Civil Law Treatise series, he authored countless other books and articles on the civil law, maritime law, comparative law, and conflict of laws. His works were often garnished lavishly with literary allusions: *Of Immovables, Component Parts, Societal Expectations, and the Forehead of Zeus*,² *Five Babes Lost in the Tide — A Saga of Land Titles in Two States*,³ and *Tale of Two Codes: The Code Napoleon and the Louisiana Civil Code*.⁴ His 2003 essay entitled *Requiem for a Civil Code*,⁵ which was far from an actual epitaph for his life's work, commenced with another reference to Dickens, then followed in sequential order all of the sections of Verdi's opera *Requiem*, concluding in its final paragraph with a metaphor likening the Louisiana Civil Code to the phoenix of Greek mythology.

He was long the editor of West's Pamphlet Edition of the Louisiana Civil Code, a position that he unabashedly used to have the final word on matters pertaining to the style or substance of the Civil Code, particularly when he felt that the authors of a revision had fallen into error. He wrote a four-paragraph editor's note explaining that the 2010

¹ Cours de Droit Civil Français (Obligations), By Aubry Et Rau, 1 CIVIL LAW TRANSLATIONS (West 1965).

² Yiannopoulos, *Of Immovables, Component Parts, Societal Expectations, and the Forehead of Zeus*, 60 LA. L. REV. 1 (2000).

³ Yiannopoulos, *Five Babes Lost in the Tide — A Saga of Land Titles in Two States*: Phillips Petroleum Co. v. Mississippi, 62 TUL. L. REV. 1357 (1988).

⁴ Yiannopoulos, *Tale of Two Codes: The Code Napoleon and the Louisiana Civil Code*, in NAPOLEON IN AMERICA 195 (La. State Museum 1989).

⁵ Yiannopoulos, *Requiem for a Civil Code: A Commemorative Essay*, 78 TUL. L. REV. 379 (2003).

amendment to Article 618 "ran into the teeth" of other articles of the Civil Code. His note following the current text and comments of "the much maligned Article 466," treating the subject of component parts of immovables, is a rejoinder to both judicial interpretations and legislative revisions of the article. But by far the most celebrated of his editor's notes is that following Article 890, which, as revised in 1996, provides that the usufruct of the surviving spouse terminates when the surviving spouse dies or remarries, *whichever occurs first*. His editor's note points out the obvious proposition that "[i]t is hardly likely that a usufructuary may first die and then remarry," citing as unimpeachable authority the Gospel of St. Mark, from which he quotes: "For when they shall rise from the dead, they neither marry, nor are given in marriage; but are as the angels in heaven."⁶ Only a little imagination is required to envision the venerable Professor Yiannopoulos now engaged in a fierce debate with these very angels over whether the gates to heaven are component parts of whatever it is to which they are attached or whether the firmament itself is movable or immovable.

In an interview published only months before his death in the *Louisiana Bar Journal*,⁷ which proclaimed him "Louisiana's most influential jurist in our time," Professor Yiannopoulos expressed his intent to continue work on the revision of the Civil Code toward the end of achieving, in his words, "a complete revision of all titles, recast into a modern, flawlessly and smoothly working whole without the continuous need for amendments." That is his challenge to us; a work he has left undone for us to carry on. In the same interview, perhaps mindful of the inexorable march of time, he gave a parting farewell to his legions of former students: αἰὲν ἀριστεύειν - "ever to excel," a quotation from a speech by Glaucus in Homer's *Iliad*: "Ever to excel, to do better than others, and to bring glory to your forebears, who indeed were very great This is my ancestry; this is the blood I am proud to inherit." We, all former students of this remarkable scholar and teacher and now representatives of the bench, bar, and academia of this state, are proud beyond all measure to inherit, in common with all of you, the immense legacy of Professor A. N. Yiannopoulos.

*Requiem aeterna dona ei et lux perpetua luceat ei.*⁸

Presented to the Council, at Baton Rouge, Louisiana, this 17th day of March, A.D. 2017.

Mr. L. David Cromwell, Presenter and Vice-President, Louisiana State Law Institute
Honorable Guy Holdridge, Judge, Louisiana Court of Appeal, First Circuit
Prof. Melissa T. Lonegrass, Louisiana State University Law Center
Prof. Ronald J. Scalise Jr., Tulane University School of Law
Prof. Dian Tooley-Knoblett, Loyola University of New Orleans College of Law
Mr. John David Ziober, President, Louisiana State Law Institute

⁶ Mark 12:25.

⁷ Interview with Professor A. N. Yiannopoulos, *Louisiana's Most Influential Jurist in Our Time* (Tyler Storms, Interviewer), 64 LA. BAR JOURNAL 24 (2016). Many of the quotations and statements attributed in this resolution to Professor Yiannopoulos, as well as much of his personal history, are found in this published interview.

⁸ "Eternal rest grant unto him, and let light shine upon him," the Latin phrase with which he concluded his *Requiem for a Civil Code*, *supra* note 5.

“The Most Interesting Lawyer in the World”
Thomas C. Galligan, Jr., Dean of the LSU Paul M. Hebert Law Center
75th Annual Banquet of the Louisiana State Law Institute

Let me begin with a message from all of us sons and daughters of the old sod, all of us who are the children, grandchildren, great grandchildren and great, great grandchildren of those who emigrated from Ireland to the U.S., Happy St. Patrick's Day.

It is a great day for the Irish and on St. Patrick's Day we are all Irish.

The Irish are said to have good luck. And, the Irish are said to have the gift of gab.

I myself have three times climbed the steps of Blarney Castle to kiss the vaunted stone of the same name. But, truth be told, whatever gift of gab I may possess, when Bill asked me to talk to you tonight, I was honored and excited but I was intimidated as you are such an august and accomplished group.

What would I talk about? I am a torts teacher and I thought perhaps I should discuss the civil law of torts, its origins, major themes, social dimensions, and comparisons with the common law. Or, perhaps I would discuss the work of Louisiana's greatest torts teachers, scholars, and jurists. When I suggested these topics to Bill, he said those were fine ideas and maybe as I developed them I might think of something a little less dense and a little lighter since my talk would take place after a wonderful dinner which would be served after an hour of cocktails at the end of a long day.

So, I went back to the drawing board and came up with another idea. I decided, like an Irishman to tell some stories about the lawyer who influenced me the most. And, please be aware these are stories. I saw some of them take place but others were told to me. They were told to me by someone who saw something who then related it and I had to hear it, digest it, remember it, maybe add some little literary license of my own, and then tell it to you. So think of my stories as an interpretation—an interpretation of something that might have some roots in what might be the truth. In any event, the lawyer who influenced me the most was my father.

My father was a labor and advertising lawyer for Colgate-Palmolive, the company for which he worked for over 50 years. In fact, he was hired as a 25 year old in 1933 to deal with something new on the horizon—the National Labor Relations Act. Colgate thought they needed a labor lawyer and my Dad was to be it. As a child, in our house, “the company” meant one thing—Colgate. When rumors arose that the man in the moon in Proctor and Gamble's logo was a Satanic symbol, we Galligans never doubted it. Only a few years later did I realize my Dad actually owned some Proctor stock. Diversity is a good thing—that is a lawyer lesson.

In any event, as a boy, I always thought of my father as a lawyer—that is what he did and that is what he was. He was not my hero but long before Dos Equis came up with the phrase, I realized my father was the most interesting man I would ever know. And, he is certainly the most interesting lawyer I have ever known.

My father was an orphan at nine. His mother died from TB when he was two and his father died in 1917 when the last of a series of strikes killed him. My Dad and his siblings moved from aunt to aunt, none of whom particularly valued education or what it might do for their charges. Friends, if I am honest about it, until he was 13, my father lived with people who did not love him.

He was an orphan with little or no support and poor prospects. So, he did not have realistic hopes but he had dreams. Everyone has dreams. And, when he dreamed, he dreamed of becoming a lawyer. As he looked around town and saw who people respected he saw doctors and he saw lawyers. When someone planned for the future they went to a lawyer. When they wanted to buy land, they went to a lawyer. When they wanted to go into business they went to a lawyer. And when they got into trouble, they went to a lawyer. Lawyers were respected; they were successful; and they had and were often characters in wonderful stories.

Two such stories my father remembered arose from a murder trial that occurred in his hometown. The prosecutor, Lawyer Washington, told these stories. The defendant, let us call him Jones, had killed a taxi cab driver but pled not guilty by reason of insanity. Jones' lawyer put on witnesses to testify to that effect. One of those witnesses testified as follows:

Defense Counsel: Do you think Jones is a normal person?

Witness: No. I think he's crazy.

Washington: Objection you honor, the witness is not qualified to give an opinion on sanity; he is only qualified to testify to facts, things about which he has personal knowledge.

Judge: Sustained. The witness will not express opinions on sanity. Testify to things you have seen or know.

Defense Counsel: Have you seen Mr. Jones engage in odd behavior?

Witness: Yes

Defense Counsel: Tell us about it.

Witness: Well when he drinks coffee, Jones puts cream into the cup, then he puts the sugar in; then he stirs it up. And then, he pours the coffee into the saucer and he bends down and laps it up like a cat.

Defense Counsel: No more questions.

Judge: Mr. Washington.

Washington: You have testified about the manner in which Mr. Jones drinks his coffee, please tell us how you drink your coffee.

Witness: Well I pour in the cream, then I stir in the sugar. Then. I pour the coffee into the saucer. But, like a sane man, I bring the saucer up to my lips and drink my coffee. I don't lap it up like a cat.

Washington: No more questions.

Later in the trial, there was an issue about the width of a stream that Jones had allegedly jumped after the crime. The question was how he had gotten back to town so quickly if he had committed the murder during the suggested timeframe. Washington's theory was that he had hurdled the stream which explained the fast return. The defense attorney sought to prove that it was impossible to jump across the stream because it was too wide. The owner of the farm at which the jump would have occurred was on the stand when the following colloquy occurred:

Defense Counsel: Farmer Smith, how wide is the stream at the spot we have discussed?

Smith: Hard for me to say exactly.

Defense Counsel: Can you estimate?

Smith: S'pose I might.

Defense Counsel: And?

Smith: Best I can say is I can urinate about half way across.

Washington: Objection your honor, the testimony is quite simply out of order.

Smith: Your damn straight it's out of order. If it was in order I could urinate all the way across.

Defense Counsel: No more questions your honor.

Judge: Mr. Washington?

Washington: I certainly cannot outdo that your honor.

My father was intrigued with these stories and so, thanks to his Aunt Sara, who took him into her New Jersey home as he started high school, he managed to work his way through high school and then, with scholarships, Rutgers University and finally, Cornell Law School. He became a lawyer. And, as a lawyer, he began to develop his own identity and his own stories.

As he began work for Colgate, he also took on a case for his aunt. It would be characteristic of him for the rest of his life that, as he worked for Colgate, he also practiced law on the side, writing wills, probating estates, helping with small business deals, and at least once, litigating. He loved being a lawyer and while he did not charge much, he loved the fees he earned because, as I indicated, he had grown up poor and consequently, he never met a nickel he did not want to keep.

Anyway, Aunt Sara had a cousin, Cousin Ed, who worked as a caretaker at a convent in New York State. Ed lived in a small room in a barn on the convent premises. He would eat his meals with the nuns, go to Mass with the nuns, and work all day doing chores, farming, and taking care of the livestock they kept. Cousin Ed was not paid much but he did not spend much and what little he earned, he mostly saved. At one point, right after my father was admitted to the bar, Cousin Ed asked my Dad to draft a will for him. In that will, Ed left everything to his favorite cousin, Sara.

Then, one chilly night, not long after my father drafted the will, Cousin Ed was sitting quietly at the dinner table with the nuns. Uncharacteristically, Cousin Ed, who was not a small man, was not eating very much. One of the sisters asked him if he was alright.

"Sister," he said. "I do not feel very well. I am going to my room." With that, Ed excused himself and left the table.

Later, after prayers, one of the younger nuns, concerned for Ed, thought she would check on him. As she neared the barn, she heard groans. Hurrying to Ed's room, she knocked but there was no reply. Opening the door, the nun saw Ed lying in the bed, drool coming from his mouth. She rushed back to the main convent and the other nuns came running.

"Get the priest; get the priest," yelled Mother Superior. "He has had a stroke."

The priest was summoned and somehow between the priest, the nuns, and another hired hand they moved Ed from his cold barn room into the convent and put him on a feather bed.

Ed did not improve. And, with the nuns sitting by the side of the bed praying, the priest performed last rites as Ed slipped in and out of consciousness.

By the morning, poor Cousin Ed was no more. But miraculously, because the Lord works in mysterious ways, during the night, Cousin Ed had executed a new will leaving everything he owned to the nuns.

“Lord be praised,” said Mother Superior.

“I smell a rat,” said my father.

As the attorney for his Aunt Sara, my father challenged the new will in court. He believed in justice and he believed that the new will was the result of duress and undue influence at a time when Cousin Ed was not in his right mind.

That case taught my father many lawyer lessons about procedure and questioning witnesses and evidence...and losing. He lost at the trial level and then lost again on appeal. You see a lawyer cannot win all the time.

As the years passed, he married; I was born and life went on.

He retired from Colgate when he was in his late seventies, only to go back later and do another year or so stint. But when he retired, he continued to write wills for people and had those wills typed by his new administrative assistant, who owned a computer. That was my wife. She worked pro bono so the wages were to my Dad’s liking. Anyway, he would handwrite the wills and send them to Susan in Baton Rouge. She would type them and send them back to him. Then, he would get copies made and get the will executed.

One day, after a typed will had arrived from the South, he decided to go into New York and visit the folks at Colgate. He could also get the will photocopied there at no charge. Remember he liked to save money—even other people’s money. It was a late winter morning when he put on his overcoat and set out for New York—after rush hour was over.

Now, my father was a small man and, at one point, his friends had counseled him to be careful about muggers, which were unfortunately common in pre-Rudy Giuliani New York.

Like any good lawyer, my father developed a plan. Of course, he did not want to get mugged but if it happened he had figured out how to avoid losing anything important. It was the three wallet plan. To foil a potential mugger, my father carried three wallets. In one he kept a \$20 bill (or more) and his Colgate identification card. In another, he kept a credit card and a blank check. And, in the third, he kept \$2. The \$2 wallet was the one he would give the mugger when his wallet was demanded. The wallets were distributed among the pockets of my father’s pants, suit jacket, and overcoat.

Off he went.

Arriving at the Port Authority Bus Terminal in New York City, he made his way into the bowels of the earth below to get on his subway. As he prepared to drop a token in the slot and pass through the turnstile, someone grabbed him from behind. It was a mugger, not a hugger. The mugger wrapped an arm around my father's neck and stuck something—gun, knife, thumb—into the small of my Dad's back. "Give me your wallet," growled the man.

This was it. This was the moment. It was time to implement the three wallet plan and turn over the \$2 billfold.

But...which...which pocket... which pocket contained which wallet. He did not recall. "Damn it." "Jackass!"

He felt his backside—wallet but which one. He felt his right chest suit coat pocket—wallet but which one. He felt his left overcoat pocket—wallet but which one? He stood a one in three chance of giving the mugger the \$2 wallet but a two in three chance of giving the mugger a wrong, more valuable wallet.

"Your wallet mister...now," snarled the robber.

Which one—one in three.

And so my father did the only thing he could have done, he clinched his left fist. He cocked his arm and he fired his elbow back into the gut of the erstwhile mugger who let out a gush of stale breath and loosened his grip on my father's neck as my Dad pushed the arm away, dropped the token in the slot, and proceeded off to his train and got his copies made.

So, you see, while a lawyer might have a plan, a lawyer always needs to be flexible enough to abandon that plan and come up with another course of action when the first plan doesn't work out. The three wallet scheme was a dud; but the elbow whack was an effective alternative solution to the problem.

My father loved New York City; he loved working there and he loved being there. It made him feel important I think to be a lawyer for one of the world's major companies in one of the world's great cities. But, the time came when he could no longer go to New York. Then the time came when he really could no longer practice law. It was then that he moved from New Jersey to Baton Rouge to be closer to us and then, later, moved with us to Tennessee. It was there one day, as we were talking together that he said: "Tom, we were wrong."

"What?" I asked. What had I done wrong?

"We were wrong about the movie," he said pensively and nodded to me and to himself.

"What movie?" I asked. As I asked, I began to realize what he was talking about.

You see there was a movie called The Out of Towners with Jack Lemmon and Sandy Dennis. There is a remake with Steve Martin and Goldie Hawn but I do not think it is as good. The movie is about some folks from Ohio who come to New York because of a job opportunity. They are there for an interview and they have an absolutely, awful, miserable time. In the end they decide to forego the opportunity and go home to Ohio.

Anyway, in about 1970 my father took my friend Frank Drobot and me to see The Out of Towners. As we approached the ticket seller, a girl of about 17, we saw the sign that provided ticket pricing information. Children 12 and under were charged less. At the time, I was 14 and Frank was 15. Both of us hovered over my shorter father as he stepped up to the window.

"One adult and two children," he said with confidence.

The poor girl looked over his shoulder at us. We smiled sheepishly; I was embarrassed.

As she opened her mouth to speak, my father beat her to it. "Young lady, they are sleeping and eating under my roof and as long as that is the case, they are children."

Without a reply she sold us one adult ticket and two children's tickets.

By the way, my father hated the movie. It was too anti-New York. Anyway, later that same summer the Drobots took me along on their vacation and we went to see a movie. As we waited in line something possessed me to say to Mrs. Drobot: "You know, we can get in as children if you want."

She looked at me kindly. She was always kind to me. "Tommy," she said sweetly. "We don't do that."

"Oh," I stammered. Frank must have told her the story.

After returning home, I told my father what she had said.

His response was gruff. "Hrrmphhh."

But, thirty years later, he recalled and he pondered and he was right. "We were wrong," he said. "The Drobots were right."

At first, I felt sorry for him. Reliving old failures but then I realized that I just did not get it. And, I felt proud because do you know what he was doing? He wasn't just dwelling on the past and ruing a decision. He was reflecting. He was reflecting on right and wrong. He was ruminating and making himself a better person. And he was still trying to teach me. He was being a great lawyer and he was being a wonderful parent.

Thank you so much for listening to my reminiscences about my Dad. I appreciate your patience. And, Happy St. Patrick's Day!