

# LOUISIANA STATE LAW INSTITUTE

## MEETING OF THE COUNCIL

January 14, 2022

Friday, January 14, 2022

### Persons Present:

Adams, Marguerite (Peggy) L.	Manning, C. Wendell
Babington, J. Bert	Matt, Meghan K.
Baker, Pamela J.	McCarty, Jacob
Bowers, Clinton M.	Medlin, Kay C.
Braun, Jessica G.	Michelli, Mona
Breard, L. Kent	Miller, Gregory A.
Castle, Marilyn	O'Brien, Michael J.
Comeaux, Jeanne C.	Norman, Rick J.
Coreil, Jeffrey	Payne, Claudia A.
Crigler, James C., Jr.	Philips, Harry "Skip", Jr.
Crigler, John D.	Pirtle, Amy
Cromwell, L. David	Pittman, Richard
Curry, Kevin C.	Price, Donald W.
Davrados, Nikolaos A.	Ramsey, Regina
Dyess, Desiree Duhon	Richard, Herschel, E., Jr.
Forrester, William R., Jr.	Riviere, Christopher H.
Freel, Angelique D.	Rutledge, Steffan W.
George, Ellen D.	Ryan, Graham H.
Gonzalez, Zack	Simien, Eulis, Jr.
Hallstrom, Kären	Smith, Gary L., Jr.
Hawthorne, George "Trippe"	Smith, Kimberly
Hayes, Thomas M., III	Sprague, Brandon
Haymon, Cordell H.	Stephenson, Gail S.
Hebert, Christopher B.	Stuckey, James A.
Hogan, Lila Tritico	Talley, Susan G.
Holdridge, Guy	Tate, George J.
Janke, Benjamin West	Tew, Robert S.
Judd, David T.	Ventulan, Josef
Kunkel, Nick	Veron, J. Michael
Lampert, Loren M.	Waller, Mallory C.
Lawrence, Quintillis	White, H. Aubrey, III
Lee, Amy Allums	Woodruff-White, Lisa
Manint, Hailey E.	Ziober, John David
Maloney, Marilyn C.	

President Thomas M. Hayes, III called the January 2022 Council meeting to order at 10:00 a.m. on Friday, January 14, 2022 at the Lod Cook Alumni Center in Baton Rouge. After introductions and a few administrative announcements were made, the President called on Ms. Kären Hallstrom, Reporter of the Children's Code Committee, to begin her presentation of materials.

### Children's Code Committee

Ms. Hallstrom began her presentation by informing the Council that the proposals before them resulted from several years of work by an expert group of judges and lawyers during the creation of a Children's Code benchbook. In the materials labeled "Continuous Revisions," the Council quickly agreed with the proposal to add a cross-reference to Children's Code Article 1404 to provide clarity. The Reporter then introduced the "cost of transcription" topic by explaining that some children were essentially being denied access to the courts because they were unable to pay transcription costs. To remedy this problem, the Committee proposes to add the cost of transcription with respect to supervisory writs as well as to incorporate a presumption of indigency. Furthermore, the

Committee proposes to separate the application of the law with respect to the child from the parent because in some proceedings, the parent and child may have opposing interests. The Council expressed support for these proposals and adopted Children's Code Articles 335(D) and (E) as presented, but the Committee will consider further amending Paragraph E to require written reasons if the court determines that the parent is able to pay the costs even though counsel has been appointed for them. In Paragraph F, the Council suggested adding the term "supervisory writ" for purposes of consistency, and the Reporter agreed. Next, the Council questioned the meaning of Paragraph G and wondered if this provision could be eliminated entirely. The Council suggested that a record that is both untimely and incorrect will, in fact, prejudice the appeal. The Reporter suggested that the intent of this language is to stop the time delays from running against the party if the clerk makes a mistake with respect to the record. Because that interpretation shifts the common understanding of the term "prejudice" in the law, the Council ultimately decided to recommit Paragraph G to the Committee for further consideration.

The Reporter next introduced the materials on the "early appointment of counsel" and noted that a determination of indigency has traditionally been linked to the appointment of counsel. Indigency determinations, however, can be made at any stage of the proceedings, but the appointment of counsel should take place as early as possible. Ms. Hallstrom and Mr. Richard Pittman, a member of the Children's Code Committee, explained that as a practical matter, this proposal ensures that counsel may be appointed prior to the determination of indigency to ensure judicial efficacy at the very first point of contact as well as the establishment of the attorney-client relationship. A Council member explained that in her jurisdiction, there is an immediate presumption of indigency and automatic appointment of counsel, and when the parties appear for a hearing, they are required to apply for indigency. With that explanation, the Council approved Articles 320(B) and 575(A) and (B) as presented.

Ms. Hallstrom then noted that Article 575(C) is new language that will allow the Indigent Parent Representation Program to represent a parent prior to the first court proceeding. The Council questioned whether the program is an entity and struggled with the notion of a program acting and having discretion. Members of the Council understood that, in reality, the state's public defenders administer the program but suggested adding language to reference the program's governing board. The Reporter accepted this suggestion, and Paragraph C was approved as follows:

**Article 575. Duties of the program; qualifications of counsel**

\* \* \*

C. The program, through its governing authority, may provide for representation of indigent parents prior to the commencement of court proceedings.

Moving to Articles 607 and 608, the Reporter noted that these proposals add the necessary language to the Child In Need of Care title of the Children's Code to ensure the early appointment of counsel for the child and for the parents. Once again, the right to counsel attaches immediately because of the presumption of indigency and, at the first hearing, the proper application for indigency will be made. The Council approved these articles as presented. Ms. Hallstrom then explained that Children's Code Article 623 requires the department to provide notice of court hearings to certain persons, and the Committee is proposing to expand this duty to include providing notice of any order to the district defender and to counsel for the child. After discussion, the Reporter agreed to remove the proposed notice requirement for Articles 617 and 618 concerning temporary restraining orders and protective orders because the right to counsel does not attach for these proceedings. The Council again questioned how notice is given to a program, and the Reporter agreed to change the term to "entity." The following was approved:

**Article 623. Notice; right to be heard**

A. The department shall give notice of any ~~court hearing order~~ regarding the child issued in accordance with Article 619(C) or 620 to his the child's parents, the district defender or other entity designated by the Indigent Parents' Representation Program for representing parents, the entity designated for the jurisdiction by the Louisiana Supreme Court to provide qualified, independent counsel for the child, and other parties. ‡ The department shall also give such notice regarding any child in foster care to any foster parent, pre-adoptive parent, and relative providing care. The department shall notify the court of each party's address and shall have a continuing duty to provide current information to the court about each party's whereabouts.

B. The notice shall state the date, time, and place of ~~the~~ any scheduled hearing and inform the recipient of ~~his~~ the right to attend and be heard. The notice to the district defender and the entity designated for the jurisdiction by the Louisiana Supreme Court to provide qualified, independent counsel for the child shall also include a copy of the verified complaint, the affidavit required in Article 620(B), and any order issued by the court.

The Reporter next explained that the changes to Article 624 eliminate the presumption that, by signing, the parents agree to the safety plan. These changes guarantee parents the right to request a hearing and trigger the right to counsel when an instanter order is issued. Without any discussion, the proposal was approved.

Ms. Hallstrom next directed the Council's attention to the "service" materials and explained that the Committee found the service requirements inconsistent between Child In Need of Care proceedings and termination proceedings, as well as not providing service for children who are parties and their counsel. The Council approved the following language in Article 638:

**Article 638. Service of petition; parent; child**

A copy of the petition and the notice of the nature of the hearing and the rights of the parent, as provided for in Article 639, shall be served, in a sealed envelope, upon every parent of the child. A copy of the petition and the notice of the nature of the hearing shall be served on the child through the entity designated for the jurisdiction to provide counsel for the child.

The Reporter then explained that the changes to Article 640 clarify that, because a child cannot accept service personally, service must be made through counsel for the child and may be made by email if an address is provided. Without discussion, this proposal was approved. Ms. Hallstrom next informed the Council that new Article 1019.1 replicates current Article 635.1 and new Article 1019.2 replicates current Article 638 to require notice and service to counsel in a termination proceeding. The Council substituted the word "program" for "entity" in both articles before adopting them as amended. The Reporter then explained that the last article presented, Article 1021, replicates current Article 640 for service and return on the child, through counsel, and the child's parent. Due to the severe consequences of the termination of parental rights, the Council suggested adding language to Paragraph C regarding receipt of service by electronic mail. The Council agreed to copy the language from Code of Civil Procedure Article 1313 and adopted the following:

**Article 1021. Service and return; child; resident parent; counsel**

\* \* \*

C. Service by electronic mail is complete upon transmission, provided that the sender receives an electronic confirmation of delivery.

At this time, a Council member questioned whether the delay for answering should also be made consistent with the Code of Civil Procedure and increased to twenty-one days. The Reporter noted that many time periods in the Children's Code are shorter than in the Code of Civil Procedure due to the nature of the proceedings, where the intention is to be fair but fast regarding the stability of children's lives. The Council then questioned the efficacy of service by certified mail and discussed eliminating it or at least adding actual delivery by commercial courier as a method of service. The Reporter agreed to ask the Committee to study issues surrounding effective service at future meetings.

In the interest of time, the Council requested that the Reporter hold off on presenting the materials related to incorporating safety protocols and agreed to review and send feedback to the Committee prior to the February Council meeting. Ms. Hallstrom then concluded her presentation, and the President called on Mr. Skip Philips, Co-Chair of the Torts and Insurance Committee, to begin his presentation of materials.

### **Torts and Insurance Committee**

Mr. Philips began his presentation by explaining that he would be discussing the issue of "doxing" – the intentional dissemination of private identifying information – as presented in House Resolution No. 109 of the 2021 Regular Session. He noted that the Committee leadership had begun its work by meeting with the resolution's author, Representative Charles Owen, to get a sense of what had prompted the resolution and what direction the author envisioned the project taking. Representative Owen explained to the Committee leadership that he had authored the resolution in response to a doxing incident that had occurred in Minnesota in the aftermath of the 2020 election, where a number of volunteers had had their names and addresses posted online and had faced significant harassment. Representative Owen further noted that he wished to add some protection to the law for private citizens who had not "signed up" to be in the public spotlight.

With this in mind, the Committee began its work on the project by brainstorming a list of issues implicated by a potential cause of action for doxing primary among these jurisdiction and the First Amendment. The Co-Chair explained that the Committee had then conducted extensive research on these issues, the results of which were ultimately summarized in a memorandum to the Committee that had been circulated to the Council. Mr. Philips noted that the Committee had met again to discuss the results of its research and, given the significant number of complications associated with the creation of a civil cause of action for doxing – namely, concerns over constitutionality and issues related to the exercise of personal jurisdiction over defendants – the Committee had ultimately concluded that creating a cause of action for doxing would do more harm than good. Mr. Philips further noted that Committee members had pointed out that various tort theories already available under current law would likely serve to provide remedies for many doxing incidents. The Co-Chair further explained that ultimately, the Committee had reasoned that the benefits of creating a civil remedy for doxing would be outweighed by the detriments. Mr. Philips also noted that the Committee had contemplated the possibility that a criminal statute might better serve Representative Owen's goals, as this would eliminate some of the difficulties associated with bringing and sustaining an action for doxing, such as the identification of the defendant and the financial burden associated with such a lawsuit.

Having summarized the current status of the Committee's work, Mr. Philips explained that Committee leadership had recently spoken to Representative Owen, who expressed that he was likely to pursue a legislative solution to doxing regardless of whether such legislation was recommended by the Committee. Accordingly, the Committee was seeking the Council's approval of its conclusions generally as well as direction as to how it should proceed. Mr. Philips highlighted the doxing memorandum as one potential course of action, suggesting that it could be converted into a report that would then be submitted to the legislature in response to House Resolution No. 108. The Co-Chair then asked the Council for its thoughts.

One Council member noted that he had reviewed the doxing memorandum and expressed agreement with the Committee's analysis of the situation, as expressed both in the memorandum and by the Co-Chair. The member explained that he had had the same thoughts with respect to the overall cost-benefit analysis of creating a statutory cause of action for doxing, which would, in his estimation, have significant unintended consequences. He further voiced agreement with the Committee's argument that existing laws were adequate to address the issue of doxing but added that he did not personally believe that a criminal statute was the correct answer. On this final point, the Committee's other Co-Chair, Mr. Donald Price, clarified that the Committee was *not*, in fact, recommending the enactment of a criminal doxing statute but was instead merely suggesting as a general matter that this might be a more desirable course of action than a civil statute, if indeed Representative Owen decided to legislate on the issue regardless.

Another Council member, expressing agreement with the Committee's analysis that doxing legislation would be constitutionally complicated, inquired as to the experiences of other jurisdictions that had enacted doxing statutes. Mr. Philips answered that he was uncertain as to whether such jurisdictions had had sufficient time to have experienced litigation related to these statutes. Confirming that the Co-Chair was correct, Mr. Nick Kunkel, staff attorney for the Torts and Insurance Committee, stated that a handful of states had enacted doxing statutes within the past year or so, some of which varied somewhat significantly. Mr. Kunkel explained that some statutes imposed civil liability, some statutes imposed criminal liability, and others still were hybrid statutes; further, some statutes were generally applicable, while others addressed the doxing of some specific category of person. As an example of this last category, he listed California's doxing statute, which applies specifically to a particular class of healthcare worker. Ultimately, though, Mr. Kunkel emphasized that Mr. Philips was correct in his estimation that these laws had not yet been in effect long enough to have produced any meaningful body of jurisprudence.

This prompted a Council member to raise another issue: that such statutes were undoubtedly incredibly politically fraught and would likely be treated similarly to hate crimes statutes, which he characterized as well-intentioned but generally disregarded in practice due to their addition of an elevated burden of proof. In this regard, the Council member agreed with the previous suggestion that a doxing statute would lead to unintended consequences. Mr. Philips agreed, adding a comparison of "specific" doxing statutes to Louisiana's "specific" theft statutes. On the topic of adding unnecessary remedies to the law, another Council member emphasized again the availability of various tort theories as causes of action applicable in doxing scenarios. He added that even if some specific tort remedy was *not* available, a victim could always fall back on Civil Code Article 2315, Louisiana's "general" tort. Several Council members expressed agreement with this point.

The conversation then turned to what steps the Committee should next take. Mr. Philips noted his belief that Representative Owen would be accepting of the Committee's analysis and recommendations but would likely nevertheless go forward with some form of doxing legislation. One Council member suggested that converting the memorandum to a report was a good idea, and another Council member tentatively agreed but wondered whether the memorandum was too neutral. Mr. Philips clarified that if the memorandum were converted to a report, it would be revised so as to be written more conclusively. Another Council member inquired as to how such a report recommending *against* legislative action would be "publicized," noting that, given the strong concerns of both the Committee and the Council regarding the enactment of doxing legislation, it was important for legislators to be made aware of the Committee's analysis. Ms. Mallory Waller, the Law Institute's Coordinator of Research, explained that copies of the report would be distributed to the author and to the Speaker of the House and the Chairman and staff of the legislative committee from which the resolution originated, as well as that a copy of the report would also be published on the Law Institute's website. Ultimately, the Council agreed that the Committee should convert its memorandum into a report to be presented for final approval at the February Council meeting.

Next, one of the Council's junior honorary members explained that she agreed with the analysis of both the Committee and the Council from a legal perspective but wished to comment on the prevalence of doxing generally. In particular, she opined that doxing is indeed a significant issue in the state of Louisiana and throughout the country. She added that, in the course of her previous employment as a community advocate, she had both had her own private information shared online and seen others' private information shared online. The member further expressed that doxing occasionally leads to harassment and that this is an especially significant issue for many minorities involved in community advocacy work. Mr. Philips thanked the junior honorary member for her perspective and reiterated that he anticipated that Representative Owen would pursue a legislative solution to doxing regardless of the Law Institute's ultimate recommendation.

At this time, Mr. Philips concluded his presentation, and the January 2022 Council meeting was adjourned.



Jessica G. Braun



Nick Kunkel