**LOUISIANA STATE LAW INSTITUTE**

**THE MEETING OF THE COUNCIL**

**January 12-13, 2018**

**Friday, January 12, 2018**

**Persons Present:**

Adams, E. Pete
Boudreaux, Bernard E., Jr.
Braun, Jessica
Breard, L. Kent
Carroll, Andrea
Castle, Marilyn
Crigler, James C., Jr.
Cromwell, L. David
Curry, Kevin C.
Davidson, James J., III
Dawkins, Robert G.
Dimos, Jimmy N.
Domingue, Billy J.
Ellison, David M., Jr.
Garofalo, Raymond E., Jr.
Gregorie, Isaac M. "Mack"
Griffin, Piper D.
Hallstrom, Kären
Hamilton, Leo C.
Hamm, David P., Jr.
Hayes, Thomas M., III
Haymon, Cordell H.
Hester, Mary C.
Hogan, Lila T.
Holdridge, Guy
Jewell, John Wayne
Knighten, Arlene D.
Kostelka, Robert "Bob" W.
LaVergne, Luke
McGough, Lucy
McIntyre, Edwin R., Jr.
Mengis, Joseph W.
Miller, Cody "C.J."
Morris, Glenn
Morvant, Camille A.
Nedzel, Nadia
Norman, Rick J.
Ottinger, Pat
Philips, Harry "Skip", Jr.
Price, Donald W.
Rials, Megan
Richardson, Sally
Scalise, Ronald J., Jr.
Sole, Emmett C.
Surprenant, Monica T.
Talley, Susan G.
Tate, Bradley Joseph
Title, Peter S.
Trahan, J. Randall
Tucker, Zelda W.
Waller, Mallory
Weems, Charles S., III
White, H. Aubrey, III
Wilson, Evelyn L.
Ziober, John David

President Susan Talley opened the Friday session of the January 2018 Council meeting at 10:00 a.m. on Friday, January 12, 2018, at the Lod Cook Alumni Center in Baton Rouge. During today's session, Professor J. Randall Trahan presented for the Lesion Beyond Moiety Committee and Ms. Kären Hallstrom presented for the Children's Code Committee.

**Lesion Beyond Moiety Committee**

The Reporter, Professor Trahan, represented the Lesion Beyond Moiety Committee. He began by noting that when he presented to the Council in September of 2017, he was unable to complete his presentation and stated that at that meeting, the Council had approved the Committee's decisions reviewed at that time. He explained that, regarding the issue of taking into account for the purposes of fair market value a characteristic of the thing that was not discovered until after the sale, the Council had approved the Committee's decision *not* to consider such a characteristic for the purposes of fair market value, but that the Council had disliked the Committee's solution of amending Civil Code Article 2589 to include a definition of fair market value so that a Comment could be added to the Article because the Council did not want inadvertently to change the meaning of fair market value. The Reporter explained that he had a different solution to the problem that he would present at today's meeting.

Turning first to page 2 of the Lesion Presentation materials, the Reporter directed the Council's attention to point II.B. on line 28, which asked whether the law of lesion should be modified to provide that, in the case of a sale of land, the land's potential for "mineral development" should not be taken into account in determining the land's fair market value. The Committee had previously deadlocked in a vote on the issue, and the Reporter now is seeking a policy vote. He noted that the Mineral Code excludes mineral rights from the law of lesion. One Council member stated that there is a difference between mineral rights and land with mineral rights, because in a sale, the former clearly alerts the seller to the fact that he possesses mineral rights, but the latter does not alert the seller. A motion was made not to modify the law with regard to this issue. Members discussed how the land's potential for mineral development might not be different from other disparities of knowledge between the buyer and the seller, with one member asking how a seller's reservation of mineral rights in an act of sale would be handled. Another motion was made to replace the previous one: a motion to exclude mineral potential from the fair market value of the land; and this substitution was accepted. One member noted that an expert usually considers mineral potential when determining the fair market value of a tract of land, which suggests that there is no policy reason to exclude mineral potential from the fair market value definition. Members also discussed the wisdom of revising the Civil Code over this issue because only one judge on the First Circuit has dissented from the generally prevailing view that mineral potential is included in fair market value.

The Council then voted on changing the Civil Code to exclude potential mineral development for fair market value for lesion purposes, and the motion failed. The Reporter noted that this means that there will be no change in the law, and one member suggested asking for the Mineral Code Committee's advice.

Next, turning to page 2, point II.A.7. on line 24, the Reporter explained that the Committee had voted not to modify the law of lesion to include a codification of the heightened standard of proof that the courts apply in assessing the sufficiency of the plaintiff seller's proof of "fair market value." A motion was made not to codify this heightened standard of proof in agreement with the Committee's decision. With little discussion, the Council voted in favor of the motion.

Turning next to page 2, point II.A.5. on line 14, the Reporter directed the Council's attention to the question of whether the law of lesion should be clarified to provide that the original seller may pursue a third person to whom the original buyer has re-transferred the thing in cases in which the original buyer and the

third person have acted in "bad faith" to defraud the seller of his lesion rights. He also directed the Committee to page 2 of Avant-Projet #3, where proposed Civil Code Article 2594 appears. He explained that the problem is that since 1848, courts have recognized the possibility of a bad-faith exception to current Civil Code Article 2594. For a proposed definition of bad faith, the Reporter directed the Council to Comment (d) on page 4 of Avant-Projet #3. He explained that the Committee had voted to codify this jurisprudential exception and asked what the Council wished to do, while also noting that the Council was not being asked to vote on this specific language. A motion was made to codify the jurisprudential exception in agreement with the Committee's decision. A member questioned why this exception should be codified when it has never in fact been used in practice, while another member noted that the 1993 Lesion Committee endorsed codifying the exception. One member suggested using the word "conspire" in Civil Code Article 2594 and stating that the exception does not deal with the public records. Another member stated that it would be wise to distinguish between control and affiliation when determining the bad faith or lack thereof of a third person because most of the bad faith cases involve collusion. Council members also discussed the implications of fraud on this exception and whether "transfer" is the best word choice. The Council then voted in favor of the motion to codify the jurisprudential exception. One member pointed out that on page 2, lines 19 and 20 of Avant-Projet #3, there are three instances of the word "transfer" that the Reporter might consider revising.

Next, the Reporter turned to page 2 of the Lesion Presentation, point II.A.6. on line 19, which asks whether the law of lesion should be clarified to provide that the seller's ability, if any, to pursue a third person to whom the original buyer has re-transferred the thing is the same regardless of whether the re-transfer was onerous or gratuitous. He explained that because current Civil Code Article 2594 is silent about exchanges and about gratuitous transferees, there is a presumption that a gratuitous transferee can be pursued by the seller, whereas onerous transferees are protected. However, the Civil Code also provides that there is no remedy when a buyer destroys the thing physically; thus, the authors of the Civil Law Treatise have argued that the buyer should also to be able to destroy it juridically, and under this argument, gratuitous transferees are protected. The Committee had previously voted to expand Civil Code Article 2594 to cover both gratuitous and onerous transferees. A motion was made to clarify the law of lesion to protect gratuitous transferees to the same extent as onerous transferees.

The Reporter explained that the policy question is whether gratuitous transferees should be explicitly protected, and a motion was made to protect them; the Reporter also clarified again that the Council was not voting on the language in the Avant-Projet at this time. One member asked whether, if the seller still has a right against the lesionary buyer, and the buyer's obligation is to pay the supplemental price or return the thing, must the buyer in this circumstance still pay the supplemental price? Members also discussed the principle of not asserting a nullity against a gratuitous transferee under Civil Code Article 2035 and how that would affect protecting a gratuitous transferee, as well as the public records doctrine. The Council then voted on the motion to protect gratuitous transferees to the same extent as onerous transferees, and the motion failed.

The Reporter then stated that the Council could either not amend the law in any way or amend Civil Code Article 2594 to reflect the Council's vote of an affirmative policy that gratuitous transferees are not protected and asked which approach the Council would prefer. The Council voted on a motion not to amend the law in any way, and none were in favor. Thus, the Lesion Beyond Moiety Committee will now draft new language revising Article 2594 to reflect the Council's decision not to protect gratuitous transferees for the Council's review.

At this time, Professor Trahan concluded his presentation, and the Council adjourned for lunch, during which time there was a meeting of the Membership and Nominating Committee.

**L U N C H**

After lunch, the President called on the Chairman of the Membership and Nominating Committee, Mr. Emmett C. Sole, to present the Committee's supplemental report.

**Membership and Nominating Committee**

Mr. Sole began by informing the Council that the Membership and Nominating Committee had met during lunch for the purpose of supplementing the report it presented to the Council in December of 2017. Specifically, the Committee had approved the nomination of a new practicing attorney as well as representatives from the Loyola College of Law. A motion was then made and seconded to adopt the Committee's supplemental report, and the motion passed with no objection. Mr. Sole then reminded the Council that the Membership and Nominating Committee was always looking for dedicated individuals who would be good additions to the Council, specifically practicing lawyers representing both sides of the litigation bar. After welcoming the Council to submit such suggestions, Mr. Sole then concluded his presentation, and the President called on Ms. Kären Hallstrom and Professor Lucy McGough to being their presentation of materials from the Children's Code Committee.

**Children's Code Committee**

Ms. Hallstrom started her presentation with the material relative to the Indian Child Welfare Act (ICWA) and asked Professor Lucy McGough to provide background information on this project. Although ICWA was passed in 1978, the final rule was not promulgated by the Department of the Interior until 2016. Thereafter, the Court Appointed Special Advocates asked the Children's Code Committee to consider adding ICWA to the Code. The intent of this proposal is to alert courts and practitioners to the proceedings where ICWA may supersede state law.

Ms. Hallstrom then turned the Council's attention to the first proposed Article, 103.1, that is a general statement on the applicability of ICWA to child custody proceedings. The Council suggested stylistic changes and the following was adopted:

**Art. 103.1. Applicability of Indian Child Welfare Act**

The provisions of the Federal Indian Child Welfare Act and the regulations promulgated thereunder supersede the Children's Code whenever the outcome of an involuntary or voluntary proceeding may result in the removal of an Indian child from a parent under circumstances in which the parent cannot have the child returned upon demand.

The Reporter introduced the definition section, Article 116, and the Council questioned the clarity of the definition of "Indian child". Upon further review and discussion, the following was approved:

**Art. 116. Definitions**

Except where the context clearly indicates otherwise, these definitions apply for the following terms used throughout this Code.

* * *

(5) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary of the Interior in accordance with their status as Indians.

* * *

(8) "Indian child" means any unmarried child under eighteen years of age who is a member of an Indian tribe or who is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.

In proposed Article 301, the types of child custody proceedings to which ICWA applies, the Reporter accepted the same amendment made in Article 103.1 to further clarify the reference to ICWA by adding the terms "federal" and "regulations promulgated thereunder." Thereafter, this Article was adopted.

Article 612 sets forth the Department of Children and Family Services' role in investigating reports of abuse and neglect. Although the department already makes this inquiry in accordance with their rules, the Committee is proposing codifying that requirement. With little discussion, the Council approved the proposal.

The Reporter explained that the new language added to Article 624 alerts the court and persons before the court of the duty to inquire at the commencement of every child custody proceeding whether there is reason to know the child is an Indian child. The Reporter made a terminology change and the following was approved:

**Art. 624. Continued custody hearing; continued safety plan hearing; Indian Child Welfare Act**

D. At the commencement of the hearing, on the record, the court shall ask each person before the court whether he knows or has reason to know that the child is an Indian child. Each person before the court shall be instructed to inform the court if he subsequently discovers information that suggests the child is an Indian child.

Moving to Article 634 regarding information required in a petition for a Child In Need of Care proceeding, the Council questioned whether every petition would have to include a positive or negative statement regarding the status of a child as an Indian child. The Reporter explained that the department is required to make the inquiry, so it does not increase their burden to include the information in the petition. The Council redrafted and adopted the provision as follows:

**Art. 634. Contents of petition**

A. The petition shall set forth with specificity:

(3) A statement of whether the petitioner knows or has reason to know that the child is an Indian child and facts that support that statement.

Proposed Article 661.1 attempts to guide the court in making the inquiry whether the child is an Indian child and how to proceed depending upon the results of the inquiry. The Council members were concerned that someone could fraudulently claim a child is an Indian child just to halt the proceeding. They suggested requiring certain facts to be presented to the court prior to halting the proceeding. The Reporter explained that because the federal requirements are vague and undefined the court will have to make a determination based on what information they have. After continued discussion, the Council offered a few suggestions to tighten up the language and the Reporter agreed to elaborate in the Comments what exactly it means to

immediately proceed as if the child is an Indian child. The following was adopted:

**Art. 661.1. Indian Child Welfare Act Inquiry**

At the commencement of the adjudication hearing, the court shall inquire as to whether the petitioner or any person before the court knows or has reason to know that the child is an Indian child. If no person before the court responds affirmatively, the court may proceed, although it shall caution each person before the court of his continuing duty to inform the court of any new information suggesting that the child is an Indian child. If any person before the court sufficiently demonstrates that there is reason to know that the child is an Indian child, the court shall immediately proceed as if the child is an Indian child.

The next Article, proposed Article 666, requires the court to make a finding whether there is reason to know the child is an Indian child at the conclusion of the evidence, but prior to adjudication. The discussion revealed possible misinterpretations of the proposed language leading courts to make inappropriate determinations. The Reporter agreed to a change in the wording and agreed to be clear in the Comment that the federal law states that if the trial court finds there is reason to know the child is an Indian child, notice is given to the Tribe and the Tribe determines whether the child is indeed a member. However, if the Tribe does not respond to the notice, there is no time limitation and the court is given the authority to ultimately determine if the child is an Indian child and continue with the proceeding. Although the following was approved, the Reporter decided to take the proposed Comment back to the Committee for further drafting:

**Art. 666. Adjudication order**

A. At the conclusion of the evidence, the court shall make a finding whether there is reason to know that the child is an Indian child.

The Reporter noted that she will present the remaining ICWA material to the Council at its February meeting and she began her presentation on the use of restraints in juvenile court proceedings. Ms. Hallstrom reminded the Council of the growing national movement against indiscriminate shackling and the Supreme Court case that held that shackling of adults in the courtroom is unconstitutional. She explained that based on the Council discussion at the December meeting, the Committee reworked the proposal to restate the presumption against indiscriminate shackling, provide an exception for individualized determinations, and clarify the process.

The Council again seemed concerned with the procedure for the judge to determine if the child presents a particularized risk of physical harm to himself or another or presents a substantial risk of flight from courtroom. Committee member Richard Pittman explained that the intent is for the determination to be made with flexibility prior to the child entering the courtroom and without many other formal requirements. The Council still questioned whether the language truly captured the intent and whether Paragraphs C and D should be combined to eliminate timing concerns. The Council recommitted the proposal to the Committee to clarify that the judge maintains the ability to immediately order the child to be restrained for behavior in the courtroom, allow the child's attorney to request restraints, and provide for notice and a hearing prior to the finding.

Having completed the presentation of the material from the Children's Code Committee, the Council adjourned for the day.

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Boudreaux, Bernard E., Jr.
Breard, L. Kent
Crigler, James C., Jr.
Curry, Kevin
Dawkins, Robert G.
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Hamilton, Leo C.
Hamm, David P., Jr.
Hayes, Thomas M., III
Hogan, Lila T.
Holdridge, Guy
Jewell, John Wayne
Knighten, Arlene D.
Kostelka, Robert "Bob" W.
Lavergne, Luke
McIntyre, Edwin R., Jr.
Morvant, Camille A.
Norman, Rick J.
Price, Donald W.
Rials, Megan
Riviere, Christopher H.
Sole, Emmett C.
Talley, Susan G.
Tate, Bradley Joseph
Tucker, Zelda W.
Waller, Mallory
White, H. Aubrey, III
Wilson, Evelyn L.
Ziober, John David

President Susan Talley called the Saturday session of the January 2018 Council meeting to order at 9:05 a.m. on Saturday, January 13, 2018. She then called on Judge Guy Holdridge, Acting Reporter of the Code of Criminal Procedure Committee, to begin his presentation of materials on noncapital postconviction relief.

**Code of Criminal Procedure Committee**

Judge Holdridge began his presentation by reminding the Council that it had previously considered general provisions concerning noncapital postconviction relief, as well as the two form applications for first and second or subsequent applications. He then noted that the provisions under consideration during today's meeting would focus on the procedure applicable to noncapital postconviction relief, and he reminded the Council that from a policy standpoint, the goal of this revision was to minimize the frequency with which meritless applications for postconviction relief are filed in order to ensure that those applications with merit are presented to the court in a more timely fashion.

With that introduction, Judge Holdridge directed the Council's attention to Article 927.6, on page 10 of the materials. The Acting Reporter explained that the Committee had recommended changing the title to this provision and revising its substance to provide that within sixty days of the filing of the application for postconviction relief, for each claim in the application, the district judge must

dismiss the claim, order the applicant to respond with a more definite statement, or order the state to respond. He also explained that there are two grounds for dismissal at this stage: either the application sets forth no cause of action for postconviction relief, such as in the case of an applicant who alleges that he is entitled to postconviction relief because he took an anger management course, or the application sets forth a cause of action in theory but there is no factual basis to support such cause of action, such as in the case of an applicant who alleges ineffective assistance of counsel because he never had an attorney, when the record clearly shows that the applicant's attorney was present every day of the proceedings. Judge Holdridge then explained that apart from dismissal, the judge can also order the applicant to respond with more information, at which time the judge again can either dismiss the claim or proceed to the third option of ordering the state to respond.

It was then moved and seconded to adopt Article 927.6, at which time one Council member questioned why both the judge and the state have the option to request a more definite statement from the applicant. Judge Holdridge explained that whereas the judge is trying to collect information for purposes of determining whether there is any merit to the applicant's claim, the state's request is intended to operate much like an exception of vagueness. Another Council member questioned why the language on lines 10 and 11 of page 11 of the materials was necessary, to which the Acting Reporter responded by explaining that the Committee wanted to ensure that the state would not be asked to respond to the application without the court first determining that a dismissal is improper and that no additional information is needed. One Council member then expressed her confusion with respect to the language on line 17 of page 11 and suggested replacing "the order granting or denying a dismissal upon the pleadings" with "any order," a change that Judge Holdridge accepted.

Several Council members then questioned the time periods included in Article 927.6(A)(2)(a), and the Acting Reporter clarified that the applicant has sixty days within which to respond to a request for a more definite statement, after which time the judge has sixty days within which to dismiss the claim if the applicant fails to respond. After asking whether the judge's only option is to dismiss the claim if an applicant does not respond to a request for a more definite statement, one Council member then suggested adding "timely" after "received" on line 1 of page 11 and replacing "shall" with "may" on line 2 of the same page. Several other Council members disagreed, however, noting that if the judge is asking for a more definite statement from the applicant, it is likely because he is inclined to dismiss the claim but wants to give the applicant one last chance to provide relevant information before doing so. After further discussion, the Council ultimately agreed that a Comment to Article 927.6 should be added to explain that an application should only be dismissed pursuant to Subsubparagraph (A)(2)(a) in the event that the judge was inclined to dismiss the application prior to requesting a more definite statement from the applicant because the claim would have no merit unless it was supplemented with additional information.

A motion to amend was then made and seconded to move the phrase "within sixty days of the expiration of the time period for the applicant to respond" between "court" and "shall" on line 2 of page 11, and to make a similar change on line 6 of the same page. The motion passed over 1 objection, and it was then moved and seconded to adopt Article 927.6 as amended. This motion also passed over 1 objection, and the adopted proposal reads as follows:

**Article ~~928~~ 927.6. ~~Dismissal upon the pleadings~~ Action required by district court after application is filed**

A. Within sixty days from the date of the filing of an application for postconviction relief, the district court shall do one of the following for each claim alleged in the application:

(1) Dismiss a claim in an ~~The~~ application for postconviction relief ~~may be dismissed~~ without an answer or the necessity of a hearing if either of the following is true:

(a) The applicant raises ~~the application fails to allege~~ a claim which, if established, would not entitle the ~~petitioner~~ applicant to relief, or which fails to state a ground upon which relief can be granted pursuant to Article 927.3.

(b) An examination of the application and record clearly refutes any factual basis for the claim.

(2) Order the applicant to respond with a more definite statement as to any claim for relief for which the court determines a more definite statement is needed. The applicant shall respond with a more definite statement within sixty days from the date of the order. The court may grant an extension of time for good cause shown.

(a) If a more definite statement as to the claim is not received, the court, within sixty days of the expiration of the time period for the applicant to respond, shall dismiss the claim pursuant to Subparagraph (A)(1) of this Article.

(b) If a more definite statement as to the claim is received, the court, within sixty days of receipt of the applicant's response, shall either dismiss the claim pursuant to Subparagraph (A)(1) of this Article or proceed in accordance with Subparagraph (A)(3) of this Article.

(3) Order the State to respond. If the court does not grant a dismissal upon the pleadings pursuant to Subparagraphs (1) or (2) of this Paragraph, the court shall order the State to respond within sixty days from the date of the order by filing a request for a more definite statement under Article 927.7, a procedural objection under Article 927.8, or an answer on the merits of the claims for relief under Article 927.10. The court may grant an extension of time for good cause shown.

B. A copy of any order shall be furnished to the applicant, his attorney, the State, and the custodian.

Next, the Council turned to Article 927.7, on page 11 of the materials. After Judge Holdridge explained that this provision provides the state with an opportunity to request a more definite statement from the applicant prior to filing its answer subject to approval by the court, a motion was made and seconded to adopt Article 927.7 as presented. The motion passed with no objection, and the adopted proposal reads as follows:

**Article 927.7. Request for a more definite statement by the State**

A. If the State files a request for a more definite statement as to any claim for relief, the district court may order the applicant to respond with a more definite statement within sixty days from the date of the order. If a more definite statement is ordered by the

court and not received, the claim shall be dismissed by order of the court. The court may grant an extension of time for good cause shown.

B. If the district court denies the request of the State for a more definite statement, or if the applicant has filed a more definite statement pursuant to Paragraph A of this Article, the court shall order the State to file a procedural objection or an answer within sixty days from the date of the order. The court may grant an extension of time for good cause shown.

Next, the Acting Reporter directed the Council's attention to Article 927.8, on page 12 of the materials. He explained that Paragraph B of this provision sets forth a non-exclusive list of procedural objections, including that the applicant failed to raise the claim in prior proceedings or pursue the claim on appeal, that the claim is untimely, or that no new claim is raised in an application. A motion was made and seconded to adopt Article 927.8, at which time one Council member asked the Acting Reporter to provide an example of a situation in which consideration of a claim that was fully litigated in an appeal would be required in the interest of justice. The Council then discussed the examples of DNA evidence or other advances in technology and agreed to change "interests" to "interest" on line 18 of page 12. Another Council member then questioned whether "legislation or jurisprudence" on line 13 of the same page could be replaced with "law," but Judge Holdridge explained that several of these procedural objections had been developed jurisprudentially, plus this was an illustrative list. A vote was then taken on the motion to adopt Article 927.8 as amended, and the motion passed with no objection. The adopted proposal reads as follows:

**Article 927.8. Procedural objections**

A. If it is required to respond, the State may file any procedural objection alleging that a procedural bar precludes the applicant from seeking relief on the grounds and factual basis set forth in the application for postconviction relief. Any procedural objection shall set forth the factual basis for the objection. The objection shall be filed at any time prior to the answer or with the answer.

B. Procedural objections are those provided by legislation or jurisprudence, including the following:

(1) The application alleges a claim for relief that was fully litigated in an appeal from the proceedings leading to the judgment of conviction and sentence, in which case the claim shall be dismissed unless consideration of the claim is required in the interest of justice.

(2) The application alleges a claim about which the applicant had knowledge and inexcusably failed to raise in the proceedings leading to the conviction, in which case the claim shall be dismissed.

(3) The application alleges a claim that the applicant raised in the district court and inexcusably failed to pursue on appeal, in which case the claim shall be dismissed.

(4) The application contains a claim that is untimely pursuant to Article 926, in which case the claim shall be dismissed.

(5) The application is a successive application that fails to raise a new or different claim, in which case the application shall be dismissed.

(6) The application is a successive application that raises a new or different claim that was inexcusably omitted from a prior application, in which case the application shall be dismissed.

C. Any responses to the State's procedural objections shall be filed by the applicant within forty-five days from the date on which the procedural objections were filed. The court may grant an extension of time for good cause shown.

The Council then considered Article 927.9, on page 12 of the materials. Judge Holdridge explained that this provision concerned the disposition of procedural objections and included an extra fifteen days between the last day the applicant can respond to procedural objections and the first day the judge can rule on procedural objections to account for the prison mailbox rule. He also explained that this provision sets forth the manner by which the court should dispose of procedural objections, including handling them summarily if possible before scheduling proceedings for further factual development. Finally, Judge Holdridge explained that Paragraph C states that procedural objections should be ruled upon prior to any hearing on the merits unless the parties agree or the court determines that proceeding to the merits of the application is in the interest of justice. After the Council agreed to delete "on" between "hearing" and "or" on line 20 of page 13 and to change "interests" to "interest" on line 22 of the same page, it was moved and seconded to adopt Article 927.9 as amended, and the motion passed with no objection. The adopted proposal reads as follows:

**Article 927.9. Disposition of procedural objections**

A. A claim for relief on the merits raised in an application for postconviction relief shall be dismissed without an answer or the necessity of a hearing if the court determines that a procedural objection precludes the applicant from seeking relief on the basis of the claim.

B. The court shall dispose of the procedural objections no sooner than sixty days nor longer than one hundred twenty days from the date on which the procedural objections were filed. The court may grant an extension of time for good cause shown. Procedural objections shall be disposed of in the following manner:

(1) If the court can dispose of all procedural objections summarily, the court shall rule on the procedural objections.

(2) If the court can dispose of one or more procedural objections summarily, and the ruling would result in the dismissal of either the application or all of the claims contained within the application, the court shall rule on those procedural objections.

(3) If the court cannot dispose of the procedural objections or the application in accordance with Subparagraphs (1) and (2) of this Paragraph, the court shall defer disposition of any procedural objections and shall issue an order to both the State and the applicant scheduling further proceedings pursuant to Article 927.12 for factual development of the procedural objections that cannot be disposed of summarily. Within thirty days of the completion of

these proceedings, the court shall rule on all procedural objections together.

C. The court shall rule on all procedural objections prior to any evidentiary hearing or proffer of any evidence that exclusively relates to the merits of the claims for relief. Except as provided by agreement of the applicant and the State or in the interest of justice, a response by the State shall not be ordered, and evidentiary hearings shall neither be ordered nor conducted on the merits, until the rulings on the procedural objections have become final.

D. The court shall rule in writing on each procedural objection. A copy of the order granting or denying a dismissal upon procedural objections shall be furnished to the applicant, his attorney, the State, and the custodian.

Next, the Council turned to Article 927.10, on page 14 of the materials. After the Acting Reporter explained that this provision requires the state to respond if a more definite statement is not requested or if the application is not dismissed upon procedural objection, it was moved and seconded to adopt Article 927.10. One Council member suggested deleting "demand for a" on line 4 of page 14, and Judge Holdridge accepted this change. Another Council member questioned what would happen in the event that a more definite statement is requested, and the Acting Reporter responded that Article 927.7(B) would apply. The Council member then suggested combining Paragraphs A and B by replacing the language on line 8 of page 14 with "The State shall file its answer within sixty," and Judge Holdridge accepted this change. Another Council member questioned why the court must order the state to answer when such a thing does not occur when exceptions are denied in the civil context. The Acting Reporter explained that the proposed revisions were intended to move noncapital postconviction relief proceedings forward by constantly requiring someone – the applicant, the State, or the judge – to be taking some action. Other Council members also noted that many applicants for noncapital postconviction relief are appearing pro se such that it is preferable to clearly and explicitly state the requirements applicable to these proceedings. A vote was then taken on the motion to adopt Article 927.10 as amended, and the motion passed with no objection. The adopted proposal reads as follows:

**Article 927.10. Answer and responses**

A. If a more definite statement is not requested, or if the application for postconviction relief is not dismissed upon procedural objections, the court shall order the State to file an answer on the merits of each claim that was not dismissed. The State shall file its answer within sixty days from the date of the order. The court may grant an extension of time for good cause shown.

B. Any responses to the State's answer shall be filed by the applicant within forty-five days from the date on which the answer was filed. The court may grant an extension of time for good cause shown. The applicant's response shall be strictly confined to rebuttal of the points raised in the State's answer.

Finally, the Acting Reporter directed the Council's attention to Article 927.11, on page 14 of the materials. After explaining that this provision would allow the court to grant or deny relief based on the application, responses, and supporting documents, one Council member questioned the inclusion of

"depositions" on line 22 of page 14. Another Council member asked a similar question with respect to the meaning of "relevant transcripts" on line 21 of the same page, and Judge Holdridge responded that both refer to information from the proceedings leading up to the original conviction. A motion was then made and seconded to adopt Article 927.11 as presented, and the motion passed with no objection. The adopted proposal reads as follows:

**Article ~~929~~ 927.11. Summary disposition**

A. If the court determines that the factual and legal issues can be resolved based upon the application, ~~and~~ answer, response, and supporting documents, including relevant transcripts, depositions, and other reliable documents submitted by either party or available to the court, the court ~~may~~ shall grant or deny relief without further proceedings no sooner than sixty days nor longer than ninety days from the date on which the answer was filed. The court may grant an extension of time for good cause shown.

B. ~~For good cause, oral depositions of the petitioner and witnesses may be taken under conditions specified by the court. The court may authorize requests for admissions of fact and of genuineness of documents. In such matters, the court shall be guided by the Code of Civil Procedure.~~ A copy of the order granting or denying relief shall be furnished to the applicant, his attorney, the State, and the custodian.

At this time, Judge Holdridge explained that the Committee had formed a Capital Postconviction Relief Subcommittee and that the plan was to propose legislation on both capital and noncapital postconviction relief during the 2019 Regular Session. He also explained that the Louisiana Supreme Court was planning to require mandatory judicial training with respect to postconviction relief once these revisions became effective. Judge Holdridge then concluded his presentation, and the January 2018 Council meeting was adjourned.

Jessica Braun 5-4-18
Date

Mallory Waller 5/4/2018
Date

**SUPPLEMENTAL MEMBERSHIP AND NOMINATING COMMITTEE REPORT**
**January 12, 2018**

This committee respectfully makes the following supplemental nominations to fill vacancies on the Council of the Louisiana State Law Institute for 2018 as follows:

**PRACTICING ATTORNEY ELECTED AS MEMBER:**
**For four-year term expiring, December 31, 2021**

1. Miriam Nogan Henry E.C.S.

**REPRESENTATIVE, LOYOLA UNIVERSITY SCHOOL OF LAW**
**For four-year term expiring, December 31, 2021**

Dian Tooley-Knoblett; Loyola University School of Law, 7214 St. Charles Avenue, New Orleans, Louisiana, 70118.

**LOYOLA UNIVERSITY SCHOOL OF LAW**

Randall J. Bunnell; 5416 Annunciation Street, New Orleans, Louisiana, 70115.

Kristen J. Pouey; 46 Sycamore Street, Covington, Louisiana, 70433.

Emma Jane Short; 724 Napoleon Avenue, Apartment 1, New Orleans, Louisiana, 70115.

Respectfully submitted,

L. David Cromwell
Kevin C. Curry
Leo C. Hamilton
Thomas M. Hayes, III
Emmett C. Sole
Monica T. Surprenant
Susan G. Talley
MEMBERSHIP AND NOMINATING COMMITTEE

By: Emmett C. Sole
Emmett C. Sole, Chair
January 12, 2018