

LOUISIANA STATE LAW INSTITUTE

MEETING OF THE COUNCIL

December 14-15, 2018

Friday, December 14, 2018

Persons Present:

Adams, Marguerite (Peggy) L.
Ball, Trenton
Bergstedt, Thomas M.
Bludworth, Darnell
Braun, Jessica
Breard, L. Kent
Brister, Dorrell J.
Carroll, Andrea B.
Castle, Marilyn
Cromwell, L. David
Curry, Kevin C.
Dawkins, Robert G.
Doguet, Andre'
Garofalo, Raymond E., Jr.
Gregorie, Isaac M. "Mack"
Griffin, Piper D.
Hall, Keith
Hamilton, Leo C.
Hargrove, Joseph L., Jr.
Hayes, Thomas M., III
Holdridge, Guy
Janke, Benjamin
Jewell, John Wayne
Kutcher, Robert A.
Lavergne, Luke
Leefe, Richard K.

Little, F.A., Jr.
Manning, C. Wendell
McIntyre, Edwin R., Jr.
Mengis, Joseph W.
Miller, Cody "C.J."
Miller, Gregory A.
Morris, Glenn G.
Norman, Rick J.
Philips, Harry "Skip", Jr.
Price, Donald W.
Richardson, Sally Brown
Scalise, Ronald J., Jr.
Schlegel, Scott
Sklamba, Stephen
Sole, Emmett C., Jr.
Stuckey, James A.
Surprenant, Monica T.
Tate, George J.
Thibeaux, Robert P.
Title, Peter S.
Tucker, Zelda W.
Veron, J. Michael
Waller, Mallory
Wilson, Evelyn L.
Ziober, John David

Vice President Rick J. Norman called the December 2018 Council meeting to order at 10:00 a.m. on Friday, December 14, 2018, at the Louisiana Supreme Court in New Orleans. After asking the Council members to briefly introduce themselves, Mr. Norman called on Professor Ronald J. Scalise, Jr., Reporter of the Prescription and Trust Code Committees, to begin his presentation of materials.

Prescription Committee

Professor Scalise began his presentation by first asking the Council to consider the draft report in response to House Concurrent Resolution No. 89 of the 2018 Regular Session. He explained that during the most recent legislative session, a bill was introduced that would have imposed a prescriptive period of ten years on claims by insureds against their insurers for breach of the duty of good faith and fair dealing. The Reporter also explained that this bill failed to pass out of the House Civil Law and Procedure Committee and that, instead, a resolution was sent to the Law Institute to study and make recommendations with respect to the prescriptive period that should apply to these actions. He then provided the Council with a summary of the draft report in response to this resolution, explaining that there are two relevant provisions of the Revised Statutes governing the duty of good faith and fair dealing in the insurance context – R.S. 22:1892 and R.S. 22:1973, one of which is more explicit than the other. Professor Scalise also explained that neither of these provisions set forth a specific prescriptive period with respect to these actions and that, as a result, the jurisprudence that has developed has recognized either a one-year prescriptive period under the theory that the action is based in tort and governed by Civil Code Article 3492, or a ten-year prescriptive period under the theory that the action is based in contract and governed by Civil Code Article 3499.

The Reporter then explained that pages 5 through 8 of the draft report discuss the state and federal court cases that have recognized a one-year prescriptive period, and pages 8 through 10 discuss the state and federal court cases that have recognized a ten-year prescriptive period.

Next, Professor Scalise articulated the arguments in favor of either a one-year prescriptive period or a ten-year prescriptive period with respect to actions for breach of the duty of good faith and fair dealing brought by insureds against their insurers. For example, proponents of a one-year prescriptive period argue that breach of the duty of good faith and fair dealing resembles a tort, particularly since this duty is statutory in nature and punitive damages are generally only awarded in delictual – not contractual – actions. Additionally, proponents of a one-year prescriptive period argue that the duty of good faith and fair dealing is one that is owed to everyone and that the action for breach of that duty is an outgrowth of Civil Code Article 2315. Contrastingly, proponents of a ten-year prescriptive period argue that the relevant statutory provisions provide that the duty of good faith and fair dealing is owed by insurers to their insureds, not to everyone, and that this duty arises out of the contractual relationship between these parties. Additionally, proponents of a ten-year prescriptive period argue that the articles of the Civil Code on obligations provide for penalties other than those typically awarded in an ordinary breach of contract claim and that the duty of good faith and fair dealing in contracts is inherent in these obligations articles. Additionally, the Reporter explained that a fifty-state survey was performed to review the statutes of limitations imposed on claims for breach of the duty of good faith and fair dealing in the insurance context throughout the country, the results of which could be found in Appendix A beginning on page 13 of the draft report. He then noted that other states are wrestling with this issue as well but have largely avoided making a determination one way or the other by simply providing a specific time period applicable to these sorts of actions. Professor Scalise then explained that the recommendation on page 12 of the draft report is that the legislature should enact a specific prescriptive period applicable to claims by insureds against their insurers for breach of the duty of good faith and fair dealing, but that what that period should be is a policy determination most appropriately made by the legislature; however, an average of the time periods throughout the country with respect to this issue is roughly four years.

At this time, a motion was made and seconded to adopt the Prescription Committee's draft report as presented. One Council member then questioned whether the two- or three-year statutes of limitations in some states coincides with those states' statutes of limitations for tort actions, and another Council member noted that the prescriptive period with respect to uninsured motorist claims is two years. Other Council members then articulated their support for either the ten-year analysis or the one-year analysis, and one Council member questioned whether a longer prescriptive period would lead to higher insurance rates in Louisiana. The Council then engaged in a great deal of discussion with respect to this issue, including the fact that the statutes specifically prohibit this type of action but that the argument was nevertheless made at legislative proceedings during the most recent Session. The Council also discussed that one of the issues with the proposed bill last Session was that it would have applied retroactively to affect the outcome of pending litigation. One Council member then questioned the language of the recommendation that the period shall run from the day of the breach, and Professor Scalise responded by explaining that this language was borrowed from the peremptive periods in the legal and accounting malpractice statutes. The Council also generally discussed the applicability of the doctrine of *contra non valentum* as well as the meaning of good faith before debating whether to endorse either the one- or ten-year periods provided in Civil Code Articles 3492 and 3499 respectively, or whether to recommend the enactment of an arbitrary time period similar to what is included on lines 18 through 20 of page 12 of the draft report. The Council then engaged in additional discussion concerning the merits of the arguments in favor of both one-year and ten-year prescriptive periods, as well as the fact that Civil Code Article 3499 does not apply solely to contractual actions, but rather to all personal actions for which no other prescriptive period has been specifically provided. After the Reporter also noted that a new time period would apply prospectively only and would be less likely to impact ongoing litigation, a vote was taken on the motion to adopt the draft report as presented, and the motion passed over one objection.

Next, Professor Scalise asked the Council to turn to the “Proposed Revisions” materials to consider prescription of actions for redhibition and breach of the warranty of fitness for use on page 1. A handout was also distributed outlining both of these actions as well as the prescriptive periods that apply with respect to movables and immovables when the seller is in good faith or bad faith under existing and proposed law. The Reporter reminded the Council that it had engaged in much discussion during its September meeting with respect to the Committee’s original proposed revisions to Article 2534, which could be found on page 3 of the materials. As a result, the Council voted to recommit the proposal for additional consideration by the Committee, and to guide that discussion, the Council took a number of policy votes concerning issues such as whether the prescriptive periods for redhibition and breach of the warranty of fitness for use should be unified, whether the distinction between commercial and residential immovables and all other immovables should be eliminated for purposes of redhibition, and whether an outside time limitation should apply to the prescriptive period applicable to actions for redhibition against bad faith sellers.

The Council then reviewed the handout, first with respect to the types of issues that are not covered by redhibition, including products liability claims and claims involving new homes, which are governed by the New Home Warranty Act. The Reporter summarized the charts on page 1 of the handout, beginning with prescription for good faith sellers of immovables, which is one year from the date of delivery for residential and commercial immovables only; for all other immovables, such as undeveloped tracts of land, the prescriptive period is four years from the date of delivery or one year from discovery, whichever occurs first, and this period is the same for movables. Professor Scalise then explained that the Committee determined that the prescriptive periods applicable to all immovables should be the same, and that the prescriptive period for movables should not be longer than the prescriptive period for immovables; however, the Council did not approve of the Committee’s original proposal that the prescriptive period applicable to actions for redhibition against good faith sellers of both movables and immovables should be one year from the date of delivery in all cases. As a result, the Committee redrafted its proposal to provide a prescriptive period of two years from the date of delivery or one year from discovery, whichever occurs first, in such cases. The Reporter then explained that with respect to bad faith sellers of both movables and immovables, the Council had discussed whether some sort of outside time limitation should be imposed with respect to these claims and determined that even though Comment (b) to the 1993 revision was incorrect, the policy of imposing a ten-year time limitation was a good one. As a result, the Committee redrafted its original proposal providing that claims for redhibition against bad faith sellers of movables and immovables prescribe one year from discovery or ten years from perfection of the sale, whichever occurs first.

Next, the Council considered page 2 of the handout with respect to breach of the warranty of fitness for use, and Professor Scalise explained that courts and commentators have been unable to articulate a difference between these claims and claims for redhibition. As a result, litigants often allege both redhibition and breach of the warranty of fitness for use because the damages awarded and prescriptive periods applied differ depending on the type of claim. For example, the Reporter explained that because no specific prescriptive period is provided with respect to fitness for use claims, the ten-year period in Article 3499 applies, which is much longer than the prescriptive periods for redhibition claims. As a result, the Committee proposes to unify the prescriptive periods applicable to these two actions by providing that claims for breach of the warranty of fitness for use prescribe two years from delivery or one year from discovery, whichever occurs first, which is the same period that applies to claims for redhibition against good faith sellers.

Professor Scalise then directed the Council’s attention to page 1 of the “Proposed Revisions” materials, and a motion was made and seconded to adopt the Committee’s proposed revisions to Article 2534. One Council member questioned whether the ten-year period in Paragraph B, on lines 17 and 18 of page 1, should run from delivery rather than perfection of the sale, and the Reporter responded that perfection of the sale is consistent with existing Comment (b) to Article 2534 as well as a number of court cases that have been decided with respect to this issue. Another Council member questioned

whether there was a gap in the Committee's revised proposal to amend Article 2534 in that Paragraph B deals only with actions for redhibition – as opposed to actions for breach of the warranty of fitness for use – against bad faith sellers. Professor Scalise responded by explaining that a distinction between good and bad faith sellers has never been made in the context of fitness for use claims, and as a result, Paragraph A covers all fitness for use claims, regardless of whether the seller was in good or bad faith, as well as claims for redhibition against good faith sellers. The Council also discussed whether “defect” on line 8 of page 1 was broad enough to include fitness for use claims, which prompted debate as to the distinctions, if any, between redhibition and fitness for use claims based on the specificity or particularity of the intended use. Ultimately, a motion was made and seconded to add “or unfitness” after “defect” on line 8 of page 1, and the motion passed by a vote of 24 in favor and 8 opposed. A motion was then made and seconded to adopt Paragraph A of Article 2534 as amended, and the motion passed with no objection.

The Council then considered Paragraph B of Article 2534, on page 1 of the “Proposed Revisions” materials, and Professor Scalise reiterated that this provision deals only with actions for redhibition against bad faith sellers, since Paragraph A deals with all claims for breach of the warranty of fitness for use, regardless of whether the seller was in good or bad faith. He also explained that this provision would add an outside time limitation of ten years for redhibition claims against bad faith sellers where there is none currently. At this time, a motion was made and seconded to adopt the proposed changes to Paragraph B, as well as the proposed clarification to Paragraph C, and the Comments to Article 2534, and the motion passed with no objection. The adopted proposal reads as follows:

Article 2534. Prescription

A.(1) The action for redhibition against a seller who did not know of the existence of a defect in the thing sold prescribes and the action asserting that a thing is not fit for its ordinary or intended use prescribe in four years two years from the day of delivery of the such thing was made to the buyer or one year from the day the defect or unfitness was discovered by the buyer, whichever occurs first.

~~(2) However, when the defect is of residential or commercial immovable property, an action for redhibition against a seller who did not know of the existence of the defect prescribes in one year from the day delivery of the property was made to the buyer.~~

B. The action for redhibition against a seller who knew, or is presumed to have known, of the existence of a defect in the thing sold prescribes in one year from the day the defect was discovered by the buyer or ten years from the perfection of the contract of sale, whichever occurs first.

C. In any case prescription on an action for redhibition is interrupted when the seller accepts the thing for repairs and commences anew from the day he tenders it back to the buyer or notifies the buyer of his refusal or inability to make the required repairs.

Revision Comments – 2019

(a) This revision changes the law to create uniform prescriptive periods for movables and immovables. It maintains the distinction between sellers who knew or should have known of the defect in the thing sold as opposed to those sellers who did not. Prior law created separate prescriptive periods for the sale of movables and for “residential or commercial immovable[s],” and in many instances it provided a longer prescriptive period for the sale of movables than for immovables. Moreover, the creation of a special prescriptive period for redhibitory defects in “residential or commercial immovable property” created uncertainty as to

prescriptive period for other immovable property. See, e.g., *MGD Partners, LLC v. 5-Z Investments, Inc.*, 145 So. 3d 1053 (La. App. 1 Cir. 2014) (holding that a claim for redhibitory defects in undeveloped immovable property is subject to “the four-year prescriptive period and/or discovery rule of La. Civ. Code art. 2534(A)(1) ... and not the one-year prescriptive period found in La. Civ. Code art. 2534(A)(2), which, by its terms, pertains to residential or commercial immovable property.”) This revision makes all good faith sellers subject to a uniform prescriptive period of two years from the day of delivery of the thing to the buyer or one year from the day the defect was discovered by the buyer, whichever occurs first.

(b) This revision also unifies the relevant prescriptive periods for actions in redhibition and those for breach of the warranty of fitness for use. Prior law provided no specific prescriptive period for breach of the warranty of fitness for use. Consequently, the ten-year prescription in Article 3499 prevailed. Because the law on redhibition and fitness for use is largely overlapping, the dichotomy between the prescriptive periods could create stark differences in outcome. See, e.g., *Cunard Line Ltd., Co. v. Datrex, Inc.*, 926 So.2d 109 (La. App. 3 Cir. 2006). This revision unifies the law on prescription for purposes of redhibition and fitness for use. Because the law of sales does not distinguish between good faith and bad faith sellers for purposes of the warranty of fitness for use, this revision does not purport to create different prescriptive periods on that basis.

(c) This revision also provides clarity regarding the prescriptive period for bad faith sellers. Comment (b) to the 1993 revision suggested that in all cases, “an action in redhibition prescribes ten years from the time of perfection of the contract regardless of whether the seller was in good or bad faith. See C.C. Art. 3499.” Article 3499, by its terms, however, applies only to personal actions in which a prescriptive period is not “otherwise provided by legislation,” whereas this Article comprehensively provides for different prescriptive periods depending both upon the characterization of the property and the “faith” of the seller. Moreover, courts rulings were not consistent in holding whether Article 3499 was applicable in the context of redhibition. See, e.g., *Tiger Bend L.L.C. v. Temple-Inland, Inc.*, 56 F. Supp. 2d 686 (M.D. La. 1999); *Mouton v. Generac Power Systems, Inc.*, 152 So. 3d 985 (La. App. 3d Cir. 2014); *Grenier v. Medical Engineering Corp.*, 243 F. 3d 200 (5th Cir. 2001). This revision specifically adopts a legislative solution to this issue and provides that liberative prescription for an action against a bad faith seller accrues in one year from when the defect was discovered by the buyer or ten years from the perfection of the contract of sale, whichever occurs first. For the time of perfection for a contract of sale, see C.C. arts. 2439.

Next, the Council considered the proposed changes to Article 3463, on page 5 of the “Proposed Revisions” materials, and Professor Scalise explained that the Committee’s revisions to the second paragraph of this provision were proposed in response to Acts 2018, No. 443 and were intended as non-substantive changes that would achieve the objective of this Act while also being more consistent with the drafting style employed throughout the Civil Code. The Reporter also explained that the legislature had enacted the second paragraph of Article 3463 in response to the *Pierce v. Foster Wheeler* case to ensure that dismissal of a claim pursuant to a compromise does not constitute a voluntary dismissal. A motion was made and seconded to adopt the proposed changes to Article 3463, at which time one Council member questioned whether “claim” should be changed to “action” on line 13 of page 5. This question prompted a great deal of discussion among Council members as to the differences, if any, among the terms “claim,” “suit,” and “action,” with some members explaining that several claims can be included in one suit or action and questioning the applicability of this provision in the event that a single claim, rather than the entire action, is dismissed against one party but not the others. For purposes of clarification, one Council member suggested that the second sentence of the first paragraph be moved to the first sentence of the second paragraph and that the “For purposes of this Article” clause on line 12 be deleted.

The Council then continued its discussion of whether “claim,” “suit,” or “action” should be used throughout Article 3463, on page 5 of the “Proposed Revisions” materials. After one Council member noted that “suit” is used in the first sentence of this provision, a motion was made and seconded to substitute “suit” for both “claim” and “action” throughout Article 3463. Several Council members, including the Reporter, then expressed their concern over the implications and possible unintended consequences of making this change, in response to which one Council member noted that introduction of the word “action” in this Article was the result of a legislative amendment made in 1999. He further explained that the original language was “abandons, voluntary dismisses, or fails to prosecute the suit” but that the temporal element with respect to dismissing the action at any time prior to or after the defendant has made an appearance was later added and appears to have introduced confusion. Another Council member then noted that the word “action” is loosely used throughout the law but appears to have no uniform meaning. After additional discussion, the motion to substitute “suit” for both “claim” and “action” throughout Article 3463 was amended to also include the relocation of the second sentence of the first paragraph to the first sentence of the second paragraph, the deletion of “For purposes of this Article” from line 12 of page 5, and the addition of “the suit” after “abandons” on line 8 of the same page. The motion passed with no objection, and the Council also instructed the Reporter to draft a Comment explaining the changes that had been made and the fact that these revisions were non-substantive and were not intended to serve as a change in the law. The adopted proposal reads as follows:

Article 3463. Duration of interruption; abandonment or discontinuance of suit

An interruption of prescription resulting from the filing of a suit in a competent court and in the proper venue or from service of process within the prescriptive period continues as long as the suit is pending.

Interruption is considered never to have occurred if the plaintiff abandons the suit, voluntarily dismisses the ~~action~~ suit at any time either before the defendant has made any appearance of record or thereafter, or fails to prosecute the suit at the trial. ~~A settlement and subsequent The~~ dismissal of a ~~defendant~~ suit pursuant to a ~~transaction or compromise shall not qualify as~~ does not constitute a voluntary dismissal pursuant to this Article.

Having concluded his presentation of Prescription materials, Professor Scalise then asked the Council to turn to the materials prepared by the Trust Code Committee.

Trust Code Committee

The Reporter first asked the Council to consider the proposed changes to R.S. 9:2156, beginning on page 28 of the materials. After explaining that Paragraphs (A)(2) and (7) and (C)(9) were being deleted because new sections were being added as R.S. 9:2156.1 and 2156.2, and Paragraph (C)(12) was being deleted because of the general rule now contained in R.S. 9:2142(3), a motion was made and seconded to adopt R.S. 9:2156 and the Comment as presented. The motion passed with no objection, and the adopted proposal reads as follows:

R.S. 9:2156. Charges

A. The following charges shall be made against income:

(1) Ordinary expenses incurred or accrued in connection with the administration, management, or preservation of the trust property;

~~(2) A reasonable allowance for depreciation on property subject to depreciation under generally accepted accounting principles, but no allowance shall be made for depreciation of that portion of immovable property used by a beneficiary as a residence;~~

~~(3)~~ (2) One-half of court costs, ~~attorney's~~ attorney fees, and other fees on periodic accounting, unless the court directs otherwise;.

~~(4)~~ (3) Court costs, ~~attorney's~~ attorney fees, and other fees on other accountings or judicial proceedings if the matter primarily concerns the income interest, unless the court directs otherwise;.

~~(5)~~ (4) One-half of the trustee's regular compensation, whether based on a percentage of principal or income;.

~~(6)~~ (5) Expenses reasonably incurred by the trustee for the management and application of income;.

~~(7) A tax levied upon receipts defined as income under this Sub-part or the trust instrument and payable by the trustee;~~

~~(8)~~ (6) Interest accrued on an indebtedness.

B. If charges against income are of unusual amount, the trustee may by means of reserves or other reasonable means charge them over a reasonable period and withhold from distribution sums sufficient to produce substantial regularity in distributions.

C. The following charges shall be made against principal:

(1) Extraordinary expenses incurred or accrued in connection with the administration, management, or preservation of the trust property;.

(2) Expenses incurred in making a capital improvement to principal, including special taxes and assessments;.

(3) Expenses incurred in investing and reinvesting principal;.

(4) One-half of court costs, ~~attorney's~~ attorney fees, and other fees on periodic accounting, unless the court directs otherwise;.

(5) Court costs, ~~attorney's~~ attorney fees, and other fees on other accountings or judicial proceedings if the matter primarily concerns the principal interest, unless the court directs otherwise;.

(6) Expenses incurred in maintaining or defending an action to construe the trust or to protect the trust or the trust property;.

(7) One-half of the trustee's regular compensation, whether based on a percentage of principal or income;.

(8) All the trustee's special compensation;.

~~(9) A tax levied upon profit, gain, or other receipts allocated to principal notwithstanding denomination of the tax as an income tax by the taxing authority;~~

~~(10)~~ (9) The amount of an estate tax apportioned to the trust, including interest and penalties;.

~~(11)~~ (10) The principal of an indebtedness;.

~~(12) All other expenses not chargeable to income.~~

D. If the payment of special taxes and assessments produces an addition to the value of the trust property, the trustee shall reserve out of income and add to principal a reasonable allowance for the depreciation of

the improvement under generally accepted accounting principles, although the improvement was not made directly to the trust property.

E. Regularly recurring charges shall be apportioned to the same extent and in the same manner that receipts are apportioned under R.S. 9:2145 through 9:2147.

Revision Comments – 2019

This Section deviates from Sections 501, 502, and 504 of the UPIA (1997). Paragraph (A)(2) of the prior law regarding depreciable property has been deleted in favor of a new provision, R.S. 9:2156.1, which is based upon Section 503 of the UPIA. Paragraphs (A)(7) and (C)(9) of the prior law regarding allocation of taxes have been deleted in favor of a new provision, R.S. 9:2156.2. Paragraph (C)(12) of the prior law, which allocated to principal all expenses not otherwise allocated to income, has also been deleted in light of the revision now contained in R.S. 9:2142(3).

The Council then turned to R.S. 9:2156.1, on page 31 of the materials, to consider the proposed new provision on property subject to depreciation. Professor Scalise explained that under this rule, the trustee would have more flexibility to transfer to principal a reasonable amount of the property subject to depreciation, whereas under existing law, which was based on “generally accepted accounting principles,” trustees may have been hesitant to make a transfer to principal based on depreciation if the trust property was not part of a business. It was then moved and seconded to adopt R.S. 9:2156.1 and its Comment as presented, and the motion passed with no objection. The adopted proposal reads as follows:

R.S. 9:2156.1. Transfers from income to principal for depreciation

A trustee may transfer to principal a reasonable amount of the net cash receipts from a principal asset that is subject to depreciation, but may not transfer any amount for depreciation during the administration of a succession or for that portion of an immovable used or available for use by a beneficiary as a residence or of corporeal movables held or made available for the personal use or enjoyment of a beneficiary. An amount transferred to principal need not be held as a separate fund.

Revision Comments – 2019

(a) This Section is based upon Section 503 of the UPIA (1997). Under Section 503(a) of the UPIA and this Section, the term “depreciation” means a reduction in value due to wear, tear, decay, corrosion, or gradual obsolescence of a fixed asset having a useful life of more than one year.

(b) Under this revision, a transfer to principal for depreciation is discretionary with the trustee. Prior law provided that a charge shall be made against income for “... a reasonable allowance for depreciation under generally accepted accounting principles...” That provision was resisted by many trustees who did not provide for depreciation for a number of reasons. One reason relied upon was that a charge for depreciation was not needed to protect the beneficiaries if the value of the land was increasing; another was that generally accepted accounting principles might not require depreciation to be taken if the property was not part of a business. This revision allows the trustee more flexibility and broader discretion in taking depreciation.

Next, the Council considered R.S. 9:2156.2, on page 32 of the materials, concerning the payment of income taxes. Professor Scalise explained the general rules provided by Paragraphs A and B, as well as the additional rules provided by Paragraphs C and D, and a motion was made and seconded to adopt proposed R.S. 9:2156.2 and its

Comments as presented. The motion passed with no objection, and the adopted proposal reads as follows:

R.S. 9:2156.2. Income taxes

A. A tax required to be paid by a trustee based on receipts allocated to income shall be paid from income.

B. A tax required to be paid by a trustee based on receipts allocated to principal shall be paid from principal, even if the tax is denominated an income tax by the taxing authority.

C. A tax required to be paid by a trustee on the trust's share of a juridical person's taxable income shall be paid as follows:

(1) From income to the extent that receipts from the juridical person are allocated only to income.

(2) From principal to the extent that receipts from the juridical person are allocated only to principal.

(3) Proportionately from principal and income to the extent that receipts from the juridical person are allocated to both income and principal.

(4) From principal to the extent that the tax exceeds the total receipts from the juridical person.

D. After applying the provisions of this Section, the trustee shall adjust income or principal receipts to the extent that the trust's taxes are reduced because the trust receives a deduction for payments made to a beneficiary.

Revision Comments – 2019

(a) This Section is based upon Section 505 of the UPIA (1997).

(b) When trust property includes an interest in a pass-through entity, such as a partnership or S corporation, it must report its share of the juridical person's taxable income regardless of how much the juridical person distributes to the trust. Whether the juridical person distributes more or less than the trust's tax on its share of the juridical person's taxable income, the trustee must pay the taxes and allocate them between income and principal.

(c) Subsection C requires the trustee to pay the taxes on its share of a juridical person's taxable income from income or principal receipts to the extent that receipts from the juridical person are allocable to each. This assures the trust a source of cash to pay some or all of the taxes on its share of the juridical person's taxable income. Subsection D recognizes that a trust normally receives a deduction for amounts distributed to a beneficiary. Accordingly, Subsection D requires the trustee to increase receipts payable to a beneficiary as determined under Subsection C to the extent the trust's taxes are reduced by distributing those receipts to the beneficiary.

Next, the Reporter directed the Council's attention to R.S. 9:2164, on page 35 of the materials, concerning underproductive property. Specifically, Professor Scalise explained that the revisions to the provisions of the Trust Code on allocation to income and principal are intended to provide the trustee with the discretion to use modern techniques to invade principal and make deductions as appropriate, and as a result, the Committee determined that the antiquated asset-by-asset approach of R.S. 9:2155 is unnecessary and should be suppressed in all but one case, which involves the marital deduction. Specifically, in cases involving the marital deduction where the trust property

is not producing enough for the spouse to benefit, R.S. 9:2164 would provide the spouse with the ability to require the trustee to make the trust property productive of income, convert the property, or make an adjustment under R.S. 9:2158. A motion was then made and seconded to adopt R.S. 9:2164 and its Comments as presented, and to delete R.S. 9:2155 on page 26 as recommended by the Committee, and the motion passed with no objection. The adopted proposals read as follows:

R.S. 9:2155. Underproductive property

~~A portion of the net proceeds of sale of any part of principal that has not produced an average net income (including the value of any beneficial use of the property by the income beneficiary) of at least one percent per annum of its inventory value for more than a year shall be treated as delayed income to which the income beneficiary is entitled as provided in this section. The net proceeds of sale are the gross proceeds received, including the value of any property received in substitution for the property disposed of, less expenses, including income taxes, incurred in disposition and less carrying charges accrued while the property was underproductive.~~

~~The sum allocated as delayed income is the difference between the net proceeds and the amount that, had it been invested at simple interest at four percent per annum while the property was underproductive, would have produced the net proceeds. That sum, plus any carrying charges and expenses previously charged against income while the property was underproductive, less any income received by the income beneficiary from the property and less the value of any beneficial use of the property by the income beneficiary, is income, and the balance is principal.~~

~~Property becomes underproductive at the beginning of the year in which it fails to produce an average net income of at least one percent per annum.~~

~~If there are successive income beneficiaries, the delayed income shall be divided among them or their heirs, legatees, or assignees according to the length of the period during which each was entitled to income.~~

~~If principal subject to this section is disposed of by conversion into property that cannot be apportioned easily, the income beneficiary is entitled to the net income from the substituted property while it is held. If within five years after the conversion the substituted property has not been further converted into easily apportionable property, no allocation as provided in this section shall be made.~~

~~This section does not apply to any period during which the trustee is under an express direction not to sell or dispose of the principal or to any period before the income from a legacy begins to accrue to the benefit of the income beneficiary.~~

* * *

SUBPART F. POWER TO MAKE PROPERTY PRODUCTIVE OF INCOME

R.S. 9:2164. Underproductive property

If a marital deduction is allowed for all or part of a trust whose assets consist substantially of property that does not provide the spouse with sufficient income from or use of the trust assets, and if the amounts that the trustee transfers from principal to income under R.S. 9:2158 and distributes to the spouse from principal pursuant to the terms of the trust are insufficient to provide the spouse an interest required to obtain the marital deduction, the spouse may require the trustee to make property productive of income,

convert property within a reasonable time, or exercise the power conferred by R.S. 9:2158. The trustee may decide which action or combination of actions to take.

Revision Comments – 2019

(a) This revision is based upon Section 413(a) of the UPIA (1997).

(b) R.S. 9:2127 provides that “[a] trustee’s investment and management decisions are to be evaluated in the context of the trust property as a whole...” The law in prior R.S. 9:2155 gave the income beneficiary a right to receive a portion of the proceeds from the sale of underproductive property as “delayed income.” This provision applied on an asset by asset basis and not by taking into consideration the trust portfolio as a whole, which conflicted with the basic precept in R.S. 9:2127. Moreover, in determining the amount of delayed income, the prior law did not permit the trustee to take into account the extent to which the trustee may have distributed principal to the income beneficiary, under principal invasion provisions in the terms of the trust, to compensate for insufficient income from the unproductive asset. Under R.S. 9:2158, a trustee must consider prior distributions of principal to the income beneficiary in deciding whether and to what extent to exercise the power to adjust.

(c) Although this revision abolishes the right to receive delayed income, it allows an income beneficiary’s right to compel the trustee to make property productive of income. The duty to make property productive of income should be determined by taking into consideration the performance of the portfolio as a whole and to the extent to which a trustee makes principal distributions to the income beneficiary under the terms of the trust and adjustments between principal and income under R.S. 9:2158.

(d) Under this revision, once the surviving spouse makes an appropriate demand that the trustee take action, the trustee must decide whether to make property productive of income, convert it, transfers funds from principal to income, or to take some combination of those actions.

The Council also approved the deletion of R.S. 9:2157, on page 34 of the materials, as unnecessary because the term “inventory” was only used in R.S. 9:2155, the deletion of which was just approved. The adopted proposal reads as follows:

~~R.S. 9:2157. Inventory value defined~~

~~The term “inventory value,” as used in this Subpart, means the cost of property purchased by the trustee and the market value of other property at the time it became subject to the trust, but in the case of a testamentary trust the trustee may use any value finally determined for the purposes of an estate tax.~~

Finally, Professor Scalise asked the Council to consider the provision on transitional matters on page 36 of the materials and explained that this provision would provide for a delayed effective date and, as a general rule, the revisions would apply to trusts existing as of such effective date. The one exception to this general rule, however, would be the provisions on mineral interests in R.S. 9:2152, which specifically provides that the trustee is permitted to allocate receipts from mineral interests under either the old law or the new law with respect to existing trusts that include mineral interests on the effective date. A motion was made and seconded to adopt this provision as presented for inclusion in the bill, and the motion passed with no objection. The adopted proposal reads as follows:

“The provisions of this Act shall become effective on January 1, 2020. Except as specifically provided in this Act or in the provisions of the

trust, the provisions of this Act apply to trusts existing as of the effective date of this Act.”

Professor Scalise then concluded his presentation, and Mr. Norman announced that the Council would adjourn for lunch, during which time there would be a meeting of the Membership and Nominating Committee.

Membership and Nominating Committee

After lunch, the Vice President called on Mr. Emmett C. Sole, Chairman of the Membership and Nominating Committee, to present the Committee’s report to the Council, a copy of which is attached. It was moved and seconded to adopt the report as presented, and the motion passed with no objection. Mr. Sole then concluded his presentation, and the Vice President called on Professor Glenn Morris, Reporter of the Corporations Committee, to begin his presentation of materials.

Corporations Committee

Professor Morris began his presentation by reminding the Council that the Corporations Committee was presently working to comprehensively revise Louisiana’s limited liability company law using the Uniform Limited Liability Company Act (ULLCA) as its guide while also consulting the ABA Prototype Act, Delaware LLC law, and the Louisiana Business Corporation Act (LBCA). He then noted that unlike previous materials, the provisions presented for the Council’s consideration today were coded against the LBCA rather than ULLCA due to the need for these provisions to be consistent with corporations law. The Reporter first asked the Council to consider §113, on page 2 of the materials, concerning reservation of names with distinguishing characteristics for a nonrenewable period of 120 days. A motion was made and seconded to adopt the provision as presented, and the motion passed with no objection. The adopted proposal reads as follows:

~~§1-402. Reserved name~~ § 113. Reservation of name

A. A person may reserve the exclusive use of a corporate limited liability company name in its filings with the secretary of state, including a fictitious name for a foreign corporation limited liability company whose corporate limited liability company name is not available, by delivering an application to the secretary of state for filing. The application must set forth the name and address of the applicant and the name proposed to be reserved. If the secretary of state finds that the corporate limited liability company name applied for is available, the secretary of state shall reserve the name for the applicant’s exclusive use for a nonrenewable period of one hundred and twenty days.

B. The owner of a reserved corporate limited liability company name may transfer the reservation to another person by delivering to the secretary of state a signed notice of the transfer that states the name and address of the transferee.

C. A terminated corporation’s limited liability company’s name is reserved by operation of law for five years after the effective date of the corporation’s limited liability company’s termination.

Next, the Council considered §114, on page 4 of the materials, concerning registration of names by foreign LLCs, and after the Reporter explained the mechanics of this provision, a motion was made and seconded to adopt the statute as presented. The motion passed with no objection, and the adopted proposal reads as follows:

~~§1-403. Registered name~~ § 114. Registration of name

A. A foreign corporation limited liability company may register its corporate limited liability company name, or its corporate limited liability

~~company~~ name with any addition authorized by ~~R.S. 12:303(A)(3)~~ R.S. 12:22-906(A), if the name is distinguishable upon the records of the secretary of state from the ~~corporate limited liability company~~ names that are not available under ~~R.S. 12:1-401(B)~~ R.S. 12:22-112(B).

B. A foreign ~~corporation~~ limited liability company registers its ~~corporate limited liability company~~ name, or its ~~corporate limited liability company~~ name with any addition authorized by ~~[R.S. 12:303(A)(3)~~ R.S. 12:22-906(A)], by delivering to the secretary of state for filing an application which does both of the following:

(1) Sets forth its ~~corporate~~ limited liability company name, or its ~~corporate limited liability company~~ name with any addition authorized by ~~R.S. 12:303(A)(3)~~ R.S. 12:22-906(A), the state or country and date of its ~~incorporation~~ organization, and a brief description of the nature of the business in which it is engaged.

(2) Is accompanied by a certificate of existence, or a document of similar import, from the state or country of ~~incorporation~~ organization which is dated within ninety days of receipt by the secretary of state.

C. The name is registered for the applicant's exclusive use upon the effective date of the application.

D. A foreign ~~corporation~~ limited liability company whose registration is effective may renew it for successive years by delivering to the secretary of state for filing a renewal application that complies with the requirements of Subsection B of this Section between October first and December thirty-first of the preceding year. The renewal application when filed renews the registration for the following calendar year.

E. A foreign ~~corporation~~ limited liability company whose registration is effective may thereafter qualify as a foreign ~~corporation~~ limited liability company under the registered name or consent in writing to the use of that name by a ~~corporation~~ limited liability company thereafter ~~incorporated~~ organized under this Chapter or by another foreign ~~corporation~~ limited liability company thereafter authorized to transact business in this state. The registration terminates when the domestic ~~corporation~~ limited liability company is ~~incorporated~~ organized or the foreign ~~corporation~~ limited liability company qualifies or consents to the qualification of another foreign ~~corporation~~ limited liability company under the registered name.

The Council then turned to §115, on page 7 of the materials, concerning the LLC's registered office and registered agent, which Professor Morris explained was modeled on the corresponding provision in the LBCA. He then provided additional background information concerning the contents of the Reporter's note, including the interaction between the model acts and Code of Civil Procedure Article 42 concerning venue, which prompted one Council member to question whether the individual domiciles of the LLC's members would be considered for purposes of achieving diversity jurisdiction over the LLC. The Reporter answered in the affirmative, and after another Council member explained that this rule was the same for partnerships, a motion was made and seconded to adopt §115 as presented. The motion passed with no objection, and the adopted proposal reads as follows:

~~§1-501~~ **115. Registered office and registered agent**

Each ~~corporation~~ limited liability company must continuously maintain in this state both of the following:

(1) A registered office that may be, but need not be, the same as any of its places of business.

(2) A registered agent, who may be either of the following:

(a) An individual who resides in this state.

(b) A domestic or foreign corporation or other eligible entity that does all of the following:

(i) Continuously maintains an office in this state and, in the case of a foreign corporation or foreign eligible entity, is authorized to transact business in this state.

(ii) Files with the secretary of state a statement setting forth the name of at least two individuals at its address in this state, each of whom is authorized to receive any process served on it as such agent.

The Council then considered §116, on page 9 of the materials, concerning how LLCs will change their registered office or registered agent, and the Reporter noted that a definition of “eligible entity” would need to be added. Professor Morris also noted that “R.S. 12:115(B)(2)” should be replaced with “R.S. 12:22-115(2)(b)(ii)” on line 19 of page 9, and the Council approved that change. After the Reporter explained that with respect to Subsection C on page 10, “limited liability companies” would need to be added to the corresponding provision of corporate law, R.S. 12:1-502, a motion was made and seconded to adopt §116 as amended. The motion passed with no objection, and the adopted proposal reads as follows:

§1-502 116. Change of registered office or registered agent

A. A ~~corporation~~ limited liability company may change its registered office or the identity or address of its registered agent by delivering to the secretary of state for filing a statement of change that sets forth all of the following information:

(1) The name of the ~~corporation~~ limited liability company.

(2) The street address of its current registered office.

(3) If the current registered office is to be changed, the street address of the new registered office.

(4) The name and street address of its current registered agent.

(5) If the identity of the current registered agent is to be changed, the name of the new registered agent, and the new agent's signed written consent to the appointment, either on the statement or attached to it.

(6) If the street address of the registered agent is to be changed, the new street address of the registered agent.

(7) If the registered agent is a corporation or eligible entity, and the corporation or eligible entity is not already in compliance with R.S. 12:22-115(2)(b)(ii), the name of at least two individuals at its address in this state, each of whom is authorized to receive any process served on it as such agent.

B. A registered agent may change its street address on the records of the secretary of state for all corporations and limited liability companies for which it serves as registered agent by delivering to the secretary of state a statement of change that sets forth all of the following information:

(1) The name of the registered agent.

(2) The name of the corporation or limited liability company for which it is acting as registered agent.

(3) Its current street address to be changed.

(4) Its new street address.

(5) A certification that the registered agent has notified all of the corporations and limited liability companies for which it serves as registered agent of the change in its address to the new street address specified in the statement of change.

C. A registered agent may satisfy the requirements of Subsection B of this Section for multiple corporations and limited liability companies through the delivery of a single statement of change that complies with Subsection B of this Section, provides the names of all of the corporations and limited liability companies for which the statement is to be effective, and certifies that the registered agent has notified all of those corporations and limited liability companies of the change in its address to the new street address specified in the statement of change.

Next, the Council considered §117, on page 12 of the materials, concerning the resignation of an LLC's registered agent. After a brief explanation by the Reporter, a motion was made and seconded to adopt this provision as presented, at which time one Council member questioned the interaction of this provision with the secretary of state's rules concerning electronic filings. The Council then discussed that the filing rules with respect to all business entities were being changed effective January 1st and that the secretary of state would be requiring electronic filings through the enactment of a single provision rather than by amending individual provisions throughout the various laws. The Reporter agreed to revisit the filing rules for both corporations and LLCs to make them consistent with this new rule. A vote was then taken on the motion to adopt §117 as presented, and the motion passed with no objection. The adopted proposal reads as follows:

~~§1-503~~ 117. Resignation of registered agent

A. A registered agent may resign the agent's appointment by signing and delivering to the secretary of state for filing the signed original and two exact or conformed copies of a statement of resignation. If the office of the registered agent is also the registered office of the corporation, the statement may include a statement that the registered office is also discontinued.

B. After filing the statement the secretary of state shall mail one copy to the registered office, if not discontinued, and the other copy to the ~~corporation~~ limited liability company at its principal office.

C. The agency appointment is terminated, and the registered office discontinued if so provided, on the thirty-first day after the date on which the statement was filed.

After agreeing that the provisions of §118 had already been addressed, as well as that §119 should be deferred pending additional discussion by the Committee with respect to service of process, the Council turned to §120, on page 19 of the materials. The Reporter explained that this provision was based on the LBCA and provided both general and particular rules for the filing of documents. He also explained that Paragraphs (H)(8) and (9) on page 21 were bracketed as placeholders because these types of transactions are not recognized by ULLCA and will likely be removed. Professor Morris then noted that the biggest change with respect to this provision involves the deletion of Subsection L on page 22, and he explained that because modern LLC law in both model acts and in Delaware requires very little to be included in the articles of organization outside of information necessary to identify the LLC, and instead contemplates that the

details of the business deal will be contained in the operating agreement – a private contract that is not filed with the secretary of state – there is no need for a detailed rule concerning information that is contained outside of the articles of organization.

After this explanation, the Council engaged in a great deal of discussion with respect to §120. One Council member asked a question pertaining to the acknowledgment of the registered agent's written consent to appointment, and the Reporter explained that this is necessary because the appointment is for service of process, among other things. The Council then discussed the practical implications of the example of a member who, at the time he establishes the company, also completes the registered agent appointment form on the secretary of state's website that perhaps is notarized but not witnessed, as well as how the requirements of Subsection H on pages 20 and 21 of the materials would change present law with respect to this issue. Members of the Council debated whether the notary's seal would constitute an "acknowledgment" for purposes of this provision, as well as how a simple email response from the registered agent accepting the appointment would be treated. Professor Morris explained that the language in question had been retained from the 1968 statute, and other Council members expressed concern with respect to the tension between this provision and the practices of the secretary of state regarding this issue. After additional discussion concerning how this requirement would apply in the context of the new electronic filing rules, as well as whether this acknowledgment needs to be notarized in the first place, the Council agreed that perhaps the Reporter and his Committee should consult with representatives of notaries and the secretary of state to determine how to resolve these issues. Members of the Council then expressed the importance of ensuring that the statutory requirements are consistent with practical procedures to allow attorneys to provide legal advice to their clients to the effect that an LLC satisfies all of the requirements for proper formation. Members also expressed that in their view, the inconsistency that presently exists between the provisions of the law and the procedures in practice should not be perpetuated moving forward. As a result of this discussion, a motion was made and seconded to recommit §120, and the motion passed with no objection.

The Council then turned to §121 on page 28 and engaged in a brief discussion concerning the fact that the secretary of state's new electronic filing rules, which effectively require the use of their forms, may be inconsistent with this provision, which provides that the secretary of state may prescribe forms only for certain things. As a result, a motion was made and seconded to also recommit §121 for further consideration by the Committee, and the motion passed with no objection. Next, the Council considered §122, on page 29 of the materials, and a motion was quickly made and seconded to adopt this provision as presented. The motion passed with no objection, and the adopted proposal reads as follows:

§1-122. § 122 Filing, service, and copying fees

The secretary of state shall collect the fee authorized in R.S. 49:222 when a document described in this Chapter is delivered to the secretary of state for filing.

Professor Morris then introduced §123, on page 30 of the materials, concerning the effectiveness of filed documents. After discussing the requirements of each Subsection, the Reporter suggested that "one of the following" be changed to "the later of the following times" on line 3 of page 30, and that "A later time" be changed to "The time" on line 6 of the same page. The Council agreed with the Reporter's first recommendation, but after one member suggested that line 6 be changed to read "On the date of receipt, at the time specified in the document as its effective time," members expressed their preference for this suggestion. Professor Morris then noted that a similar change would need to be made in the corresponding provision of the LBCA, and a motion was made and seconded to adopt §123 as amended. The motion passed with no objection, and the adopted proposal reads as follows:

~~§1-123~~ § 123. Effective time and date of document

A. Except as provided in Subsections B and C of this Section and in R.S. ~~12:1-124(C)~~ 12:22-124(C), a document accepted for filing is effective at ~~one~~ the later of the following times:

(1) The date and time of its receipt for filing, as evidenced by such means as the secretary of state may use for the purpose of recording the date and time of receipt.

(2) ~~A later time, on~~ On the date of receipt, at the time specified in the document as its effective time.

B. Except as provided in Subsection C of this Section, a limited liability company's initial ~~corporation's original~~ articles of ~~incorporation~~ organization become effective when signed as provided in R.S. ~~12:1-120~~ 12:22-120 if all of the following conditions are met:

(1) The articles are received for filing by the secretary of state within five days, exclusive of legal holidays, after the date that the articles are signed.

(2) The articles are accepted for filing.

C. A document may specify a delayed effective time and date, and if it does so the document becomes effective at the time and date specified. If a delayed effective date but no time is specified, the document is effective at the close of business on that date. A delayed effective date for a document may not be earlier than the first date and time that the document otherwise would have become effective under this Section or later than the ninetieth day after the date the document is received for filing by the secretary of state.

D. A document is accepted for filing when the secretary of state files the document as provided in R.S. ~~12:1-125(B)~~ 12:22-125(B).

Next, the Council quickly approved §124, on page 32 of the materials, as presented, and the adopted proposal reads as follows:

~~§1-124~~ 124. Correcting filed document

A. A domestic or foreign ~~corporation~~ limited liability company may correct a document filed with the secretary of state if any of the following apply:

(1) The document contains an inaccuracy.

(2) The document was defectively signed, attested, sealed, verified, or acknowledged.

(3) The electronic transmission was defective.

B. A document is corrected by delivering to the secretary of state for filing articles of correction. The articles of correction shall do all of the following:

(1) Describe the document, including its filing date, or attach a copy of it to the articles.

(2) Specify the inaccuracy or defect to be corrected.

(3) Correct the inaccuracy or defect.

C. Articles of correction are effective on the effective date of the document they correct except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, articles of correction are effective when filed.

The Council then considered §125, on page 34 of the materials, concerning the duties of the secretary of state with respect to filing. It was moved and seconded to adopt this provision as presented, at which time the Council discussed the application of this provision in the context of electronic filings, as well as whether a tension exists with respect to the provisions of Subsection D and the fact that in practice, when the secretary of state accepts an LLC's articles of organization for filing, that entity exists regardless of whether there were mistakes in the document. After additional discussion concerning both this provision and §203(B) on page 53, as well as the fact that both provisions were taken from corporations law, the Council unanimously voted to approve §125 as presented. The adopted proposal reads as follows:

~~§1-125~~ § 125. Filing duty of secretary of state

A. If a document delivered to the office of the secretary of state for filing satisfies the requirements of R.S. ~~12:1-120~~ 12:22-120, the secretary of state shall file it.

B. The secretary of state files a document by recording it as filed on the date and time of receipt. After filing a document, except as provided in R.S. ~~12:1-503~~ 12:22-117, the secretary of state shall deliver to the domestic or foreign ~~corporation~~ limited liability company or its representative a copy of the document with an acknowledgment of the date of filing.

C. If the secretary of state refuses to file a document, it shall be returned to the domestic or foreign ~~corporation~~ limited liability company or its representative within five days after the document was delivered, together with a brief, written explanation of the reason for the refusal.

D. The secretary of state's duty to file documents under this Section is ministerial. The secretary's filing or refusing to file a document does not do any of the following:

- (1) Affect the validity or invalidity of the document in whole or part.
- (2) Relate to the correctness or incorrectness of information contained in the document.
- (3) Create a presumption that the document is valid or invalid or that information contained in the document is correct or incorrect.

Because §§126 and 127 are reserved, the Council turned to §128, on page 37 of the materials, concerning certificates of existence and standing for LLCs. A motion was made and seconded to adopt the provision as presented, and the motion passed with no objection. The adopted proposal reads as follows:

~~§1-128~~ § 128. Certificate of existence and standing

A. Anyone may apply to the secretary of state to furnish a certificate of existence and standing for a domestic ~~corporation~~ limited liability company or a certificate of authorization and standing for a foreign ~~corporation~~ limited liability company.

B. A certificate of existence, or authorization, and standing shall state all of the following:

(1) The domestic ~~corporation's corporate~~ limited liability company's name or the foreign ~~corporation's corporate~~ limited liability company's name used in this state.

(2) One of the following:

(a) That the domestic ~~corporation~~ limited liability company is duly ~~incorporated~~ organized under the law of this state, along with the date of its ~~incorporation~~ organization and the period of its duration if less than perpetual.

(b) That the foreign ~~corporation~~ limited liability company is authorized to do business in this state.

(3) [Reserved.]

(4) That its most recent annual report required by R.S. ~~12:1-1621 or R.S. 12:309~~ 12:22-212 has been filed with the secretary of state and that the ~~corporation~~ limited liability company is in good standing, or that its most recent annual report has not been filed as required by law.

(5) That the ~~corporation~~ limited liability company is not dissolved or terminated.

C. Subject to any qualification stated in the certificate, a certificate of existence, or authorization, and standing issued by the secretary of state may be relied upon as conclusive evidence that the domestic ~~corporation~~ limited liability company is in existence or the foreign ~~corporation~~ limited liability company is authorized to transact business in this state, and, if the certificate so states, that the ~~corporation~~ limited liability company is in good standing.

The Reporter then explained that, as indicated on page 41 of the materials, the Committee had deferred action on a provision concerning the withdrawal of filed records before effectiveness because it had not yet considered the various forms of transactions that this provision might affect, and it also had not yet considered any transaction-specific withdrawal provisions. Members of the Council then turned to §130, on page 42 of the materials, which Professor Morris explained was enacted in response to the *Trustees of Dartmouth College* case to ensure that the legislature can amend statutory provisions without any sort of argument that entities have contractual or vested rights in the former versions of these laws. A motion was made and seconded to adopt this provision as presented, and the motion passed with no objection. The adopted proposal reads as follows:

§ ~~121~~ 130. Reservation of power to amend or repeal

The ~~{legislature of this state}~~ has power to amend or repeal all or part of this ~~{act}~~ Chapter at any time, and all limited liability companies and foreign limited liability companies subject to this ~~{act}~~ Chapter are governed by the amendment or repeal.

Next, the Council considered §201, on page 43 of the materials, concerning the organizers of an LLC. Professor Morris explained that the Committee had deliberately rejected the concept of “certificates of organization” as used in the model acts due to the history of referring to these formative documents as “articles of organization” in Louisiana. The Reporter also explained that the Committee favors the more corporate-like approach with respect the formation of the LLC and the time at which it takes existence, namely upon filing rather than when the LLC obtains members, which is the rule under both ULLCA and the ABA Prototype Act. A motion was made and seconded to adopt §201 as presented, at which time one Council member questioned the lack of inclusion of any reference to the LLC’s initial report. Professor Morris responded by explaining that this concept is being removed, and another Council member then reiterated the need to

consult the secretary of state's office concerning the requirement that the written consent of the registered agent be delivered. A vote was then taken on the motion to adopt §201 subject to review of this issue, and the motion passed with no objection. The adopted proposal reads as follows:

§201. ~~Incorporators~~ Organizers

One or more persons capable of contracting may act as the ~~incorporator or incorporators~~ organizer or organizers of a ~~corporation~~ limited liability company by delivering to the secretary of state for filing articles of ~~incorporation~~ organization and the written consent of the registered agent required by R.S. ~~12:1-202 (E)~~ 12:22-202(D).

The Reporter then directed the Council's attention to §202, on page 45 of the materials, and suggested that members first consider Subsection A on lines 2 through 13. Professor Morris explained that action on Paragraph (A)(4) should be deferred pending a decision by the Committee as to whether the rejection or limitation of the protection against liability of members and managers should be made in the articles of organization or in the operating agreement. It was moved and seconded to adopt the remaining provisions of this Subsection as presented, and the motion passed with no objection. The adopted proposal reads as follows:

§202. Articles of ~~incorporation~~ organization and signed consent by agent to appointment

A. The articles of ~~incorporation~~ organization must set forth all of the following:

(1) A ~~corporate~~ name for the ~~corporation~~ limited liability company that satisfies the requirements of R.S. ~~12:1-401~~ 12:22-112.

~~(2) The number of shares the corporation is authorized to issue.~~

~~(3)~~ (2) The street address, not a post office box only, of the ~~corporation's~~ company's initial registered office, and, if different, the street address, not a post office box only, of the ~~corporation's~~ company's initial principal office.

~~(4)~~ (3) The name and street address, not a post office box only, of its initial registered agent.

* * *

~~(6)~~ (5) The name and address of each ~~incorporator~~ organizer.

With respect to §202(B), on page 46 of the materials, the Reporter explained that action as to Paragraphs (B)(1) and (2) had been deferred by the Committee pending discussion as to the usefulness of including in the articles of organization statements concerning whether the LLC is member- vs. manager-managed. One Council member then noted that this issue also appears in the executory process statute and that this provision should be reviewed by the Committee for purposes of consistency and potentially adding a cross-reference, and another Council member suggested that the same be done with respect to the statute in Title 13 concerning mortgages granted by the LLC. After one Council member then questioned whether the LLC's duration should really be under Subsection B, which is permissive, rather than Subsection A, which is mandatory, the Reporter explained that a provision in Chapter 1 states that the LLC's duration is perpetual unless otherwise specified in the articles of organization. Professor Morris also explained that the reason an LLC may not want to include more information than necessary in its articles of organization is that in the event of a conflict between the articles of organization and the operating agreement, one will need to control with respect to the members and with respect to third parties. A motion was then made and seconded

to adopt Paragraphs (B)(3) through (6) on lines 4 through 9 of page 46 as presented, and the motion passed with no objection. The adopted proposal reads as follows:

§202. Articles of ~~incorporation~~ organization and signed consent by agent to appointment

* * *

B. The articles of ~~incorporation~~ organization may set forth any of the following:

* * *

(3) A statement of the purposes of the company or of a limitation of its purposes.

(4) A statement of the duration of the company or of a limitation of its duration.

~~(3)~~ (5) Any provision that this Chapter requires or permits to be set forth in the bylaws an operating agreement.

(6) Any other provision, not inconsistent with law, that the members elect to set forth in the articles of organization.

The Council then discussed §203(C), on page 47 of the materials, and a motion was made and seconded to adopt this provision after members agreed to use “provided” rather than “enumerated” on line 18 of page 47. The Council also agreed to defer consideration of both Subsection D concerning the previously discussed registered agent appointment issue and Subsection E concerning L3Cs because the Committee questioned how many of these there really are and whether specific rules with respect to them should be retained moving forward. The adopted version of Subsection C reads as follows:

§202. Articles of ~~incorporation~~ organization and signed consent by agent to appointment

* * *

C. The articles of ~~incorporation~~ organization need not set forth any of the ~~corporate company~~ powers ~~enumerated~~ provided in this Act Chapter.

Next, the Council considered and quickly approved §203, on page 53 of the materials, as presented. The adopted proposal reads as follows:

~~§1-203. Incorporation~~ § 203. When existence begins; effect of filing of articles of organization

A. Except as provided in Subsection C of this Section, the ~~corporate~~ existence of the limited liability company begins, and the ~~corporation company~~ is duly ~~incorporated~~ organized, when the articles of ~~incorporation~~ organization become effective under R.S. ~~42:1-123~~ 12:22-123.

B. The secretary of state's filing of the articles of ~~incorporation~~ organization is conclusive proof that the ~~incorporators~~ organizers satisfied all conditions precedent to ~~incorporation~~ organization and that the ~~corporation~~ limited liability company is duly ~~incorporated~~ organized, except in a proceeding by the state to cancel or revoke the ~~incorporation~~ organization or involuntarily dissolve the ~~corporation company~~.

C. When immovable property is acquired by one or more persons acting in any capacity for and in the name of any ~~corporation~~ limited liability company that is not duly ~~incorporated~~ organized, and the ~~corporation~~ company is subsequently duly ~~incorporated~~ organized, the ~~corporate company's~~ existence shall be retroactive to the date of acquisition of an interest in the immovable property, but such retroactive existence shall be without prejudice to rights validly acquired by third persons in the interim between the date of acquisition and the date that the ~~corporation~~ company is duly ~~incorporated~~ organized.

Members of the Council then turned to §204, on page 57 of the materials, and engaged in a great deal of discussion with respect to the sentence in Subsection A concerning members not having vested property rights resulting from provisions in the articles of organization. Specifically, the Reporter mentioned that this is less important with respect to the articles of organization and more important with respect to the operating agreement since that is where the vast majority of the substantive provisions governing the manner in which the LLC does business will be found. Members then questioned how such a statement would work with respect to, for example, rights of first refusal, which are supposed to be vested property rights. Professor Morris and other members of the Council then explained that this provision is intended to mean that although members of the LLC have the right to enforce the provisions of the articles of organization and operating agreement, these provisions are all subject to amendment in accordance with the operating agreement. The Council then agreed to approve Subsection B but to recommit Subsection A for purposes of redrafting this provision to better state its intent, namely that the members of an LLC do not have a right to preclude the application of the provisions of the operating agreement in accordance with its terms. The Council then considered Subsection C, on page 57 of the materials, concerning restatements of the articles of organization, and after the Reporter explained that the LLC's secretary would likely be responsible for making the certification contemplated on line 8 of page 58, a motion was made and seconded to adopt Subsection C as presented. The Council then considered Subsections D and E on pages 58 and 59, which the Reporter explained were taken from the LBCA. A motion was also made and seconded to adopt both of these provisions, and after the Council agreed to add "and definitive" after "final" on line 4 of page 59, the motion passed with no objection. Professor Morris then noted that similar language would need to be added in the corresponding provision of the LBCA, R.S. 12:1-1001(C)(3), and the adopted proposal reads as follows:

SECTION 202. AMENDMENT OR RESTATEMENT OF CERTIFICATE OF ORGANIZATION. § 204. Amendment or restatement of articles of organization

* * *

B. To amend its ~~certificate~~ articles of organization, a limited liability company ~~must~~ shall approve the amendment as provided in R.S. 12:22- , and then shall deliver to the ~~{Secretary of State}~~ secretary of state for filing ~~an~~ articles of amendment stating all of the following:

(1) ~~the~~ The name of the company;

~~(1) the date of filing of its initial certificate; and~~

(2) ~~the~~ The text of the amendment.

(3) That the amendment was approved as provided in R.S. 12:22- , and the date of the approval.

C. (1) To restate its ~~certificate~~ articles of organization, a limited liability company ~~must~~ shall deliver to the ~~{Secretary of State}~~ secretary of

state for filing a ~~restatement~~ restated articles of organization, designated as such in its the document heading.

(2) The restated articles of organization shall set forth the entire text of the company's articles of organization, as amended, including any new amendments that are part of the restated articles. Nevertheless, the restated articles of organization need not include the names or addresses of the company's organizers, initial members or managers or, if more recent information is on file with the secretary of state, the company's initial registered agent, initial registered office, or initial principal office.

(3) The restated articles of organization shall include or be accompanied by a certification that, except for the initial information that lawfully may be omitted from restated articles, the restated articles of organization set forth the entire text of the limited liability company's articles of organization, as amended. If the restated articles of organization include any new amendment, the certification shall state that each new amendment was approved as provided in R.S. 12:22-_____.

(4) Restated articles of organization supersede the initial articles of organization, as amended, and any earlier restatements.

~~(C) If a member of a member-managed limited liability company, or a manager of a manager-managed limited liability company, knows that any information in a filed certificate the company's articles of organization was inaccurate when the certificate was articles were filed or has become inaccurate due to changed circumstances, the member or manager shall promptly:~~

~~(1) cause the certificate articles of organization to be amended; or~~

~~(2) if appropriate, deliver to the [Secretary of State] secretary of state for filing a statement of change under Section R.S. 12:22-116 [i.e., change in registered agent or office] or a statement of correction under Section 209 R.S. 12:22-134.~~

D. An amendment that extends the duration of a limited liability company may be adopted even after that duration expires unless one of the following conditions exist:

(1) Articles of termination or a certificate of termination has been filed and the existence of the limited liability company has not been reinstated.

(2) Articles of dissolution have been delivered to the secretary of state and have not been revoked.

(3) A judgment ordering dissolution has become final and definitive.

E. If the duration of a limited liability company has expired and the adoption of an amendment extending that duration is permissible under Subsection D of this Section, then the following shall apply:

(1) The amendment may be adopted in the same manner as if the limited liability company's duration had not expired.

(2) The amendment has the same effect as if it had been adopted before the duration expired.

Finally, the Council considered §205, on page 63 of the materials, and the Reporter explained that consideration of Paragraph (A)(5) should be deferred pending further review by the Committee. Professor Morris also explained that Subsection D would need

to be recommitted in light of the Council's previous discussion pertaining to the secretary of state electronic filing issue. A motion was then made and seconded to adopt the remaining provisions of §205 as presented, and the motion passed with no objection. The adopted proposal reads as follows:

~~§1-1624~~ § 205. Annual report for secretary of state

A. Each ~~corporation~~ limited liability company shall deliver to the secretary of state for filing an annual report that sets forth all of the following information:

(1) The name of the ~~corporation~~ company.

(2) The municipal address, which shall not be a post office box only, of its registered office.

(3) The name and municipal address, which shall not be a post office box only, of its registered agent.

(4) The municipal address, which shall not be a post office box only, of its principal office.

* * *

~~(6) The total number of issued shares, itemized by class and series, if any, within each class.~~

B. Information in the annual report must be current as of the date the annual report is signed on behalf of the ~~corporation~~ limited liability company.

C. A ~~corporation's~~ limited liability company's annual report shall be delivered to the secretary of state each year on or before the anniversary of the date that the ~~corporation~~ company was ~~incorporated~~ organized.

* * *

E. A dissolved ~~corporation~~ limited liability company shall continue to file annual reports under this Section until the existence of the ~~corporation~~ company is terminated.

At this time, Professor Morris concluded his presentation, after which a Council member suggested that perhaps "limited liability company" should be deleted on line 8 of page 4 of the materials. The Friday session of the December 2018 Council meeting was then adjourned.

LOUISIANA STATE LAW INSTITUTE

MEETING OF THE COUNCIL

December 14-15, 2018

Saturday, December 15, 2018

Persons Present:

Adams, Marguerite (Peggy) L.
Bergstedt, Thomas M.
Breard, L. Kent
Brister, Dorrell J.
Castle, Marilyn
Clements, Gary P.
Cromwell, L. David
Curry, Kevin C.
Davidson, James J., III
Davis, Richard
Dawkins, Robert G.
Devillier, Emma
Di Giulio, John E.
Doguet, Andre'
Gregorie, Isaac M. "Mack"
Hayes, Thomas M., III
Holdridge, Guy

Jewell, John Wayne
Lavergne, Luke
McIntyre, Edwin R., Jr.
McWilliams, John Ford
Mengis, Joseph W.
Miller, Cody "C.J."
Norman, Rick J.
Price, Donald W.
Simien, Eulis, Jr.
Sole, Emmett C., Jr.
Tate, George J.
Thibeaux, Robert P.
Thibodeaux, Catherine Parsiola
Tucker, Zelda W.
Waller, Mallory
Wilson, Evelyn L.
Ziober, John David

Vice President Rick J. Norman called the Saturday session of the December 2018 Council meeting to order at 9:00 a.m. on Saturday, December 15, 2018, at the Louisiana Supreme Court in New Orleans. He then called on Judge Guy Holdridge, Acting Reporter of the Criminal Code and Code of Criminal Procedure Committee, to begin his presentation of materials.

Criminal Code and Code of Criminal Procedure Committee

Judge Holdridge began his presentation by first thanking the Council for electing him as Director of the Law Institute and asking members to submit suggestions for improvement. After briefly commending the work of the Capital and Noncapital Postconviction Relief Subcommittees, the Acting Reporter asked the Council to turn to Article 927, on page 4 of the postconviction relief materials. Judge Holdridge first explained that the Council had already approved the draft uniform application for postconviction relief forms, which were adopted by the Supreme Court, and noted that this provision includes the same information as required by those forms, suggesting that "form" be changed to "forms" on line 37 of page 4. He also suggested that statements about both the first and second or subsequent forms should be added to Subparagraphs (A)(5) and (7), on page 5 of the materials, and as a result, he asked the Council to defer consideration of those provisions.

Judge Holdridge then explained that Paragraph B of Article 927, on page 5 of the materials, provides for what happens in the event that the proper forms are not used, namely that the clerk of court will supply the proper forms and the application will relate back to the initial filing in the event that the application is properly refiled within sixty days. The Acting Reporter also explained that this is intended to be helpful to noncapital postconviction relief applicants, many of whom appear pro se and are even incarcerated. One Council member then questioned whether the clerks of court had been contacted with respect to this proposal, explaining that many clerks are reluctant to categorize the nature of the pleadings as an application for postconviction relief as opposed to some other kind of filing. The Acting Reporter explained that this issue was addressed in the Comments to Article 927 but agreed to contact the clerks of court to ensure that they would be amenable to this procedure. A motion was then made and seconded to adopt

Article 927, with the exception of Subparagraphs (A)(5) and (7), as presented, and the motion passed with no objection. The adopted proposal reads as follows:

Article 926 927. Petition Application and procedure

~~A. An application for post conviction relief shall be by written petition addressed to the district court for the parish in which the petitioner was convicted. A copy of the judgment of conviction and sentence shall be annexed to the petition, or the petition shall allege that a copy has been demanded and refused. An application for postconviction relief shall be filed using the uniform application for postconviction relief forms approved by the Supreme Court of Louisiana. The application shall include all of the following, either on the form or attached pages:~~

~~B. The petition shall allege:~~

~~(1) The name of the applicant, person in custody and the place of custody, if known, or if not known, a statement to that effect;~~

~~(2) The place where the applicant is in custody at the time of filing.~~

~~(2)(3) The name of the custodian of the applicant, if known, or if not known, a designation or description of him as far as possible;~~

~~(4) A copy of the judgment of conviction and sentence or an explanation as to why the applicant is unable to provide a copy of the judgment of conviction and sentence.~~

~~* * *~~

~~(3)(6) A statement of the grounds all claims upon which relief is sought, specifying with reasonable particularity the factual basis for such relief;~~

~~* * *~~

~~(5) All errors known or discoverable by the exercise of due diligence.~~

~~(8) To the best of the applicant's information and belief, a list of the names of all of the attorneys who have represented the applicant with respect to the conviction being challenged.~~

~~(9) A statement signed by the applicant or an attorney for the applicant certifying that the contents of the application are true to the best of the signatory's information and belief.~~

~~C. The application shall be signed by the petitioner and be accompanied by his affidavit that the allegations contained in the petition are true to the best of his information and belief.~~

~~D.B. The petitioner shall use the uniform application for post conviction relief approved by the Supreme Court of Louisiana. If the petitioner applicant fails to use the uniform application for postconviction relief form as required by Paragraph A of this Article, the court may provide the petitioner with the uniform application and require its use. The clerk of court shall notify the applicant that he must refile within sixty days from the date of the clerk's notice using the correct form supplied by the clerk. If the uniform application is filed within sixty days, the uniform application and the original application will be deemed as filed on the date upon which the original application was filed. Although all applicants must use the uniform application, applicants may attach additional information to the uniform application at the time of filing.~~

E.C. Inexcusable failure of the petitioner applicant to comply with the provisions of Paragraphs A and B of this Article may be a basis for dismissal of his the application.

D. Upon the filing of an application for postconviction relief by a person in custody, the clerk of court shall provide a copy of the application to the court and serve the State by mail or electronic means.

E. No supplementation or amendment of the application shall be allowed without leave of court.

Comments – 2019

Many applications for postconviction relief are erroneously titled as another type of filing. For example, applications for postconviction relief are frequently misidentified as writs of habeas corpus (e.g. *State ex rel. Lay v. State*, 2015-2332 (La. 02/26/16), 184 So. 3d 1271), motions to withdraw a guilty plea (e.g. *State ex rel. Noble v. State*, 2015-1179 (La. 04/22/16), -- So. 3d --, 2016 WL 3128804), motions to quash (e.g. *State ex rel. Walgamotte v. State*, 2015-0015 (La. 10/23/15), 177 So. 3d 705), motions for new trial (e.g. *State ex rel. Schjenken v. State*, 2014-2414 (La. 10/02/15), 175 So. 3d 959, *reconsideration denied*, 2014-2414 (La. 10/30/15), 178 So. 3d 555), and motions to correct an illegal sentence (e.g. *State ex rel. Edwards v. State*, 2015-2336 (La. 02/26/16), 184 So. 3d 1281). The law recognizes, however, “the title of a pleading does not matter, but rather courts should look through the caption of pleadings in order to ascertain their substance and to do substantial justice.” *State v. Sanders*, 1993-0001 (La. 11/30/94), 648 So. 2d 1272, 1284 (citation and internal quotation marks omitted).

Next, the Council considered Article 927.8, on page 12 of the materials, and the Acting Reporter explained that the Capital Postconviction Relief Subcommittee had proposed the change reflected in bold on lines 11 and 12 of page 12 for purposes of consistency with the definition of “procedural objection” in Article 927.4(7), on page 1 of the materials. He then explained that the Subcommittee had also proposed changing “application” to “claim” on line 37 of the same page, noting that if one claim was inexcusably omitted from a previous application, just that claim rather than the entire application should be dismissed. A motion was made and seconded to adopt the proposed changes in bold as presented, 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 court from considering the merits of that claim 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:

* * *

(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 claim shall be dismissed.

Judge Holdridge then directed the Council’s attention to Article 927.9, on page 13 of the materials, and explained that the Capital Postconviction Relief Subcommittee proposed the same change on lines 7 and 8 of page 13 as was approved in the previous article. He also explained that the Subcommittee suggested adding the bold language on

lines 11 through 14 of the same page to allow the court to dispose of procedural objections as soon as possible in the event that the applicant has filed a response to the procedural objections or has waived the right to do so. After also discussing the requirements of Subparagraph (B)(3) and Paragraph C, it was moved and seconded to adopt the proposed changes as presented, 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 court from considering the merits of that 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, except that the court may dispose of the procedural objections sooner than sixty days if the court has received from the applicant a response to the procedural objections or a waiver of the right to file such a response. The court may grant an extension of time for good cause shown. Procedural objections shall be disposed of in the following manner:

* * *

Next, the Council considered the proposed changes to Article 927.11, on page 14 of the materials, and Judge Holdridge explained that the language in bold on lines 30 through 32 was the same language that had been approved in the previous article. A motion was made and seconded to adopt the proposed revisions 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, except that the court may grant or deny relief sooner than sixty days if the court has received from the applicant a response to the answer or a waiver of the right to file such a response. The court may grant an extension of time for good cause shown.

* * *

The Acting Reporter then directed the Council's attention to Article 927.12, on page 15 of the materials, and explained that this provision provides for further factual development in the event that the court cannot dismiss the application upon the pleadings or through summary disposition. Judge Holdridge also explained that the language of Paragraph C is intended to provide the court with discretion as to how strictly to apply the provisions of the Code of Evidence in light of the fact that many postconviction relief applicants appear pro se. After additional discussion with respect to the fact that most judges would not relax the rules of evidence unless there was good cause for doing so, as well as the fact that at the evidentiary hearing stage, most applicants have attorneys appointed to represent them, it was moved and seconded to adopt Article 927.12 and its Comments as presented. The motion passed with no objection, and the adopted proposal reads as follows:

Article 930 927.12. Evidentiary hearing; factual development

~~A. An evidentiary hearing for the taking of testimony or other evidence shall be ordered whenever~~ If the court determines that there are questions of fact which that cannot properly be resolved pursuant to Articles 928 and 929 927.6 and 927.11, the court may order oral depositions of any witness, including the applicant, under conditions specified by the court; order requests for admissions of fact and genuineness of documents; or require a party to provide evidence of the authenticity of any record submitted to the court. ~~The petitioner, in absence of an express waiver, is entitled to be present at such hearing, unless the only evidence to be received is evidence as permitted pursuant to Subsection B of this Section, and the petitioner has been or will be provided with copies of such evidence and an opportunity to respond thereto in writing.~~

B. In addition, the court may order an evidentiary hearing for the taking of testimony or other evidence. At such a hearing, duly authenticated records, transcripts, depositions, documents, or portions thereof, or admissions of facts or joint stipulations may be received in evidence.

~~C. No evidentiary hearing on the merits of a claim shall be ordered or conducted, nor shall any proffer of evidence be received over the objection of the respondent, and no ruling upon procedural objections to the petition shall purport to address the merits of the claim over the objection of the respondent, unless the court has first ruled upon all procedural objections raised by the respondent, and such rulings have become final. Any language in a ruling on procedural objections raised by the respondent which purports to address the merits of the claim shall be deemed as null, void, and of no effect. Although the rules provided in the Code of Evidence shall not strictly apply, the district court should consider those rules in determining the applicability of testimonial privileges and in assessing the reliability of evidence.~~

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(a) An evidentiary hearing on the merits of the claim should only address genuinely contested factual issues that cannot be resolved on the record. Disputed facts that are not material to the outcome do not warrant an evidentiary hearing.

(b) Pursuant to Article 927.13(A), the applicant shall be physically present at any evidentiary hearing conducted in accordance with Paragraph B of this Article.

The Council then turned to Article 927.13, on page 16 of the materials, and Judge Holdridge explained that this provision requires the applicant to be physically present at an evidentiary hearing unless the applicant has provided an express waiver or only documentary evidence will be presented at the hearing. Otherwise, the applicant's presence may be obtained through video, telephone, or other remote technology. It was moved and seconded to adopt the proposed changes to Article 927.13 as presented, and the motion passed with no objection. The adopted proposal reads as follows:

Article 930.9 927.13. Attendance by the petitioner applicant

A. In the absence of an express waiver, the applicant is entitled to be physically present at an evidentiary hearing, unless the only evidence to be received is duly authenticated records, transcripts, depositions, or portions thereof, or admissions of facts or joint stipulations.

~~B. With the exception of evidentiary hearings, in the event that the petitioner applicant for post-conviction postconviction relief is incarcerated, he may be present at post-conviction the applicant's presence at postconviction relief proceedings may be obtained by teleconference, video link, or other visual remote technology if necessary.~~

Next, the Council considered Article 927.14, on page 16 of the materials, which provides that the court may appoint counsel for the applicant at any time but shall appoint counsel for the applicant when it orders an evidentiary hearing. A motion was made and seconded to adopt the proposed changes as presented, and the motion passed with no objection. The adopted proposal reads as follows:

Article 930.7 927.14. Right to counsel

A. If the ~~petitioner~~ applicant is indigent and alleges a claim which, if established, would entitle him to relief, the court may appoint counsel.

~~B. The court may appoint counsel for an indigent petitioner when it orders an evidentiary hearing, authorizes the taking of depositions, or authorizes requests for admissions of fact or genuineness of documents, when such evidence is necessary for the disposition of procedural objections raised by the respondent.~~

~~C.B.~~ The court shall appoint counsel for an indigent ~~petitioner~~ applicant when it orders an evidentiary hearing on the merits of a claim, or authorizes the taking of depositions or requests for admissions of fact or genuineness of documents for use as evidence in ruling upon the merits of the claim.

Members then turned to Article 927.15, on page 16 of the materials, and Judge Holdridge explained that this provision requires the judge to rule on the application for postconviction relief within sixty days of submission of the case on the merits. He then asked the judges on the Council for their input as to whether sixty days would be enough time, and members agreed that this time period is sufficient. The Council also discussed that courts are already required to report to the Supreme Court with respect to any matters that are under advisement for longer than thirty days, as well as that the Supreme Court had discussed requiring mandatory judicial training with respect to the new provisions on postconviction relief. The Acting Reporter then explained that Paragraph B of this provision sets forth the relief that can be granted by the court, and a motion was made and seconded to adopt Article 927.15 as presented. The motion passed with no objection, and the adopted proposal reads as follows:

Article 930.1 927.15. Judgment granting or denying relief under Articles 928, 929, and 930 Rendition of judgment

A. The district court shall render judgment within sixty days of submission of the case on the merits. A copy of the judgment granting or denying relief shall be supported by written or oral reasons setting forth the grounds on which the judgment is based. A copy of the judgment granting or denying relief and the written or transcribed reasons for the judgment shall be furnished to the petitioner applicant, the district his attorney, the State, and the custodian.

B. If the court determines pursuant to Article 927.11 or 927.12 that the application for postconviction relief has merit, the court may order a new trial or order a guilty plea to be withdrawn. In the event that the applicant is entitled to an out-of-time appeal under Article 927.3(4), the court shall order that the applicant have the right to appeal the conviction.

Next, the Council turned to Article 927.17, on page 17 of the materials, and the Acting Reporter explained that although both the Subcommittee and Committee had considered making substantive changes to this provision, ultimately they agreed that

present law is working well in practice and therefore only proposed to add “vacating the conviction” on line 5 and update terminology for purposes of consistency. One Council member then questioned what would happen under this provision in the event that there were not grounds to re prosecute the applicant, and Judge Holdridge responded that the applicant would be released. Members briefly discussed whether this provision should make an explicit statement in this regard but ultimately, a motion was made and seconded to adopt the proposed changes to Article 927.17 as presented. The motion passed with no objection, and the adopted proposal reads as follows:

Article 930.5 927.17. Custody pending retrial; ~~bail~~

If a court grants relief under an application for ~~post-conviction~~ postconviction relief vacating the conviction, the court shall order that the ~~petitioner~~ applicant be held in custody pending a new trial if it appears that there are legally sufficient grounds upon which to re prosecute the ~~petitioner~~ applicant.

In such a case, the ~~petitioner~~ applicant shall be entitled to bail on the offense as though he has not been convicted of the offense.

Judge Holdridge then asked the Council to consider Article 927.18, on page 17 of the materials, and explained that this provision allows the court to deviate from the procedures for postconviction relief proceedings upon agreement by both the applicant and the state. He provided the example of the state filing multiple procedural objections, all of which must be determined before proceeding on the merits under Article 927.9(C), but noted that the state may recognize that there is one substantive issue that would be determinative of the entire application. As a result, if the parties agree to proceed to the merits on that one issue, this Article would allow the court to deviate from the otherwise applicable requirements of Article 927.9(C). A motion was then made and seconded to adopt Article 927.18 and its Comment as presented, and the motion passed with no objection. The adopted proposal reads as follows:

Article 927.18. Departure from this Title

Upon joint motion of the applicant and the State, the district court may deviate from the provisions of this Title.

Comments – 2019

Nothing in this Article authorizes the district court to deviate from the provisions of this Title except upon joint motion of the parties. If the district court deviates from these provisions without the consent of both the applicant and the State, either party may file a motion with the district court to remedy the deviation or seek a writ of mandamus to a court with supervisory jurisdiction.

Next, the Council turned to Article 928, on page 17 of the materials, and the Acting Reporter suggested changing “court of appeal” to “appellate court” on line 39 of page 17 in the event that writs are taken to the Supreme Court, and the Council agreed. It was moved and seconded to adopt the proposed changes to Article 928 as amended, and the motion passed with no objection. The adopted proposal reads as follows:

Article 930.6 928. Review of trial district court judgments

A. The ~~petitioner~~ applicant may invoke the supervisory jurisdiction of the court of appeal if the trial court dismisses the application or otherwise denies relief on an application for ~~post-conviction~~ postconviction relief. No appeal lies from a judgment dismissing an application or otherwise denying relief.

B. If a statute or ordinance is declared unconstitutional, the ~~state~~ State may appeal to the ~~supreme court~~ Supreme Court. If relief is granted on any other ground, the ~~state~~ State may invoke the supervisory jurisdiction of the court of appeal.

C. Pending the ~~state's~~ State's application for writs, or ~~pending the state's~~ State's appeal, the district court or the appellate court ~~of appeal~~ may stay the judgment granting relief.

The Acting Reporter then asked the Council to consider Article 929, on page 17 of the materials, and explained that both the Subcommittee and Committee had determined that this provision should be moved to a standalone section of the Code rather than included in the section containing the postconviction relief articles. He also explained that in addition to various changes in terminology, including “postconviction,” “application,” and “applicant,” the Committee suggested codifying the applicable standard in Paragraph D, on page 18 of the materials, as well as changing “integrity” to “chain of custody” for purposes of clarification. After discussing the procedure for the drafting and issuance of orders in the context of DNA testing, Judge Holdridge then explained that the proposed changes in Paragraph G, on page 19 of the materials, were intended to clarify the process that should take place and the protections for the parties in the event that the amount of material is insufficient for other tests to be performed. He also noted that the proposed changes in Subparagraph (H)(1) on the same page were intended to clarify that the court can order production of any evidence relating to the DNA testing.

It was then moved and seconded to adopt the proposed changes to Article 929, at which time the staff attorney explained that “and (4)” on line 7 of page 20 should be restored rather than deleted, and the Council agreed. One Council member then questioned whether the uniform application for postconviction relief forms were required to be used for purposes of requesting DNA testing, and the Acting Reporter explained that Comment (a) on page 21 of the materials was drafted to explain that the answer to this question is no, the uniform form is not required. Another Council member then noted that under Paragraph B on page 18, an application for DNA testing is required to comply with the provisions of Article 927, which requires use of the uniform form. As a result, the Council member suggested replacing “comply with the provisions of” with “contain the information required by” on lines 8 and 9 of page 18, and Judge Holdridge accepted this change. After also discussing whether some sort of form for requests for DNA testing pursuant to this Article should be developed, a vote was taken on the motion to adopt Article 929 as amended and its Comments, and the motion passed with no objection. The adopted proposal reads as follows:

Article 926.1 929. Application for DNA testing

A.(1) Prior to August 31, 2019, a person convicted of a felony may file an application under the provisions of this Article for ~~post-conviction~~ postconviction relief requesting DNA testing of an unknown sample secured in relation to the offense for which he was convicted. On or after August 31, 2019, an applicant may request DNA testing under the rules for filing an application for ~~post-conviction~~ postconviction relief as provided in Article ~~930.4 or 930.8~~ 926 of this Code.

(2) Notwithstanding the provisions of Subparagraph (1) of this Paragraph, in cases in which the defendant has been sentenced to death prior to August 15, 2001, the application for DNA testing under the provisions of this Article may be filed at any time.

B. An application filed under the provisions of this Article shall ~~comply with the provisions of~~ contain the information required by Article ~~926~~ 927 of this Code and shall allege all of the following:

(1) A factual explanation of why there is an articulable doubt, based on competent evidence whether or not introduced at trial, as to the guilt of the ~~petitioner in~~ applicant and that DNA testing will resolve the doubt and establish the innocence of the ~~petitioner~~ applicant.

(2) The factual circumstances establishing the timeliness of the application.

(3) The identification of the particular evidence for which DNA testing is sought.

(4) That the applicant is factually innocent of the crime for which he was convicted, in the form of an affidavit signed by the ~~petitioner~~ applicant under penalty of perjury.

C. In addition to any other reason established by legislation or jurisprudence, and whether based on the ~~petition~~ application and answer or after contradictory hearing, the court shall dismiss any application filed pursuant to this Article unless it finds all of the following:

(1) There is an articulable doubt based on competent evidence, whether or not introduced at trial, as to the guilt of the ~~petitioner~~ applicant and there is a reasonable likelihood that the requested DNA testing will resolve the doubt and establish the innocence of the ~~petitioner~~ applicant. In making this finding the court shall evaluate and consider the evidentiary importance of the DNA sample to be tested.

(2) The application has been timely filed.

(3) The evidence to be tested is available and in a condition that would permit DNA testing.

D. Relief under this Article shall not be granted when the court finds by a preponderance of the evidence that there is a substantial question as to the integrity chain of custody of the evidence to be tested.

E. Relief under this Article shall not be granted solely because there is evidence currently available for DNA testing but the testing was not available or was not done at the time of the conviction.

F. Once an application has been filed and the court determines the location of the evidence sought to be tested, the court shall serve a copy of the application on the ~~district attorney~~ State and the law enforcement agency ~~which that~~ has possession of the evidence to be tested, including but not limited to sheriffs, the office of state police, local police agencies, and crime laboratories. If the court ~~grants relief under this Article and~~ orders DNA testing the court shall also issue such orders as are appropriate to determine the DNA profile of the applicant, to obtain the necessary samples to be tested, and to protect their the integrity of the samples obtained. The testing shall be conducted by a laboratory mutually agreed upon by the ~~district attorney~~ State and the ~~petitioner~~ applicant. If the parties cannot agree, the court shall designate a laboratory to perform the tests ~~which that~~ is accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) in forensic DNA analysis.

G. If in accordance with Paragraph F of this Article the court orders the testing performed at a private laboratory, the ~~district attorney~~ State shall have the right to withhold or obtain a sufficient portion of any unknown sample for purposes of his its independent testing. Under such circumstances, the ~~petitioner~~ applicant shall submit DNA samples to the

~~district attorney~~ State for purposes of comparison with the unknown sample previously retained by the ~~district attorney~~ law enforcement agency. A laboratory selected to perform the analysis shall, if possible, retain and maintain the integrity of a sufficient portion of the unknown sample for replicate testing. If after initial examination of the evidence, but before actual testing, the laboratory decides that there is insufficient ~~evidentially significant~~ material for replicate tests, then it shall notify the ~~district attorney~~ State and the applicant or his attorney in writing of its finding. The laboratory shall take no further steps in examination or testing unless the State and the applicant consent in writing or the court authorizes the testing after a contradictory hearing. If the ~~petitioner~~ applicant and ~~district attorney~~ the State cannot agree, the court shall determine which laboratory as required by Paragraph F of this Article is best suited to conduct the testing and shall fashion its order to allow the laboratory conducting the tests to consume the entirety of the unknown sample for testing purposes if necessary.

H.(1) The results of the DNA testing ordered under this Article shall be filed by the laboratory with the court and served upon the ~~petitioner~~ applicant and the ~~district attorney~~ State. The court may, in its discretion, order production of the underlying facts or data and laboratory notes, and any other evidence relating to the testing as the court may deem appropriate.

(2) After service of the application on the ~~district attorney~~ State and the law enforcement agency in possession of the evidence, no evidence shall be destroyed that is relevant to a case in which an application for DNA testing has been filed until the case has been finally resolved by the court.

(3) After service of the application on the ~~district attorney~~ State and the law enforcement agency in possession of the evidence, the clerks of court of each parish and all law enforcement agencies, including but not limited to ~~district attorneys~~ the State, sheriffs, the office of state police, local police agencies, and crime laboratories shall preserve until August 31, 2019, all items of evidence in their possession ~~which~~ that are known to contain biological material that can be subjected to DNA testing, in all cases that, as of August 15, 2001, have been concluded by a verdict of guilty or a plea of guilty.

(4) In all cases in which the defendant has been sentenced to death prior to August 15, 2001, the clerks of court of each parish and all law enforcement agencies, including but not limited to district attorneys, sheriffs, the office of state police, local police agencies, and crime laboratories shall preserve, until the execution of sentence is completed, all items of evidence in their possession which are known to contain biological material that can be subjected to DNA testing.

(5) Notwithstanding the provisions of ~~Subparagraphs~~ Subparagraph (3) and (4) of this Paragraph, after service of the application on the ~~district attorney~~ State and the law enforcement agency in possession of the evidence, the clerks of court of each parish and all law enforcement agencies, including but not limited to ~~district attorneys~~ the State, sheriffs, the office of state police, local police agencies, and crime laboratories may forward for proper storage and preservation all items of evidence described in Subparagraph (3) of this Paragraph to a laboratory accredited in forensic DNA analysis by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB).

(6) Except in the case of willful or wanton misconduct or gross negligence, no clerk of court or law enforcement officer or law enforcement agency, including but not limited to ~~any district attorney~~ the State or any sheriff, the office of state police, local police agency, or crime laboratory

~~which that~~ is responsible for the storage or preservation of any item of evidence in compliance with either the requirements of Subparagraph (3) of this Paragraph or R.S. 15:621 shall be held civilly or criminally liable for the unavailability or deterioration of any such evidence to the extent that adequate or proper testing cannot be performed on the evidence.

I. The DNA profile of the ~~petitioner~~ applicant obtained pursuant to court order under this Article shall be sent by the ~~district attorney~~ obtaining agency to the state police for inclusion in the state DNA data base established pursuant to R.S. 15:605. The ~~petitioner~~ applicant may seek removal of his DNA record pursuant to R.S. 15:614.

J. The ~~petitioner~~ applicant, in addition to other service requirements, shall mail a copy of the application requesting DNA testing to the Department of Public Safety and Corrections, Corrections Services, office of adult services. If the court grants relief under this Article, the court shall mail a copy of the order to the Department of Public Safety and Corrections, Corrections Services, office of adult services. The Department of Public Safety and Corrections, Corrections Services, office of adult services, shall keep a copy of all records sent to them pursuant to this Subsection Paragraph and report to the legislature ~~before January 1, 2003, each year~~ on the number of ~~petitions~~ applications filed and the number of orders granting relief.

K. There is hereby created in the state treasury a special fund designated as the DNA Testing ~~Post-Conviction~~ Postconviction Relief for Indigents Fund. The fund shall consist of money specially appropriated by the legislature. No other public money may be used to pay for the DNA testing authorized under the provisions of this Article. The fund shall be administered by the Louisiana Indigent Defense Assistance Board. The fund shall be segregated from all other funds and shall be used exclusively for the purposes established under the provisions of this Article. If the court finds that ~~a petitioner~~ an applicant under this Article ~~926.1 of this Code~~ is indigent, and has made a timely request for testing, the fund shall pay for the testing as authorized in the ~~court order~~ court's orders.

Comments – 2019

(a) Paragraph B of this Article requires an application filed under this Article to comply with the provisions of Article 927; however, the uniform application for postconviction relief form does not have to be used by the applicant in requesting DNA testing pursuant this Article.

(b) As provided in Paragraph D of this Article, if the evidence to be tested has been in the custody of a clerk of court or law enforcement agency since it was collected, a court should presume there is no substantial question as to the chain of custody of the evidence.

Next, the Council considered Article 880.1, on page 22 of the materials, and Judge Holdridge explained that this provision requires the clerk of court, the state, and law enforcement agencies to retain evidence in capital or life imprisonment cases. After questioning whether there is a difference between criminalistics and crime laboratories, one Council member suggested replacing “criminalistics” with “crime” on line 7 of page 22, and the Acting Reporter accepted this change. Another Council member then expressed the need for judicial education with respect to this provision and suggested that perhaps some sort of uniform order should be drafted for judges to issue in these types of situations. The Council member also questioned whether the stenographer or court reporter notes must also be preserved in addition to trial transcripts, and the Council discussed the retention policies of various courts as well as the interaction of this provision with the proposed changes to Article 923 on the same page. Ultimately, a motion was

made and seconded to adopt Article 880.1 and its Comment as presented, and the motion passed with no objection. The adopted proposal reads as follows:

Article 880.1. Order to retain evidence

A. If a sentence of death or life imprisonment is imposed, the court shall order the clerk, the State, and the appropriate law enforcement agency or agencies, including criminalistics laboratories, to retain all evidence, records, and transcripts relating to the case until the sentence is executed, served, or set aside.


B. In other cases, the court may enter such an order as may be deemed appropriate in the interest of justice.

Comments – 2019

A state actor that violates the provisions of this Article may subject itself to contempt of court, if appropriate. See Articles 20 through 25. This statutory duty is not intended to alter the test to determine whether the failure to preserve potentially useful evidence violates a criminal defendant's right to due process of law. See *State v. Lindsey*, 543 So. 2d 886, 890-892 (La. 1989), *cert. denied*, 494 U.S. 1074 (1990) (approving *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988); *California v. Trombetta*, 467 U.S. 479 (1984)); *see also State v. Manning*, 885 So.2d 1044, 1094, n. 33 (La. 2004).

Finally, the Council considered the Committee's draft report in response to House Resolution No. 200 of the 2017 Regular Session, which directed the Law Institute to review the justice reinvestment legislation and to recommend changes to correct inconsistencies with other provisions of Louisiana law. The Acting Reporter explained that the Committee had reviewed summaries prepared by various entities with respect to the legislation and its impacts as well as issues that were submitted to the Committee for consideration and subsequent legislation during the 2018 Regular Session that addressed many of these perceived problems. Ultimately, the Committee concluded that there were two issues that may need to be addressed: the repeal of the cheating and swindling statute, which, after review, was a provision that the Committee determined was not being used and therefore was unnecessary; and an inconsistency caused by a legislative database error that resulted in a reversion of the text of the statutes on drug division and substance abuse probation programs. As a result, Judge Holdridge explained that the Committee recommended two amendments to the legislature, which could be found on pages 10 through 13 of the materials. It was then moved and seconded to adopt the draft report as presented, and the motion passed with no objection.

At this time, Judge Holdridge concluded his presentation, and the December 2018 Council meeting was adjourned.


Mallory C. Waller

MEMBERSHIP AND NOMINATING COMMITTEE REPORT
December 14, 2018

This committee respectfully makes the following nominations of officers and members to fill vacancies on the Council of the Louisiana State Law Institute for 2019 as follows:

OFFICERS OF THE INSTITUTE-2019

As Chair:

John David Ziober; 320 Somerulos Street, Baton Rouge, Louisiana, 70802.

Chair Emeriti:

James C. Crigler, Jr.; 1808 Roselawn Avenue, Monroe, Louisiana, 71201.

J. David Garrett; 526 Cumberland Drive, Shreveport, Louisiana, 71106.

James A. Gray, II; 1010 Common Street, Suite 2560, New Orleans, Louisiana, 70112-2406.

Charles S. Weems, III; 2001 MacArthur Drive, P.O. Box 6118, Alexandria, Louisiana, 71307-6118.

Cordell H. Haymon; 725 Main Street, Baton Rouge, Louisiana, 70802-5594.

Marilyn C. Maloney; First City Tower, 1001 Fannin, Suite 1800, Houston, Texas, 77002.

Thomas M. Bergstedt; P.O. Drawer 3004, Lake Charles, Louisiana, 70602.

Emmett C. Sole; One Lakeside Plaza, P.O. Box 2900, Lake Charles, Louisiana, 70602-2900.

Max Nathan, Jr.; Place St. Charles, 201 St. Charles Avenue, Suite 3815, New Orleans, Louisiana, 70170.

Robert L. Curry, III; P.O. Drawer 4768, Monroe, Louisiana, 71211.

As President:

Susan G. Talley; 546 Carondelet Street, New Orleans, Louisiana, 70130.

As Vice-Presidents:

Rick J. Norman; 145 East Street, Lake Charles, Louisiana, 70601.

L. David Cromwell; P.O. Box 1786, Shreveport, Louisiana, 71166-1786.

Thomas M. Hayes, III; P.O. Box 8032, Monroe, Louisiana, 71211-8032.

Leo Hamilton; One American Place, 301 Main Street, Suite 2300, Baton Rouge, Louisiana, 70825.

As Director:

Guy Holdridge; 1600 N. Third Street, Baton Rouge, Louisiana, 70802.

As Assistant Director:

Charles S. Weems, III; 2001 MacArthur Drive, P.O. Box 6118, Alexandria, Louisiana, 71307-6118.

As Secretary:

Thomas C. Galligan, Jr.; Paul M. Hebert Law Center, Room 350, University Station, Baton Rouge, Louisiana, 70803.

As Assistant Secretary:

Robert "Bob" W. Kostelka; 1216 Stubbs Avenue, Monroe, Louisiana, 71201.

As Treasurer:

Joseph W. Mengis; P.O. Drawer 83260, Baton Rouge, Louisiana, 70884.

As Assistant Treasurer:

Glenn Morris; Paul M. Hebert Law Center, Room 348, University Station, Baton Rouge, Louisiana, 70803.

SENIOR OFFICER:

Marguerite "Peggy" L. Adams; 701 Poydras Street, 50th Floor, New Orleans, Louisiana, 70139.

EXECUTIVE COMMITTEE:

For one-year terms expiring December 31, 2019

Robert P. Thibeaux; Energy Centre, 1100 Poydras Street, Suite 3100, New Orleans, Louisiana, 70163.

J. Randall Trahan; Paul M. Hebert Law Center, Room 338, University Station, Baton Rouge, Louisiana, 70803.

Gregory A. Miller; P.O. Box 190, Norco, Louisiana, 70079.

PRACTICING ATTORNEYS ELECTED AS MEMBER:

For one-year term expiring December 31, 2019

John D. Crigler; P.O. Box 708, St. Joseph, Louisiana, 71366.

PRACTICING ATTORNEYS ELECTED AS MEMBER:

For two-year term expiring December 31, 2020

Amy Elizabeth Allums Lee; 200 W. Congress Street, Suite 900, Lafayette, Louisiana, 70501.

PRACTICING ATTORNEYS ELECTED AS MEMBER:

For three-year term expiring December 31, 2021

Benjamin West Janke; 201 Saint Charles Avenue, Suite 3600, New Orleans, Louisiana, 70170.

PRACTICING ATTORNEYS ELECTED AS MEMBERS:

For four-year terms expiring December 31, 2022

Billy J. Domingue; P.O. Box 52008, Lafayette, Louisiana, 70505-2008.

Lila T. Hogan; P.O. Box 1274, Hammond, Louisiana, 70404.

REPRESENTATIVE OF THE YOUNG LAWYERS SECTION:
For two-year term expiring December 31, 2020

Todd Charles Taranto; 21454 Koop Drive, Suite 2G, Mandeville, Louisiana, 70471.

OBSERVERS OF THE YOUNG LAWYERS SECTION:
For one-year terms expiring December 31, 2019

Jeffrey Coreil; One Petroleum Center, 1001 West Pinhook Road, Suite 200, Lafayette, Louisiana, 70503.

Rachal D. Cox; 301 Main Street, Suite 1400, Baton Rouge, Louisiana, 70801.

THREE HONOR GRADUATES OF EACH LAW SCHOOL NOMINATED FOR
JUNIOR MEMBERSHIP IN THE INSTITUTE:
For one-year terms expiring December 31, 2019

PAUL M. HEBERT LAW CENTER

Endya L. Hash; 909 Poydras Street, Suite 2500, New Orleans, Louisiana, 70112.

Kristin Oglesby; 525 Lafayette Street, Apartment 1002, Baton Rouge, Louisiana.

Jessica M. Thomas; 5248 Savannah Lane, Marrero, Louisiana, 70072.

LOYOLA UNIVERSITY SCHOOL OF LAW

Courtney Harper; 531 1/2 Orion Avenue, Metairie, Louisiana, 70005.

Kristina Lagasse; 201 St. Charles Avenue, 40th Floor, New Orleans, Louisiana, 70170-4000.

Violet Obicha; 6215 Perlita Street, New Orleans, Louisiana, 70122.

SOUTHERN UNIVERSITY LAW CENTER

Michelle Gros; 36311 West Pine Grove Court, Prairieville, Louisiana, 70769.

Kolby Marchand; 36428 Miller Road, Prairieville, Louisiana, 70769.

Mrs. Morgan Blanchard Robertson; 10171 Hillmont Avenue, Baton Rouge, Louisiana, 70810.

TULANE UNIVERSITY SCHOOL OF LAW

Clerc Cooper; 7625 Burthe Street, New Orleans, Louisiana, 70118.

Madeline Flores; 500 Poydras Street, Room C367, New Orleans, Louisiana, 70130.

Annie Hundley; 600 Camp Street, Room 219, New Orleans, Louisiana, 70130-3425.

APPOINTMENTS BY OPERATION OF LAW

ANY LOUISIANA MEMBER OF THE BOARD OF GOVERNORS OF THE NATIONAL BAR ASSOCIATION

For one-year term expiring August 2, 2019

Christopher B. Hebert; 4552 Winnebago Street, Baton Rouge, Louisiana, 70805.

A LOUISIANA MEMBER OF THE NATIONAL BAR ASSOCIATION TO BE APPOINTED BY THE PRESIDENT OF THE ORGANIZATION

For one-year expiring August 2, 2019

Arlene D. Knighten; Louisiana Department of Insurance, P.O. Box 9412, Baton Rouge, Louisiana, 70804.

THE PRESIDENT OF THE STATE CHAPTER OF THE LOUIS A. MARTINET SOCIETY OR HIS DESIGNEE

For one-year term expiring December 31, 2019

Quintillis Kenyatta Lawrence; 300 North Boulevard, Suite 2201, Baton Rouge, Louisiana, 70801.

THE STATE PUBLIC DEFENDER OR HIS DESIGNEE

For one-year term expiring December 31, 2019

John E. DiGiulio; 8075 Jefferson Highway, Baton Rouge, Louisiana, 70809.

REPRESENTATIVE, DISTRICT COURTS

For four-year term expiring October 29, 2022

C. Wendell Manning; Fourth Judicial District, 300 St John Street, Suite 400, Monroe, Louisiana, 70201.

REPRESENTATIVE, FEDERAL COURTS
For four-year term expiring December 31, 2022

Brian A. Jackson; 777 Florida Street Suite 375, Baton Rouge, Louisiana, 70801.

MEMBER, HOUSE OF DELEGATES, ABA
For two-year terms expiring August 2020

David F. Bienvenu; 1100 Poydras Street, Suite 3000, New Orleans, Louisiana, 70163-3000.

Jeanne C. Comeaux; 301 Main Street, Floor 23, Baton Rouge, Louisiana, 70801.

Robert A. Kutcher; 3850 N. Causeway Boulevard, Suite 900, Metairie, Louisiana, 70002-8130.

Michael W. McKay; 301 Main Street, Suite 1150, Baton Rouge, Louisiana, 70801.

John H. Musser, IV; 70439 Courtano Drive, Covington, Louisiana, 70433.

Frank K. Neuner, Jr.; 1001 West Pinhook Road, Suite 200, Lafayette, Louisiana, 70503.

Graham H. Ryan; 201 Saint Charles Avenue, Suite 5100, New Orleans, Louisiana, 70170.

Respectfully submitted,

L. David Cromwell

Kevin C. Curry

Leo C. Hamilton

Thomas M. Hayes, III

Emmett C. Sole

Monica T. Surprenant

Susan G. Talley

John David Ziober

MEMBERSHIP AND NOMINATING COMMITTEE

By:



Emmett C. Sole, Chair

December 14, 2018