

# LOUISIANA STATE LAW INSTITUTE

## MEETING OF THE COUNCIL

February 8-9, 2019

**Friday, February 8, 2019**

### **Persons Present:**

Alonso, Pam	Kostelka, Robert "Bob" W.
Baker, Amanda	Kunkel, Nick
Belanger, Kathryn	Kutcher, Robert A.
Bergstedt, Thomas M.	Lavergne, Luke A.
Bonaventure, Carla	Lee, Amy Allums
Breard, L. Kent	Leefe, Richard K.
Brister, Dorrell	LeJeune, Darrel
Castle, Marilyn	Little, F.A., Jr.
Comeaux, Jeanne. C.	Lonegrass, Melissa T.
Crigler, James C., Jr.	Maloney, Marilyn C.
Crigler, John D.	Manning, C. Wendell
Cromwell, L. David	Mengis, Joseph W.
Curry, Kevin C.	Milazzo, Shane
Curry, Robert L., III	Morris, Glenn G.
Davidson, James J., III	Norman, Rick J.
Dawkins, Robert G.	North, Donald W.
Dimos, Jimmy N.	Philips, Harry "Skip", Jr.
Doguet, Andre'	Price, Donald W.
Domingue, Billy J.	Richardson, Sally Brown
Eagan, Jennifer	Riviere, Christopher H.
Forrester, William R., Jr.	Robertson, Morgan Blanchard
Garofalo, Raymond, E., Jr.	Saloom, Douglas J.
Gasaway, Grace B.	Scalise, Ronald J., Jr.
Gregorie, Isaac M. "Mack"	Singletary, Robert
Hamilton, Leo C.	Stuckey, James A.
Hash, Endya L.	Surprenant, Monica T.
Hawkland, Steve	Talley, Susan G.
Hayes, Thomas M., III	Taranto, Todd Charles
Haymon, Cordell H.	Tate, George J.
Hester, Mary C.	Thibeaux, Robert P.
Hogan, Lila T.	Title, Peter S.
Holdridge, Guy	Thomas, Kacy Collins
Jackson, Brian A.	Veron, J. Michael
Janke, Benjamin West	Waller, Mallory
Jennings, Alan	Weems, Charles S., III
Jewell, John Wayne	White, H. Aubrey
Johnson, Pamela Taylor	Wilson, Evelyn L.
Knighten, Arlene D.	Ziober, John David

President Susan G. Talley called the February 2019 Council meeting to order at 10:00 a.m. on Friday, February 8, 2019, at the Lod Cook Alumni Center in Baton Rouge. After asking the Council members to briefly introduce themselves, the President called on Mr. William R. Forrester, Jr., Reporter of the Code of Civil Procedure Committee, to begin his presentation of materials.

### **Code of Civil Procedure Committee**

Mr. Forrester suggested that the Council first consider the issue presented by House Concurrent Resolution No. 88 of the 2018 Regular Session, which urges and requests the Law Institute to study the effects of enacting a law that would allow courts to raise the exception of prescription sua sponte. He reminded the Council that both the Code of Civil Procedure and Prescription Committees had considered this issue, which

specifically concerned prescription in the context of consumer debts and the interaction between Louisiana law and the federal Fair Debt Collection Practices Act. Mr. Forrester then asked Professor Ronald J. Scalise, Jr., Reporter of the Prescription Committee, to further explain the draft report to the Council. Professor Scalise began by noting that the draft report first explains why Louisiana's longstanding rule that prescription must be pled and cannot be supplied by the court should be preserved, which is consistent with the French, German, Greek, and Dutch Codes as well as international conventions and other common law jurisdictions that also employ this rule. However, he also noted that the Committees recognized the concern with respect to the ability of debt collectors to obtain default judgments on prescribed debts that result in unenforceable obligations being treated as effective because unrepresented consumers fail to plead prescription. To address this concern, Professor Scalise explained that the Committees recommend a more nuanced and narrowly tailored approach, particularly in light of the overarching application of the federal Fair Debt Collection Practices Act, and he directed the Council's attention to the proposed amendments to Civil Code Article 3452 and Code of Civil Procedure Articles 927 and 1702, on pages 3 through 5 of the draft report.

The Council then considered the proposed addition of Code of Civil Procedure Article 1702(D), on page 5 of the draft report, which would apply only to demands on open accounts, promissory notes, or other negotiable instruments that the plaintiff acquired by assignment. Professor Scalise explained that this provision would allow courts to raise the issue of prescription on their own motion in these limited circumstances, at which time the plaintiff would be required to present prima facie proof that the action has not prescribed. A motion was made and seconded to adopt the proposed amendments to Article 1702, and the Council discussed the meaning of "assignment" as any type of transfer as well as whether the prima facie proof presented by the plaintiff in such situations should be accompanied by an affidavit. One Council member then questioned whether this provision would only apply to district courts, since city courts have a different default judgment procedure, and the Council agreed that a similar provision should be added to Code of Civil Procedure Article 4904 and that the introductory language in Article 927 should be amended accordingly. Council members then discussed the procedures that will be followed by the court in the event that it raises the issue of prescription on its own motion and concluded that the court should not enter a final default judgment but also should not automatically dismiss the case, because perhaps the plaintiff would be able to submit additional evidence at a subsequent hearing or in an amended petition. Professor Scalise further explained that the intent of this proposal is to provide the court with some sort of alternative option in these types of cases, whereas currently, the court cannot raise the issue on its own and may only confirm the default judgment. One Council member then questioned the applicability of this provision in the context of appellate courts, and another Council member responded by explaining that the court of appeal would likely remand the case to the district court for further proceedings. The Council then discussed other issues, such as requiring the plaintiff to notify the defendant that the court has raised the issue of prescription, as well as limiting this provision to negotiable instruments as opposed to those that are not negotiated. Ultimately, the motion to adopt Article 1702(D) as presented was amended to include replicating this provision in Article 4904(D) and Article 4921(C) with respect to justices of the peace, as well as to add references to both of these provisions in Article 927(B) and to approve that article as amended and Civil Code Article 3452 as presented. The motion passed with no objection, and the adopted proposals read as follows:

#### **Civil Code Article 3452. Necessity for pleading prescription**

Prescription must be pleaded. Courts Except as otherwise provided by legislation, courts may not supply a plea of prescription.

#### **Code of Civil Procedure Article 927. Objections raised by peremptory exception**

\* \* \*

B. The Except as otherwise provided by Articles 1702(D), 4904(D), and 4921(C), the court may not supply the objection of prescription, which

shall be specially pleaded. The nonjoinder of a party, peremption, res judicata, the failure to disclose a cause of action or a right or interest in the plaintiff to institute the suit, or discharge in bankruptcy, may be noticed by either the trial or appellate court on its own motion.

**Code of Civil Procedure Article 1702. Confirmation of preliminary default**

\* \* \*

D. When the demand is based on an open account, promissory note, or other negotiable instrument that the plaintiff acquired by assignment, the court may raise an objection of prescription before entering a final default judgment if the grounds for the objection appear from the pleadings or from the evidence submitted by the plaintiff. In that event, the court shall not enter the final default judgment unless the plaintiff presents prima facie proof that the action is not barred by prescription. If the plaintiff requests, the court shall hold a hearing for the submission of such proof.

~~D.~~ E. When the demand is based upon a claim for a personal injury, a sworn narrative report of the treating physician or dentist may be offered in lieu of his testimony.

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

**Code of Civil Procedure Article 4904. Final default judgment in parish and city courts**

\* \* \*

D. When the demand is based on an open account, promissory note, or other negotiable instrument that the plaintiff acquired by assignment, the court may raise an objection of prescription before entering a final default judgment if the grounds for the objection appear from the pleadings or from the evidence submitted by the plaintiff. In that event, the court shall not enter the final default judgment unless the plaintiff presents prima facie proof that the action is not barred by prescription. If the plaintiff requests, the court shall hold a hearing for the submission of such proof.

**Code of Civil Procedure Article 4921. Final default judgment; justice of the peace courts; district courts with concurrent jurisdiction**

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C. When the demand is based on an open account, promissory note, or other negotiable instrument that the plaintiff acquired by assignment, the court may raise an objection of prescription before entering a final default judgment if the grounds for the objection appear from the pleadings or from the evidence submitted by the plaintiff. In that event, the court shall not enter the final default judgment unless the plaintiff presents prima facie proof that the action is not barred by prescription. If the plaintiff requests, the court shall hold a hearing for the submission of such proof.

Next, the Reporter asked the Council to consider Article 1561(A), on page 9 of the materials, concerning consolidation. Mr. Forrester explained that the Committee recommended adding “or pre-trial purposes” on line 7 of page 9 to allow courts to consolidate actions not only for the trial, but also for discovery, scheduling, and other matters that occur prior to the trial. One Council member then explained that courts were already doing this, and another Council member suggested changing “purposes” to “proceedings” on lines 7 and 26 of page 9. The Reporter accepted that change, and a motion was then made and seconded to adopt Article 1561(A) as amended. The motion passed with no objection, and the adopted proposal reads as follows:

**Article 1561. Consolidation for trial**

A. When two or more separate actions are pending in the same court, the section or division of the court in which the first filed action is pending may order consolidation of the actions for trial or pre-trial proceedings after a contradictory hearing, and upon a finding that common issues of fact and law predominate, and, in the event a trial date has been set in a subsequently filed action, upon a finding that consolidation is in the interest of justice. The contradictory hearing may be waived upon the certification by the mover that all parties in all cases to be consolidated consent to the consolidation.

\* \* \*

**Comments – 2019**

The amendment to this Article to allow the court in its discretion to consolidate two or more separate actions for pre-trial proceedings is intended to legislatively overrule the decision of the Fourth Circuit Court of Appeal in *Boh v. James Indus. Contractors, LLC*, 868 So. 2d 180 (La. App. 4 Cir. 2004).

Next, the Council considered Articles 1793(D) and 1795, on pages 12 and 13 of the materials. The Reporter explained that the amendment to Article 1795 is intended to clarify that when the jury requests review of certain testimony during its deliberations, the jury must be conducted to the courtroom and may not take depositions, trial transcripts, or other testimony into the jury room. Additionally, Article 1793(D) was amended to remove the requirement under the Code of Criminal Procedure that the jury may only take evidence into the jury room when a physical examination of the evidence is required for the jury to reach a verdict; rather, the jury can take into the jury room any object or writing received into evidence, except depositions or as otherwise provided in the Code of Evidence. A motion was then made and seconded to adopt the proposed amendments to Articles 1793(D) and 1795, at which time one Council member questioned whether Article 1795 should be limited to testimony rather than other evidence, providing the example that if the jury requests to see blueprints, the judge can simply send the blueprints into the jury room without the jury having to come into the courtroom. After this discussion, a motion was made and seconded to change “evidence” to “testimony” on line 1 of page 13, to delete “or other evidence” on lines 3 and 4 of the same page, and to

combine Paragraphs A and B of Article 1795 into a single sentence. The motion passed without objection, and the Council authorized the Reporter to make changes to the Comment as appropriate. A motion was then made and seconded to adopt Article 1793(D) as presented and Article 1795 as amended, and this motion also passed without objection. The adopted proposals read as follows:

**Article 1793. Instructions to jury; objections**

\* \* \*

D. The jury may take with it or have sent to it a written copy of all instructions and charges ~~and any object or document received in evidence when a physical examination thereof is required to enable the jury to arrive at a verdict.~~

**Comments – 2019**

Paragraph D of this Article has been amended to delete the requirement that the jury may only take evidence into the jury room when a physical examination of the evidence is required to enable the jury to arrive at a verdict. This language incorrectly imposed the criminal rule of Code of Criminal Procedure Article 793(A), which states that “the jury may take with it or have sent to it any object or document received in evidence when a physical examination thereof is required to enable the jury to arrive at a verdict.” In civil proceedings, Article 1794(B) permits the jury to take with them into the deliberation room any object or writing received in evidence, except depositions and except as otherwise provided in the Louisiana Code of Evidence.

**Article 1795. Jury request to review evidence testimony**

A. If the jury, after retiring for deliberation, requests a review of certain testimony ~~or other evidence~~, they shall be conducted to the courtroom. After giving notice to the parties, the court may have the requested testimony read to the jury.

~~B. After giving notice to the parties, the court may have the requested testimony read to the jury and may permit the jury to examine the requested materials admitted into evidence.~~

**Comments – 2019**

This Article has been amended to clarify a misunderstanding concerning the review of testimony by the jury. Under this Article, when the jury retires for deliberation and later requests review of certain testimony, the jury must be conducted to the courtroom where, after notifying the parties, the requested testimony may be read to the jury; however, the jury may not take depositions, trial transcripts, or other testimony into the jury room for examination. Because Article 1794 already permits the jury to take with it any object or writing received into evidence, except depositions and except as otherwise provided by the Code of Evidence, the references to “other evidence” and “materials” have been deleted to eliminate confusion.

Mr. Forrester then asked the Council to turn to Article 893, on page 14 of the materials, and explained that the proposed amendment was intended to make this provision consistent with Article 863, which allows the court to impose sanctions not only on the party, but also on the party’s attorney if the party’s attorney filed the petition on the party’s behalf. In other words, Article 893 would now be consistent with Article 863 by permitting the court to impose sanctions upon an attorney who signs the petition, the party on whose behalf the petition is filed, or both. A motion was made and seconded to adopt the proposed amendments to Article 893 as presented, and the motion passed with no objection. The adopted proposal reads as follows:

## Article 893. Pleading of damages

A.(1) No specific monetary amount of damages shall be included in the allegations or prayer for relief of any original, amended, or incidental demand. The prayer for relief shall be for such damages as are reasonable in the premises except that if a specific amount of damages is necessary to establish the jurisdiction of the court, the right to a jury trial, the lack of jurisdiction of federal courts due to insufficiency of damages, or for other purposes, a general allegation that the claim exceeds or is less than the requisite amount is required. By interrogatory, an opposing party may seek specification of the amount sought as damages, and the response may thereafter be supplemented as appropriate.

(2) If a petition is filed in violation of this Article, the claim for a specific monetary amount of damages shall be stricken upon the motion of an opposing party and the court may award ~~attorney's~~ attorney fees and costs against the person who signed the petition, the party who filed on whose behalf the petition was filed, or both.

B. The provisions of Paragraph A of this Article shall not be applicable to a suit on a conventional obligation, promissory note, open account, or other negotiable instrument, for alimony or child support, on a tax claim, or in a garnishment proceeding.

C. The prohibitions in Paragraph A of this Article apply only to an original, amended, or incidental demand. Evidence at trial or hearing of a specific monetary amount of damages shall be adduced in accordance with the Louisiana Code of Evidence or other applicable law.

### Comments – 2019

The amendment to Paragraph (A)(2) of this Article is intended to make this provision consistent with Article 863, which permits the court to impose sanctions for the improper certification of a pleading against the person who made the certification, the represented party, or both.

Next, the Council turned to Article 4847, on page 15 of the materials, and the Reporter explained that this provision should be recommitted in light of the concern that parish or city courts may deal with custody, spousal support, or child support issues in the context of issuing protective orders. As a result, a motion was made and seconded to recommit Article 4847, and the motion passed with no objection. The Council then considered Article 4913, on pages 15 and 16 of the materials, concerning justices of the peace, particularly the proposed amendment to Paragraph (B)(4) on page 16. After one Council member noted that the phrase “separation from bed and board” is still used in the covenant marriage context in R.S. 9:307 and 308, it was suggested that this phrase should be restored on line 6 of page 16. The Reporter and the Council agreed, and a motion was then made and seconded to adopt Article 4913(B)(4) as amended. The motion passed with no objection, and the adopted proposal reads as follows:

## **Article 4913. Limitations upon jurisdiction; nature of proceedings; justice of the peace courts**

\* \* \*

B. A justice of the peace court has no jurisdiction in any of the following cases or proceedings:

\* \* \*

(4) A claim for annulment of marriage, separation from bed and board, divorce, separation of property, ~~or alimony~~ custody, spousal support, or child support.

Next, Mr. Forrester directed the Council's attention to the issue of decretal language, beginning with Article 1918 on page 1 of the materials. He explained that presently, courts of appeal are facing an issue in that if a judgment lacks the requisite decretal language, it is not considered to be a "final judgment." As a result, the court of appeal has no jurisdiction over the case and cannot remand the judgment; rather, the court has no choice but to dismiss the case. The Reporter then explained that the language on lines 8 through 10 of page 1 is intended to address this issue, but he questioned whether this amendment would contradict the language of Article 1951, which by its nature does not allow amendments to the substance of a judgment and would presumably include the absence of decretal language. Judge Holdridge responded to this concern by explaining that typically, the attorneys for the parties prepare the judgment, which is then signed by the judge, and everyone involved in the case knows what the judgment is supposed to be, even if it does not specify the names of the parties or the relief that is granted other than, for example, "the motion for summary judgment is granted." Judge Holdridge also noted that not allowing the court of appeals to remand the case and forcing them to dismiss for lack of subject matter jurisdiction creates all sorts of issues with respect to appellate delays and executions of judgments. He also noted that Article 1841 defines a final judgment as a judgment that determines the merits in whole or in part.

A motion was then made and seconded to adopt the proposed amendments to Article 1918, and a great deal of discussion with respect to this issue ensued. Specifically, one Council member expressed concern about courts of appeal receiving a partial final judgment under Article 1915(B) with no designation and supplying the designation themselves. Other Council members responded by explaining that although courts of appeal will not supply the designation themselves, they will sometimes supply the reasons for the designation if one is present. Another Council member then noted that some circuits will issue a rule to show cause to the trial court specifying that if the judgment is not amended to add the proper designation under Article 1915(B), the case will be dismissed by the court of appeal for lack of subject matter jurisdiction. Other circuits disagree with this approach, however, taking the position that they cannot issue a rule to show cause in a case over which they have no jurisdiction.

At this time, the Reporter again expressed his concern that the language on lines 8 through 10 of page 1 is crossing the line from purely technical to somewhat substantive. One Council member then expressed that in her view, the requirements of Article 1911 concerning the designation required of partial final judgments are hyper technical and perhaps should be amended, and another Council member noted that every circuit has now taken the position that the lack of decretal language in a final judgment is jurisdictional. Another Council member responded by expressing his concern that every single judgment must now include the words "this is a final judgment" even though it may be clear from the record, such as in a case where there is one plaintiff, one defendant, and the judgment says "motion for summary judgment is granted." One Council member then echoed the concerns with respect to the "designation or" language on line 9 of page 1, suggesting that the qualification of "when required" should be added or that the phrase should simply be deleted. As a result, a motion was made and seconded to delete "designation or" from line 9 of page 1, and the motion passed with no objection. The Council then discussed that Comment (c) to Article 1918 would also need to be deleted, and the Reporter agreed to make that change. Another Council member suggested that "in favor of whom the ruling is ordered" should be changed to "in whose favor the relief is awarded" on line 7 of page 1, that "the ruling is ordered" should be changed to "the relief is awarded" on lines 7 and 8, and that "ordered" should be changed to "awarded" on line 8 of the same page. The Council agreed, and a motion was made and seconded to adopt Article 1918 as amended. The motion passed with no objection, and the adopted proposal reads as follows:

## **Article 1918. Form of final judgment**

A. A final judgment in accordance with Article 1841 shall be identified as such by appropriate language; shall be signed and dated; and shall, in its decree, identify the name of the party in whose favor the relief is awarded, the name of the party against whom the relief is awarded, and the relief that is awarded. A final judgment that does not contain the appropriate decretal language shall be remanded by the appellate court to the trial court where it may be amended in accordance with Article 1951.

B. When written reasons for the judgment are assigned, they shall be set out in an opinion separate from the judgment.

### **Comments – 2019**

(a) The amendments to this Article are intended to codify Louisiana jurisprudence providing that a final judgment must contain decretal language that identifies the party in favor of whom the ruling is ordered, the party against whom the ruling is ordered, and the relief that is granted or denied. *See, e.g., Matter of Succession of Porche*, 213 So. 3d 401 (La. App. 1 Cir. 2017); *Abshire v. Town of Gueydan*, 208 So. 3d 405 (La. App. 3 Cir. 2016); *Schiff v. Pollard*, 222 So. 3d 867 (La. App. 4 Cir. 2017); *Contreras v. Vesper*, 202 So. 3d 1186 (La. App. 5 Cir. 2016). The issue of whether a judgment constitutes a final judgment should be determined in accordance with Article 1841, which provides that “[a] judgment that determines the merits in whole or in part is a final judgment.” A judgment’s lack of proper decretal language should not divest the appellate court of jurisdiction but should instead be considered a flaw in the judgment that may be corrected by an amendment in accordance with Article 1951.

(b) These amendments are consistent with existing requirements pertaining to final judgments affecting immovable property under Article 1919 and granting an injunction or temporary restraining order under Article 3605.

Next, the Council considered Article 1951 on pages 2 and 3 of the materials. Judge Holdridge explained that “or a proper designation in accordance with Article 1915(B)” would need to be removed from line 43 of page 1, and he also suggested deleting “but not its substance” on line 42 of the same page and instead inserting a new second sentence to read as follows: “A final judgment may not be amended under this Article to change its substance.” The Council agreed with these suggestions, and a motion was made and seconded to adopt Article 1951 as amended. The motion passed with no objection, and the adopted proposal reads as follows:

## **Article 1951. Amendment of judgment**

On motion of the court or any party, a final judgment may be amended at any time to alter the phraseology of the judgment, ~~but not its substance~~, or to correct deficiencies in the decretal language or errors of calculation. A final judgment may not be amended under this Article to change its substance. The judgment may be amended only after a hearing with notice to all parties, except that a hearing is not required if all parties consent or if the court or the party submitting the amended judgment certifies that it was provided to all parties at least five days before the amendment and that no opposition has been received.

Mr. Forrester then directed the Council’s attention to Article 2088, on page 10 of the materials, and a motion was quickly made and seconded to adopt the proposed clarification that the trial court retains jurisdiction for purposes of setting the amount of attorney fees after an appeal has been taken. The motion passed without objection, and the adopted proposal reads as follows:



## **Article 2088. Divesting of jurisdiction of trial court**

A. The jurisdiction of the trial court over all matters in the case reviewable under the appeal is divested, and that of the appellate court attaches, on the granting of the order of appeal and the timely filing of the appeal bond, in the case of a suspensive appeal or on the granting of the order of appeal, in the case of a devolutive appeal. Thereafter, the trial court has jurisdiction in the case only over those matters not reviewable under the appeal, including the right to do any of the following:

- (1) Allow the taking of a deposition, as provided in Article 1433<sub>2</sub>;
- (2) Extend the return day of the appeal, as provided in Article 2125<sub>2</sub>;
- (3) Make, or permit the making of, a written narrative of the facts of the case, as provided in Article 2131<sub>2</sub>;
- (4) Correct any misstatement, irregularity, informality, or omission of the trial record, as provided in Article 2132<sub>2</sub>;
- (5) Test the solvency of the surety on the appeal bond as of the date of its filing or subsequently, consider objections to the form, substance, and sufficiency of the appeal bond, and permit the curing thereof, as provided in Articles 5123, 5124, and 5126<sub>2</sub>;
- (6) Grant an appeal to another party<sub>2</sub>;
- (7) Execute or give effect to the judgment when its execution or effect is not suspended by the appeal<sub>2</sub>;
- (8) Enter orders permitting the deposit of sums of money within the meaning of Article 4658 of this Code<sub>2</sub>;
- (9) Impose the penalties provided by Article 2126, or dismiss the appeal, when the appellant fails to timely pay the estimated costs or the difference between the estimated costs and the actual costs of the appeal<sub>2</sub> of<sub>2</sub>;
- (10) Set and tax costs, ~~and~~ expert witness fees, and attorney fees.

B. In the case of a suspensive appeal, when the appeal bond is not timely filed and the suspensive appeal is thereby not perfected, the trial court maintains jurisdiction to convert the suspensive appeal to a devolutive appeal, except in an eviction case.

### **Comments – 2019**

The amendment to Subparagraph (A)(10) of this Article clarifies that the trial court retains jurisdiction for purposes of setting attorney fees after an appeal has been taken from the initial judgment. Trial courts award reasonable attorney fees in many judgments, but often these judgments are appealed prior to the setting of the attorney fees. Prior to this amendment, many appellate courts were dismissing the appeal in order to allow the trial court to set the amount of the attorney fees. This amendment is intended to solve that problem by providing that the trial court has the right to set attorney fees while the appeal is pending.

Next, the Council considered the proposed amendments to Article 592(A)(3), on pages 4 and 5 of the materials. The Reporter explained that the Council had previously approved an amendment to Article 592(A)(3)(e), but after additional review by the Committee, it had determined that this provision should simply be deleted. After discussion concerning the fact that courts are already allowing motions and exceptions

that are dispositive of common issues to be resolved prior to certification of the class action – and that both plaintiff and defense attorneys agree that this should be the case – a motion was made and seconded to adopt the proposed revisions on pages 4 and 5 of the materials as presented. The motion passed with no objection, and the adopted proposal reads as follows:

**Article 592. Certification procedure; notice; judgment; orders**

A.(1) \* \* \*

\* \* \*

(3)(a) \* \* \*

\* \* \*

(c) If the court finds that the action should be maintained as a class action, it shall certify the action accordingly. If the court finds that the action should not be maintained as a class action, the action may continue between the named parties. In either event, the court shall give in writing its findings of fact and reasons for judgment provided a request is made not later than ten days after notice of the order or judgment. A suspensive or devolutive appeal, as provided in Article 2081 et seq. of the Code of Civil Procedure, may be taken as a matter of right from an order or judgment provided for herein.

\* \* \*

~~(e) No order contemplated in this Subparagraph shall be rendered after a judgment or partial judgment on the merits of common issues has been rendered against the party opposing the class and over such party's objection.~~

\* \* \*

**Comments – 2019**

Subsubparagraph (A)(3)(e) of this Article has been repealed. This amendment is intended to recognize a series of jurisprudential decisions permitting motions and exceptions that are dispositive of common and determinative issues to be resolved prior to certification of the class action. *See, e.g., Cooper v. CVS Caremark Corporation*, 176 So. 3d 422 (La. App. 1 Cir. 2015); *Smith v. City of New Orleans*, 131 So. 3d 511 (La. App. 4 Cir. 2013); *Clark v. Shackelford Farms Partnership*, 880 So. 2d 225 (La. App. 2 Cir. 2004); *see also Wade v. Kirkland*, 118 F. 3d 667 (9 Cir. 1997).

Finally, the Council turned to page 17 of the materials to engage in a policy discussion concerning amending R.S. 13:3661 with respect to the payment of witness fees. The Council considered the options set forth on pages 18 through 20 of the materials as well as the fees provided in the Federal Rules of Civil Procedure and discussed whether to increase witness fees to \$50 plus mileage and to provide discretion to the trial judge to add an additional \$50/day after the first day of attendance. Several Council members questioned whether the trial judge should also have the discretion to increase the fee to accommodate additional expenses, as well as whether mileage should be paid to all witnesses or just to those who live a certain distance from the courthouse. Ultimately, a “straw vote” of the Council was taken, and all but one member was in favor of Option 2(B) on pages 18 and 19 of the materials, providing for an attendance fee of \$50 plus reimbursement for mileage for all witnesses and granting the court the discretion to increase these fees for good cause shown, such as to award \$50 for each additional day of attendance by the witness.

At this time, Mr. Forrester concluded his presentation, and the Council adjourned for lunch.

### **Notaries Committee**

After lunch, the President called on Professor Melissa T. Lonegrass, Reporter of the Notaries Committee, to present her Committee's materials. Professor Lonegrass began by bringing the Council up to speed on the project, reminding the members that she had presented on behalf of the Notaries Committee twice to this point. At one of these presentations, she had simply sought policy advice from the Council; at the other, a single provision—pertaining to the filing of print-out copies of electronic acts—had been approved. Professor Lonegrass further reminded the Council of its prior policy vote to exempt authentic acts from the framework being developed for remote online notarization. Noting that the Committee had been meeting as frequently as was feasible, she explained that the goal was to have proposed legislation ready for the upcoming legislative session.

Prior to moving on to consideration of actual language, the Reporter again reminded the Council that the goal of the Committee's proposals was to permit notaries to perform notarial functions remotely and online. She urged the Council to keep in mind the difference between remote online notarization and electronic but still traditional "in-room" notarization—a process already permitted under Louisiana law and not addressed by the current proposals. Still previewing the language at which the Council would be looking, Professor Lonegrass explained that, generally, the idea behind remote online notarization was that a party would be in one location, the notary in another location, and the two would "meet" using two-way audio-video technology. This process, she continued, includes the presentation of identification by the signatory and verification of that identification by third-party technology. Further, the Reporter added, the party would affix their electronic signature and then a digital signature—a type of encryption—would be applied to the document.

Moving then to the actual draft, Professor Lonegrass explained that the first decision for the Council to make would be what instruments would be included and excluded from the framework. She reminded the Council that it had already voted as a policy matter to exclude authentic acts and then asked the Council to turn its attention to R.S. 35:623, the scope provision. She added that she would come back to approve individual definitions as they were encountered in the body of the draft. Taking up R.S. 35:623, the Reporter explained that the provision set to accomplish three things: first, it states that the process of notarization can be accomplished remotely and online; second, it exempts certain acts from this authorization; and third, it ensures conformity with the Louisiana Uniform Electronic Transactions Act (LUETA), R.S. 9:2601 et seq.

Professor Lonegrass then took R.S. 35:623 paragraph-by-paragraph, beginning by reading Subsection A. A motion was made and seconded to approve the Subsection, and the floor was opened for comments. One Council member pointed out that the provision had a litany of different phrases saying effectively the same thing. He noted his understanding that the impetus for that language was to try to "pick up" all the different ways of saying "in the presence of a notary," but nevertheless opined that a single, more generic phrase might be optimal. He argued that, by using several different phrases, there would be a negative implication—an implication of deliberate exclusion—if the provision failed to "get them all." The Reporter noted her agreement with the Council member's logic but explained that she was uncomfortable accepting friendly amendments due to the extent of the debate at the Committee level over the provision in question.

Another Council member pointed to the phrase "notarial act," and noted that it was not a defined term. Professor Lonegrass explained that this was correct, and that the intent behind the term was to capture all possible notarial functions. The Council member explained that their concern was that the language "notarial act" might actually exclude things that are not required to have a notary. The Reporter noted that she understood this concern but added that this particular language tracked UETA language. Accordingly, she reasoned, the lack of problems with UETA's use of the language "notarial act" should portend a lack of problems here. She added that the language was intended to capture all things requiring the presence of a notary.

This prompted a Council member to raise the issue of an act of sale that was acknowledged after the fact. The Council member pointed out that acknowledgment was not required for the validity of the act, and therefore such an acknowledgment might be excluded by the language “if the law requires ...” Noting that this was a salient point, the Reporter suggested that perhaps that particular language ought to be omitted. Agreeing, another Council member noted that oftentimes parties stipulate that “this instrument must be in this form” even if not technically required by law. Another Council member reasoned that what was really being sought was a statement to the effect of “this has an equivalent effect to the effect if the notarization was accomplished by standard procedure.” It was suggested that the language “if the law requires” simply be removed. Another Council member pointed out, however, that removing this language would nevertheless leave a problem with the language “satisfies any requirement,” and that that language would likewise need to be removed. A Council member contended that there were two reasons why the language in question should not be deleted: first, because it tracks UETA; and second, because while the presence of the notary might not be required for validity, it would be required to achieve the desired legal consequence. At this, a suggestion was made to add a statement that “a remote online notarial act constitutes a notarial act” and then to simply define “notarial act.” Professor Lonegrass resisted this suggestion, explaining her desire to be crystal clear that this provision—and the draft as a whole—deals with and satisfies the specific requirement for appearance.

Taking this discussion into account, a Council member suggested the deletion of both “if the law requires” and “satisfies the law and.” A motion was made and seconded to amend proposed R.S. 35:623 accordingly. The motion carried with all but one Council member in favor. Professor Lonegrass then read aloud the amended version. After the provision was read aloud, a Council member suggested changing “must” to “shall.” This suggestion was accepted as a friendly amendment. With these changes in place, the Council returned to the motion on the floor—the approval of R.S. 35:623 as amended. With all in favor, the provision was approved as follows:

**R.S. 35:623. Legal recognition of remote online notarial acts**

**A. Except as otherwise provided in Subsections B and C of this Section, a remote online notarial act that meets the requirements of R.S. 35:625, 626, and 627 satisfies any requirement that a party appear before a notary public at the time of the execution of the notarial act. In all other respects, a remote online notarial act shall comply with other applicable law governing the manner of the execution of that act.**

The Reporter next asked the Council to take up Subsections B and C of R.S. 35:623 together, explaining the structure and content of the provisions and highlighting the need to exempt certain instruments specifically and without ambiguity. She explained, with respect to Subsection B, that the Committee reviewed every instance in Louisiana law where a notary was required and exempted any instruments where the notary requirement served either solemnity purposes or to protect “weaker” parties. Professor Lonegrass next pointed out that the purpose of Subsection C was to make crystal clear that authentic form could not, in any way, be achieved through remote online notarization, regardless of whether authentic form was required for the validity of a particular instrument. A motion was then made and seconded to approve Subsections B and C. One Council member suggested adding anything modifying or overriding an authentic act to the list of exemptions contained in Subsection B. Another Council member voiced opposition to this suggestion, pointing out that the purpose of the suggestion was already dealt with in Subsection C. Professor Lonegrass agreed with the latter opinion.

One Council member, expressing general favor with respect to the list contained in Subsection B, posed a question regarding Subsection C. Opining that an attempt to execute an authentic act through remote online notarization would surely not suffice as an authentic act because there would be no witnesses, he wondered if the language used should be modified accordingly—perhaps to say something along the lines of “Remote online notarization cannot be used to make an authentic act.” In response, the Reporter clarified that witnesses actually could be used in performing a remote online notarization.

Accordingly, she voiced uncertainty regarding the suggestion. Another Council member, however, voiced support for the suggestion, adding his own inquiry into whether the Committee had considered affidavits when compiling the list of exclusions. The Reporter confirmed that affidavits were, indeed, discussed at length, and were seen by the Committee as perhaps the primary instrument that could be executed via remote online notarization. She clarified the Committee's stance with respect to affidavits, highlighting their use for evidentiary purposes as opposed to serving a solemnity function. Another Council member wondered if it would be possible to circumvent Subsection C's prohibition on remote online notarization for authentic acts by giving power of attorney. Professor Lonegrass explained that this would be prevented by the equal dignities doctrine.

After some additional discussion and wordsmithing, a motion was made to amend the first sentence of Subsection C to read: "Remote online notarization may not be used to execute an authentic act as defined in Civil Code article 1833." The motion was seconded, but prior to a vote, there was some discussion about the use of the word "execute" versus the word "perform." The Reporter reasoned that "perform" might be the optimal word choice, being that the provision was dealing with the remote online notarization process. Members of the Council, however, voiced support for "execute," arguing that it fit better with the object, "an authentic act," and that "perform" typically refers to the performance of obligations. Ultimately, Professor Lonegrass noted that she had no strong opinion either way. The motion then passed, and the provision was amended accordingly.

With this amendment in place, a Council member advocated adding the phrase "or alter" after "execute"—arguing that the protection should be in place not just for the initial execution but also for any subsequent alteration of an authentic act. Other Council members voiced disagreement with this addition, noting that the modification of an authentic act would, itself, need to be in authentic form, therefore rendering the "added" protection redundant. A motion was made and seconded to add the phrase "or alter," but the motion failed.

Next, the Council returned to the motion on the table—to approve Subsections B and C as amended. The motion carried, and Subsections B and C of R.S. 35:623 were approved as follows:

B. The following acts shall not be performed by remote online notarization:

- (1) Testaments or codicils thereto;
- (2) Trust instruments;
- (3) Donations inter vivos;
- (4) Matrimonial agreements; or
- (5) Acts modifying, waiving, or extinguishing an obligation of final spousal support.

C. Remote online notarization may not be used to execute an authentic act as defined in Civil Code article 1833. An act that fails to be authentic as a result of being performed by remote online notarization may still be valid as an act under private signature.

Professor Lonegrass moved next to Subsection D of R.S. 35:623. She explained to the Council that, while it was not entirely necessary, the Committee nevertheless felt it to be an important safeguard. She further noted that such statements could be found at numerous other places in the law. A motion was made and seconded to approve Subsection D. The motion passed, and the provision was approved as follows:

D. This Chapter supplements and does not repeal, supersede, or limit the provisions of the Louisiana Uniform Electronic Transactions Act, R.S. 9:2601 et seq.

The Reporter next asked the Council to consider approval of the defined terms appearing in R.S. 35:623. She identified two such terms: “remote online notarial act” and “remote online notarization”. She explained that, although there was no real distinction between the two, attempting to use only one or the other was unduly cumbersome from a language and drafting perspective. She also pointed out that many other states use and define both. Professor Lonegrass then read definitions (4) and (5) aloud and stated that the Committee had discussed at length the use of each term, with the “act” referring to something having been “executed,” and “notarization” referring to the process itself. Noting that “communication technology”—itself a defined term—appeared within these definitions, she read definition (1) aloud as well. She explained that this term and its definition were mostly uniform language. A motion to approve these three definitions was made and seconded.

A Council member inquired as to what a “notarial act” encompassed. The Reporter explained that the Committee had used that term to mean anything requiring a notary. This led to a second question from the Council—why, in that case, not simply say “an act before a notary”? A second suggestion was made to use the language “a writing executed in the presence of a notary.” Another Council member pointed out that, although “notarial act” is admittedly a bit colloquial, it is nevertheless used throughout the Revised Statutes and thus should not be a cause of consternation. Professor Lonegrass agreed with this point, adding that the Committee tried, where possible, to err on the side of simplicity. She warned that if the Council tried to define “notarial act” within R.S. 35:622(5) things would become complicated.

Another Council member suggested instead adding an individual definition of “notarial act.” The Reporter suggested perhaps defining the term as “an act executed before a notary public.” A motion was made and seconded to add this definition. Before a vote was held, however, a Council member pointed out that adding such a definition would raise the question of which document is “the act,” noting that in the case of an acknowledgment, there would be multiple “acts” at issue. Professor Lonegrass agreed that this was a good point. Another Council member, however, disagreed, arguing that, in such case, “the act” would be the act of acknowledgment. Another Council member voiced agreement with the argument that this would lead to unforeseen complications. He cautioned that, while there may not necessarily be any problem currently, adding such a definition could lead to issues down the line. Ultimately, a vote was taken and the motion to add a definition of “notarial act” failed.

The Council then returned to the other motion on the floor—the motion to approve definitions (1), (4), and (5). Prior to the vote, a Council member moved to replace the language “of execution of a notarial act” on line 31 with “through which a notarial act is executed”. This motion carried and the provision was amended. With this change in place, the original motion similarly passed, and the definitions at issue were approved as follows:

**R.S. 35:622. Definitions**

**A. In this Chapter:**

**(1) “Communication technology” means an electronic device or process that allows substantially simultaneous communication by sight and sound.**

\* \* \*

**(4) “Remote online notarial act” means a notarial act executed by means of communication technology that meets the standards adopted under this Chapter.**

(5) "Remote online notarization" means the process through which a notarial act is executed by means of communication technology that meets the standards adopted under this Chapter.

The Reporter next asked the Council to turn to page 2 of the materials, again reminding the Council that she would take up defined terms as they arose. Moving to Section 624, Professor Lonegrass explained that this provision authorized and required the Secretary of State to develop standards related to the implementation of the Chapter. These standards, she explained, would deal with things such as an application for remote online notarization authorization, training, technology, and recordkeeping. Section 624 was read aloud in its entirety, and a motion was made and seconded to approve the Section.

One Council member, pointing to Subsection C, asked whether the "rules" referred to in line 33 were the same as the standards referred to by the Reporter. The Reporter answered in the affirmative, clarifying that no change was required because Subsection A stated that the secretary "shall, by rule ... develop and maintain standards." Another Council member asked whether the secretary of state would require a fee for application. Professor Lonegrass explained that if a fee would ultimately be required, it would be brought in a separate bill that would not be made on the Law Institute's recommendation. Ms. Carla Bonaventure, attending as a representative for the secretary of state's office, confirmed that the secretary of state was on board with R.S. 35:624 as it appeared before the Council presently. One Council member who also served on the Notaries Committee clarified that the secretary was indeed represented at the Notaries Committee's meetings, so there would be no need for the Council to worry about the secretary's theoretical concerns regarding any of these provisions. The Council member also pointed out that "which" at line 28 should be changed to "that". This was accepted as a friendly amendment.

Another Council member, pointing again to Subsection C, asked why the provision would allow for amendment of the standards without input of the initial stakeholder committee. Professor Lonegrass answered that the reason for this was because requiring the stakeholder committee's approval for subsequent changes would render these changes overly cumbersome. She explained that allowing for easy modification was particularly important here because many of the changes the Committee anticipated would deal with new technologies and thus should be able to be accomplished swiftly. A Council member who also served on the Committee added that down the line, this issue would no longer be "hot-button," and requiring input of the stakeholder committee would effectively give each of the interest groups involved "veto-power" over any changes. The Reporter further pointed out that the secretary of state would be required to adhere to the notice-and-comment process for rulemaking. Thus, these interest groups would have a chance to provide their input regardless.

Another friendly amendment was suggested and accepted to make "stakeholders" on line 35 singular. With these changes in place, the motion to approve R.S. 35:624 carried, and the provision was approved as follows:

**R.S. 35:624. Standards for remote online notarization**

A. The Secretary of State shall, by rule, in accordance with the Administrative Procedure Act, develop and maintain standards for the implementation of this Chapter.

B. In developing standards for remote online notarization, the Secretary of State shall form a stakeholder committee that shall include but need not be limited to representatives from the Louisiana Land Title Association, the Louisiana Association of Independent Land Title Attorneys, the Louisiana Notary Association, the Louisiana Bankers Association, the Louisiana Clerks of Court Association, and the Louisiana State Law Institute.



C. The rules shall be adopted not later than twelve months from the date of the enactment of this Chapter, and may thereafter be modified, amended or supplemented with or without the input of a stakeholder committee.

The Reporter next moved to R.S. 35:625, dealing with the authorization to perform remote online notarization. She noted that Subsection A—dealing with which notaries can become authorized to perform remote online notarization—was not agreed to unanimously by the Committee. Professor Lonegrass explained that the Committee had originally conceptualized of an “automatic” authorization, but with the secretary of state now willing to undertake some level of remote online notarization training, the Committee had shifted to a system where authorization would have to be affirmatively granted. She added that the secretary was also considering the possibility of requiring a supplemental bond for notaries authorized for remote online notarization, but that such requirement was not part of the current proposal. Next, the Reporter read Subsection A aloud, and a motion was made and seconded to approve the provision.

One Council member inquired as to why the eligibility to become authorized for remote online notarization was limited to notaries with statewide jurisdiction if one of the apparent reasons for the remote online notarization proposal was a notary shortage. Professor Lonegrass answered that the thought was that notaries with statewide jurisdiction would have had to pass the standardized, statewide notary exam, adding that the secretary of state was strongly in favor of the restriction on eligibility. Guest attendee Alan Jennings, representing the Notaries Association, stated that the Notaries Association would oppose the inclusion of this restriction. He argued that such a requirement would be unfair to those notaries who did not have statewide jurisdiction. Next, a Council member inquired into why, specifically, the secretary of state favored such a restriction. The Reporter explained that the secretary desired this limitation due to the rigor and uniformity of the statewide exam. Further, she added, any notary who wished to become authorized to perform remote online notarization functions but was ineligible could simply take the statewide exam and become qualified. Another Council member asked whether it was not policy to try and avoid legislative cross-references wherever possible, pointing to the cross-reference on line 41 as perhaps calling for revision. The Reporter clarified that the Committee had initially had the language “statewide commission,” but had been informed that this language was incorrect. Subsequently, the Committee looked to R.S. 35:191(P) for the proper language, planning to track it, but found that the language there was odd and untenable for the present provision. Thus, she explained, the Committee—as something of a “last resort”—had decided a cross-reference was the best course of action with respect to the present provision.

With no more comments or questions on Subsection A of R.S. 35:625, a vote was held and the motion on the floor carried. The provision was approved as follows:

**R.S. 35:625. Notaries authorized to perform remote online notarization**

A. Only a notary public who has the power to exercise the functions of a notary public in all parishes of this state as provided in R.S. 35:191(P) may be authorized by the Secretary of State to perform remote online notarization.

The Reporter then moved to Subsections B and C, reading the provisions aloud and asking the Council to take them up together. A motion was made and seconded to approve Subsections B and C of R.S. 35:625. With the floor open for discussion, one Council member asked the purpose of the phrase “meets any requirements” in Subsection C. Professor Lonegrass explained that this language was intended to cover the possibility that the secretary might add new requirements. Another Council member inquired as to what, in particular, the secretary of state “training” would entail. The Reporter replied that she would let Ms. Bonaventure answer that question. Ms. Bonaventure explained that, although the specifics had not yet been worked out, the thought was that the training would likely include things such as an instructional video, a quiz, and similar components. Professor Lonegrass added that the Committee had decided against requiring notaries to identify what specific software they planned to use,



because the Committee had been told that typically the choice of software vendor was left to the discretion of lenders. She also added that vendors would require their own training with respect to their particular software, so the secretary's training need not be overly involved.

One Council member pointed out that issues could arise with notaries' failure to maintain the requisite CLE credits. In particular, he warned, a notary's failure to keep up with such requirements could wind up affecting the validity of an act, which would injure the innocent customer. Another Council member agreed with this warning, suggesting instead a system whereby Subsection C would authorize and require the secretary of state to affirmatively revoke a notary's remote online notarization authorization for failure to meet any applicable requirements, as opposed to the authorization simply "evaporating." Other Council members supported this suggestion, reasoning that it would help prevent injury to innocent members of the public. Professor Lonegrass noted that everything the Council had said with respect to the issue at hand was consistent with the Committee's own thinking—but that the Committee simply had not followed that particular thread of analysis to such point. A member of the Committee, however, contended that the present issue—the lack of warning to an unsuspecting member of the public where a notary loses their commission—was not a new issue limited to the proposed legislation. The Committee member argued that this was already happening in other contexts. A second Committee member agreed and pointed out that the harm to the public may not be too significant, given that, in many instances, the acts of notaries in such a context might often still be upheld under the de facto notary doctrine. One member of the Council noted that this point regarding the de facto notary doctrine was correct but pointed out that the doctrine was inconsistently applied. He advocated an approach that would rely on the doctrine as little as possible. The Council agreed with this sentiment.

After some additional discussion on how to best implement a system whereby the secretary of state would be tasked with taking affirmative action to revoke remote online notarization authorization, a Council member made a motion to replace existing Subsection C with the following language: "The authority to perform remote online notarization shall continue as long as the notary public is validly commissioned and the Secretary of State has not revoked the notary public's authority to perform remote online notarization." The motion was seconded and ultimately carried with all in favor. The Council then returned to the prior motion on the floor—to approve Subsections B and C of R.S. 35:625, now as amended—and this motion passed as well. The provisions were approved as follows:

B. In order to obtain authorization to perform remote online notarization, a notary public shall submit an application to the Secretary of State in a format prescribed by the Secretary of State, complete any course of instruction required by the Secretary of State, and satisfy any other requirements imposed by the Secretary of State.

C. The authority to perform remote online notarization shall continue as long as the notary public is validly commissioned and the Secretary of State has not revoked the notary public's authority to perform remote online notarization.

The Reporter then moved to R.S. 35:626, noting that this would be the final provision she would take up today. She explained that R.S. 35:626 was a relatively simple provision dealing with the locations of parties, notaries, and witnesses during the remote online notarization process. In particular, she pointed out, the provision as drafted required the notary to be located within the state of Louisiana and required the witnesses to be present with the parties. A motion to approve the provision was made and seconded.

One Council member pointed that the provision raised potential issues regarding venue, namely that Subsection B would allow for parties to be hailed to court in inconvenient places. Reading Code of Civil Procedure Article 76.1 aloud, the Reporter noted that the point raised was a good one but that the Committee felt that the statement contained in Subsection B was necessary because the parties themselves could be outside of the state. A Council member suggested a bifurcated rule under which the

remote online notarial act would be deemed to be executed where either party was located if any party to the act was located in the state of Louisiana, but where the notary was located if not. Professor Lonegrass noted that this was a good suggestion but added that wordsmithing on the fly could prove difficult. Accordingly, she suggested that the Council vote on the policy of the present provision at the time being, and then deal with the language the following morning. The Council agreed with this suggestion.

After some discussion on the issue, a motion was made to adopt a policy that a remote online notarial act would be deemed to be executed in the parish (1) where either party was located at the time the act was executed, if one of the parties was located within the state, and (2) where the notary was located at the time the act was executed, if neither party was located within the state. The motion carried.

With the policy issue pertaining to R.S. 35:626 decided, Professor Lonegrass noted that she would draft language later that afternoon for presentation to the Council the next morning. Professor Lonegrass then concluded her presentation, and the Friday session of the February 2019 Council meeting was adjourned.

## LOUISIANA STATE LAW INSTITUTE

### MEETING OF THE COUNCIL

February 8-9, 2019

**Saturday, February 9, 2019**

#### **Persons Present:**

Alonso, Pam	Kostelka, Robert "Bob" W.
Baker, Amanda	Kunkel, Nick
Belanger, Kathryn	Lampert, Loren
Bergstedt, Thomas M.	Lavergne, Luke A.
Boren, Jim	Lee, Amy Allums
Breard, L. Kent	Little, F.A., Jr.
Brister, Dorrell	Lonegrass, Melissa T.
Clements, Gary	Maloney, Marilyn C.
Crigler, James C., Jr.	Manning, C. Wendell
Crigler, John D.	Maw, Emily
Cromwell, L. David	McWilliams, Ford
Curry, Kevin C.	Norman, Rick J.
Curry, Robert L., III	Philips, Harry "Skip", Jr.
Daniels, Harry, III	Price, Donald W.
Dawkins, Robert G.	Riviere, Christopher H.
Di Giulio, John E.	Scalise, Ronald J., Jr.
Dimos, Jimmy N.	Simien, Eulis
Garofalo, Raymond, E., Jr.	Stuckey, James A.
Gregorie, Isaac M. "Mack"	Talley, Susan G.
Hamilton, Leo C.	Tate, George J.
Hash, Endya L.	Thibeaux, Robert P.
Hawkland, Steve	Thomas, Kacy Collins
Hogan, Lila T.	Veron, J. Michael
Holdridge, Guy	Waller, Mallory
Jackson, Brian A.	Weems, Charles S., III
Jewell, John Wayne	White, H. Aubrey
Knighten, Arlene D.	Ziober, John David

President Susan G. Talley called the Saturday session of the February 2019 Council meeting to order at 9:00 a.m. on Saturday, February 9, 2019, at the Lod Cook Alumni Center in Baton Rouge. She then called on Professor Melissa T. Lonegrass, Reporter of the Notaries Committee, to continue her presentation from yesterday.

#### **Notaries Committee**

Professor Lonegrass directed the Council to pick back up the point at which she had left off, Subsection B of proposed R.S. 35:626. She reminded the Council that there had been a discussion regarding the venue implications of the provision as it had previously been drafted and asked the Council to turn its attention to the handout that had been drafted the prior afternoon. The Reporter noted that there had been several suggestions to simply delete Subsection B, explaining that, without the provision, default venue rules would apply. The default rules, she reasoned, would not be problematic. One Council member voiced support for the deletion of Subsection B, opining that the provision added "needless trouble." The Council member added that the draft would still need to tackle the issue of where the act would be deemed to have been executed but contended that that could be done while remaining silent on the issue of venue.

With this, Professor Lonegrass turned to the handout, reading the newly drafted proposal aloud. A motion was made and seconded to approve the provision as proposed. Multiple Council members voiced support for the new version of R.S. 35:626(B), noting that it addressed the issues identified during the prior day's discussions. One Council

member inquired as to the result in a situation where one party was a juridical person rather than a natural person. The Reporter confirmed that the same result would obtain. A vote was taken, and the provision was approved as follows:

**R.S. 35:626. Location of notary, parties, and witnesses; location of remote online notarial act**

A. A notary public physically located in this state may perform a remote online notarization for a party who is not in the physical presence of the notary and who may be located in or outside of this state. A witness to a remote online notarial act shall be in the physical presence of the party.

B. A remote online notarial act is deemed to be executed in any parish of this state where any party is physically located at the time of the remote online notarization. If no party was physically located in this state at the time of the remote online notarization, the remote online notarial act is deemed to be executed in the parish where the notary public is physically located at the time of the remote online notarization.

The Reporter moved next to R.S. 35:627, noting that she would go through the provision piece by piece, first explaining the remote online notarization process covered in Subsection A. First, parties would log into a specialized software program—the “communication technology” referenced previously and in the Section on definitions. Next, the notary would verify the parties’ identities using the software. This identity confirmation, the Reporter explained, could be done either via personal knowledge, as contemplated in Paragraph (A)(1), or through the process outlined in Paragraph (A)(2). After reading this provision aloud, Professor Lonegrass explained that the parties would present their identification credential to the computer, which takes a photograph from which it pulls data. Next, she continued, “credential analysis”—a defined term—occurs. Noting that this was an industry standard term of art, she explained that credential analysis was a process by which the authenticity of the ID credential is ascertained. She added that software providers are already performing this step currently, so it is built into the program. The next step the Reporter outlined—also a defined term—was “identity proofing.” Identity proofing, she noted, consists of two aspects: dynamic, knowledge-based authentication and biometric analysis. The Reporter explained that the first of these is a series of questions similar to those one might answer to recover a password; the second she described as akin to fingerprint analysis. She noted that the Committee initially did not want to include these specific processes and terms in its draft—instead preferring to leave such matters to the secretary of state—but ultimately changed its mind for two reasons. First, Professor Lonegrass explained, the terms are industry standard. Second, she added, these things are already done quite commonly. Returning to the process overall, the Reporter explained that, at this point in the process, the notary would receive a percentage score for the aforementioned steps. She noted that, given the level of confidence the notary has based on this score, the notary can elect whether to continue with the notarization process or otherwise decline—just as a notary would do with an in-person notarization. Next, the parties and notaries go through the actual act itself, signing where signatures are needed. Finally, Professor Lonegrass continued—now turning to Subsection B—the notary attaches a digital signature, rendering the document tamper-proof. She then moved to Subsection C, pointing out that after the remote online notarization process, the notary will be required to append a statement to the act identifying it as having been executed remotely.

Stopping here, the Reporter asked the Council to take up Subsections A, B, and C, as well as the definitions contained therein, prior to moving on. A motion was made and seconded to approve the aforementioned provisions. One Council member inquired as to the consequences for a failure to follow the steps laid out in Subsections A through C, wondering whether an act could still stand as an act under private signature if it failed as an acknowledged act. Professor Lonegrass answered in the affirmative. Another Council member asked whether the parties would need to consent to give access to personal information so as to ensure that the identification process could be performed. The Reporter noted that she was not certain about this but added that her assumption was that they did consent, as such information is typically

shared with lenders regardless of whether the act utilized remote online notarization. A member of the Notaries Committee more familiar with the process confirmed the Reporter's hunch. The Council member asked next about the cost of the remote online notarization process. Professor Lonegrass again answered that she was not entirely certain—but noted that cost would not be of primary concern, because the system itself was entirely optional. Returning to the Reporter's answer to an earlier question, one Council member wondered why acts that failed to follow this process would fail to be notarial acts. He noted that many times the act would simply be an acknowledgment—meaning that it would have no value as an act under private signature. The Council member suggested instead placing some sort of penalty on the offending notary, advocating this as a better alternative than effectively penalizing the innocent public. Professor Lonegrass answered that the Committee had adopted its current approach due to a high level of concern amongst the Committee for protections for attorneys examining the public records. Among such parties, she explained, there was a strong desire for added scrutiny of remote online notarization acts.

The Council member then stated that he had a second question. He noted that he understood the purpose for including Paragraph (A)(1) regarding personal knowledge but asked what would stop someone from simply using Skype in this scenario. He reasoned that, if the notary was relying on personal knowledge, there would be no need for all of the identity-related software safeguards. Professor Lonegrass answered that, for one, the parties would be unable to upload their document into Skype. She added that there were additional, later requirements—like the application of a digital signature—that the parties would similarly be incapable of satisfying via Skype. Another Council member, noting support for maintaining the requirement of adding a statement identifying the act as having been done remotely, voiced concern over making the requirements for remote online notarization so much more stringent than an in-person notarization. The Council member worried that these would serve as barriers to entry that would funnel all notary business to a couple of large vendors. To this, Professor Lonegrass replied that there were several good reasons to keep the relevant safeguards in place. First, she began, all other states with statutes authorizing remote online notarization have the same or substantially similar requirements. Second, she noted that the industry feels very strongly about how the remote online notarization process should be done. And finally, Professor Lonegrass opined that the fact that remote online notarization would be stricter than in-person notarizations is no reason to ignore potential safeguards that technology makes possible. Another Council member suggested that the personal knowledge issue could potentially be solved by simply removing Paragraph (A)(1) and requiring everyone to go through the more involved process. The Reporter noted that she did not necessarily oppose this suggestion but argued that if Paragraph (A)(1) were deleted, some statement should be made to clarify whether the use of less sophisticated software such as Skype would suffice. Another Council member argued that Paragraph (A)(1) should not be deleted, highlighting the fact that, even in cases with personal knowledge, there were still protections provided for in Subsection B. The Council found some level of favor with this argument.

The Council member further proposed replacing “party” with individual in four instances in R.S. 35:626. He noted that this broader term would serve to more clearly include witnesses and signatories for juridical entities. A motion was made and seconded to make this replacement; the motion passed with all in favor. Next, another suggestion was made to strike the second sentence of Subsection C. The Council member who made this suggestion reasoned that its purpose was already accomplished via R.S. 35:623. This led another Council member to raise the broader question of whether the requirement contained in Subsection C—that a notary must include a statement in a remote online notarization act identifying it as a remote online notarization act—was necessary at all. A motion was made to take a policy vote on the issue. After it was confirmed that a vote in favor of the motion would count as a vote in favor of retaining Subsection C's requirement, the motion was seconded. Ultimately, a majority of votes were cast in favor of retaining Subsection C and its requirement.

This led to additional discussion of the use of the term “party” versus “individual” in Subsection C. Another member raised concern that this change would risk causing the invalidation of a remote online notarization act as a notarial act simply because the name

of every witness to the act was not listed. After some debate, a motion was made to replace the phrase “a statement that the party/individual appeared remotely” with “a statement that it is a remote online notarial act”—thereby circumventing the aforementioned issues with the terms “party” and “individual.” With this motion still on the table, the Reporter ceded the podium, and the President 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 by asking the Council to consider a few remaining provisions and additional changes in the “Noncapital” materials, beginning with Article 924(5) on page 1. A motion was made and seconded to adopt the proposed change in bold as presented, and the motion passed with no objection. The adopted proposal reads as follows:

#### **Article 924. Definitions**

As used in this Title:

\* \* \*

(5) “Imprisoned” means involuntarily detained or confined in an institution without freedom to leave pursuant to the conviction.

\* \* \*

Next, the Council considered Article 926, on page 2 of the “Noncapital” materials. After Judge Holdridge explained that Subparagraph (A)(1) of this article provides that applications for postconviction relief must be filed within two years unless new facts are discovered that were not known to the applicant or his attorney and either the applicant exercised due diligence in attempting to discover those facts or exceptional circumstances exist and the interest of justice would be served by considering the claim based on the new facts. A motion was made and seconded to adopt the proposal as presented, and after discussing that both the state and the defense agreed to this provision and that the judge will have discretion to assess whether the applicant’s assertions are sufficient to allow an otherwise time-barred application to be filed, the motion passed with no objection. The Acting Reporter then explained that Subparagraph (A)(2) provides another exception to the time limitation that would otherwise apply when the applicant’s claim is based upon a new interpretation of constitutional law, such as in the case of the crime for which the applicant was convicted being held unconstitutional. One Council member then questioned what constitutes “a final ruling of an appellate court,” and Judge Holdridge responded that any Louisiana or United States Supreme Court case would be sufficient along with any Louisiana Court of Appeal or Fifth Circuit Court of Appeal case where writs were denied. A motion was made and seconded to adopt Subparagraph (A)(2) as presented, and the motion passed with no objection.

The Council then considered Article 926(B) and (C), on pages 3 and 4 of the “Noncapital” materials, as well as the Comments to Article 926. Judge Holdridge first explained that Paragraph B of this Article provides that even if the applicant satisfies the conditions set forth in Paragraph A, if the state would be materially prejudiced by its inability to respond to the applicant’s assertions through no fault of its own, the applicant’s claim may be dismissed by the court after a contradictory hearing. A motion was made and seconded to adopt Paragraph B, at which time the Council discussed that this provision is existing law and was one of the compromises that were carefully developed, particularly in light of the safeguard of judicial intervention. One Council member then questioned whether this provision would expand the number of hearings that are required during postconviction relief proceedings, and the staff attorney responded in the negative, explaining that a hearing is presently required under existing law on lines 43 through 45 of page 3. The Acting Reporter then explained that the proposed revisions to Paragraph C, on page 4 of the materials, were also intended to serve as a clarification of existing law, and a motion was made and seconded to adopt this provision as presented as well

as the Comments to Article 926. These motions passed with no objection, and the adopted proposals read as follows:

**Article 930.8 926. Time limitations; exceptions; prejudicial delay**

A. No application for ~~post-conviction~~ postconviction relief, including ~~applications which seek~~ an application that seeks an out-of-time appeal, shall be considered if it is filed more than two years after the judgment of conviction and sentence has become final under the provisions of Article ~~Articles~~ 914 or 922, unless any of the following apply:

(1) The application alleges, and the ~~petitioner~~ applicant proves or the state State admits, that the facts upon which the claim is predicated were not known to the ~~petitioner or his prior attorneys~~ applicant. For the purposes of this exception to the time limitation, facts that were known to any attorney for the applicant shall be presumed to have been known by the applicant unless the applicant provides proof by clear and convincing evidence to rebut this presumption. Facts that were contained in the record of the court proceedings concerning the conviction challenged in the application shall be deemed to have been known by the applicant. Further, the petitioner shall prove that he exercised diligence in attempting to discover any post-conviction claims that may exist. "Diligence" for the purposes of this Article is a subjective inquiry that must take into account the circumstances of the petitioner. Those circumstances shall include but are not limited to the educational background of the petitioner, the petitioner's access to formally trained inmate counsel, the financial resources of the petitioner, the age of the petitioner, the mental abilities of the petitioner, or whether the interests of justice will be served by the consideration of new evidence. New facts discovered pursuant to this exception shall be submitted to the court within two years of discovery. Further, for this exception to the time limitation to apply, the applicant shall also prove one of the following:

(a) The applicant exercised due diligence in attempting to discover any postconviction claims or facts upon which any claims may be based.

(b) Exceptional circumstances exist and the interest of justice will be served by consideration of the claim based upon the previously unknown facts. The applicant shall prove by clear and convincing evidence the existence of exceptional circumstances and that the newly discovered facts in support of the claim are sufficiently compelling that an injustice will result if the claim is not considered.

(2) The application contains a claim asserted in the ~~petition~~ is based upon a final ruling of an appellate court establishing a ~~theretofore unknown~~ new interpretation of constitutional law and ~~petitioner~~, and the applicant establishes that ~~this~~ the interpretation is retroactively applicable to his case, and the ~~petition~~ application is filed within one year of the finality of such ruling.

~~(3) The application would already be barred by the provisions of this Article, but the application is filed on or before October 1, 2001, and the date on which the application was filed is within three years after the judgment of conviction and sentence has become final.~~

~~(4) The person asserting the claim has been sentenced to death.~~

B. An application for ~~post-conviction~~ postconviction relief ~~which that~~ is timely filed, or ~~which that~~ is allowed under an exception to the time limitation as set forth in Paragraph A of this Article, shall be dismissed after a contradictory hearing upon a showing by the state State of material prejudice to its ability to respond to, negate, or rebut the allegations of the ~~petition~~ application, and that the prejudice has been caused by events not



under the control of the ~~state which~~ State that have transpired since the date of original conviction, ~~if the court finds, after a hearing limited to that issue, that the state's ability to respond to, negate, or rebut such allegations has been materially prejudiced thereby.~~ This defense to relief may be raised at any time prior to final submission to the district court on the merits of the claim to which the defense is asserted.

C. At the time of sentencing, the ~~trial~~ court shall inform the defendant of the two-year prescriptive period for ~~post-conviction~~ postconviction relief either verbally or in writing. If a written waiver of rights form is used during the acceptance of a guilty plea, the notice required by this Paragraph may be included in the written waiver of rights. The failure to inform the defendant of the prescriptive period does not constitute grounds to vacate the conviction and sentence or remand the case for the purpose of resentencing.

### **Comments – 2019**

(a) For purposes of Paragraph (A)(1) of this Article, an uncorroborated statement by the applicant will generally be insufficient to meet the applicant's burden of rebutting the presumption that facts known by the applicant's attorney were also known to the applicant. Further, facts that were known to any attorney for the applicant and were contained in the record of the court proceedings concerning the conviction challenged in the application prior to its filing shall be treated as if they were known to the applicant.

(b) The use of the word "exceptional" in Subparagraph (A)(1)(b) of this Article establishes that the provision is not intended to apply in an ordinary case solely on the basis that the applicant has discovered previously unknown facts. A mere assertion that "exceptional circumstances" exist in the case is insufficient to warrant application of the rare exception provided in this Subparagraph.

(c) Depending upon the circumstances, a claim raised pursuant to the United States Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), may fall within an exception to the two-year time limitation period.

(d) The amendment to Paragraph B of this Article is intended to clarify when the State may raise this defense to relief. All other amendments to this Paragraph do not change existing law.

The Council then turned to Article 927, on pages 4 and 5 of the "Noncapital" materials, to consider the proposed changes in bold on lines 8 through 10 and 37 and 38 of page 5. After the Acting Reporter explained that this language was added to clarify which of the two forms that had been adopted by the Louisiana Supreme Court should be used by the applicant, a motion was made and seconded to adopt the proposed changes in bold as presented. The motion passed with no objection, and the adopted proposals read 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:~~



\* \* \*

(5) A statement as to whether the application is the applicant's first application for postconviction relief. The applicant's first application shall be filed on the first uniform application for postconviction relief form, and any additional applications shall be filed on the second or subsequent uniform application for postconviction relief form.

\* \* \*

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 forms, applicants may attach additional information to the uniform application forms at the time of filing.

\* \* \*

The Acting Reporter then directed the Council's attention to Article 927.4, beginning on page 8 of the "Noncapital" materials. First, Judge Holdridge explained that he would like to redesignate the provisions in this Article, and the Council agreed. He then explained the provisions of Paragraphs A and (B)(1), now B, on lines 29 through 39 of page 8. After one Council member questioned whether the language on lines 1 and 2 of page 9 requiring the parties to be provided with a copy of the order should be replicated in Paragraph B on line 39 of page 8, a motion was made and seconded to adopt new Paragraphs A and B as presented. The motion passed with no objection, and Judge Holdridge then explained Paragraph (B)(2), now C, on lines 41 through 46 of page 8 and lines 1 and 2 of page 9. A motion was made and seconded to adopt new Paragraph C as presented, and this motion also passed with no objection. Next, the Acting Reporter turned to Paragraph (B)(3), now D, on lines 4 through 28 of page 9, and explained that in addition to the changes in designations on lines 9, 12, 15, and 22, the reference to "Subparagraph (2) of this Paragraph" should be changed to "Paragraph C of this Article" on lines 12 and 13 of page 9 and the reference to "Subsubparagraph (a) of this Subparagraph" should be changed to "Subparagraph (1) of this Paragraph" on lines 15 and 16 of the same page. A motion was made and seconded to adopt new Paragraph D as amended, at which time one Council member questioned whether, on lines 25 and 26 of page 9, the custodian of the file would be permitted to redact information without authorization. Judge Holdridge answered in the affirmative but explained that the redaction would likely take place as an initial matter, but then the applicant would argue that the information should not have been redacted and the judge would conduct an in camera review to make a determination. A vote was then taken on the motion to adopt new Paragraph D as presented, and the motion passed with no objection. Motions were also made and seconded to adopt Paragraph (B)(4), now E, on lines 30 through 33 of page 9, and Paragraph (B)(5), now F, on lines 35 through 40 of page 9, as presented, and these motions also passed with no objection. Finally, a motion was made and seconded to adopt Paragraph C, now G, on lines 42 through 44 of page 9, as well as the Comments to Article 927.4 on page 10, after the Council agreed to replace "Subparagraph (B)(3)" with "Paragraph D" on line 11 of page 10. One Council member questioned whether "that will not be free of cost" on line 43 was necessary, and Judge Holdridge responded by explaining that this language was intended as a clarification for the pro se litigants that will be using this provision. A vote was then taken on the motion to adopt Paragraph G as presented and the Comments as amended, and the motion passed with no objection. The adopted proposal reads as follows:

#### **Article 927.4. Production of information**

A. In addition to receiving the appellate record as provided in Article 923, upon conviction of a felony, a person is entitled to receive one free copy of the following: the indictment, the district court minutes of the trial or guilty plea, a *Boykin* transcript of the guilty plea, if applicable, the minutes of sentencing, and the commitment papers for the proceeding that forms the basis for which an application for postconviction relief may be filed.

B. If the applicant seeks documents that can only be found through information contained in the district court record or to which the applicant is not entitled pursuant to Paragraph A of this Article, the applicant shall file a motion for production of specific documents with the district court. If the applicant is indigent and alleges a particularized need for the documents, the documents shall be provided free of cost to the applicant.

C. If the applicant seeks documents that can be found through information contained in prior counsel's file, the applicant shall request the file from prior counsel. Upon a showing by the applicant that prior counsel's file was not received within sixty days of the applicant's request, the applicant may file an ex parte motion for production of prior counsel's file with the district court. If the court finds that the applicant has requested the file from prior counsel, and prior counsel has not provided a copy to the applicant, the court shall order the prior counsel to provide the file or a copy of the file free of cost to the applicant within thirty days from the date of the order. A copy of the order shall be furnished to the applicant, his attorney, and the State.

D. (1) If the applicant seeks documents that can only be found through information contained in the file of the District Attorney, the Attorney General, or a law enforcement agency, the applicant may file a motion for production of documents with the district court alleging facts that, if established, would satisfy both of the following conditions:

(a) The documents have not been previously produced to the applicant or his current attorney.

(b) The documents cannot be obtained from prior counsel pursuant to Paragraph C of this Article.

(2) A motion for production of documents filed in accordance with Subparagraph (1) of this Paragraph shall allege a particularized need for the documents and identify the documents sought with reasonable particularity. The court shall not order the custodian of the file subject to the motion to produce any documents without first providing the custodian with an opportunity to respond. If the motion for production of documents is granted and the applicant is indigent, the documents shall be provided free of cost to the applicant.

(3) The custodian of the file responsive to the order to produce documents may file a motion with the district court to modify or vacate any order for production of documents within sixty days from the date of the order on the grounds of privilege or that production of the documents would be unreasonable, oppressive, or unduly burdensome. The custodian may redact or seek a protective order with regard to any information that is confidential, privileged, or otherwise protected by law. The custodian shall not be compelled to produce the documents until the ruling on the motion to modify or vacate has become final.

E. If the court has received a motion filed pursuant to this Article seeking documents related to any claim in an application for postconviction relief that is pending before the court, the court shall not dismiss the

application before deciding the applicant's motion, unless both can be decided simultaneously.

F. Notwithstanding the deadlines provided in this Title, if a court orders production of documents as a result of a motion filed pursuant to this Article, the court shall give the parties a reasonable opportunity not to exceed ninety days to review any documents that are produced and make additional filings based upon those documents. The State shall be given sixty days to file a response to any timely additional filing made by the applicant. Upon motion of either party, the court may grant an extension of these time periods for good cause shown.

G. Nothing in this Article is intended to alter the applicant's right to request information that will not be free of cost pursuant to the requirements of the Public Records Act, R.S. 44:1 et seq.

### **Comments – 2019**

(a) Paragraph A of this Article establishes that, in accordance with prior jurisprudence, inmates are entitled to receive certain court documents free of cost and without demonstrating particularized need. See *State ex rel. Simmons v. State*, 93-0275 (La. 12/16/94), 647 So. 2d 1094.

(b) "Particularized need" as used in Paragraph B of this Article is defined in Article 924 as "specific claims of constitutional errors that require the requested documentation for support and have been set out by an applicant in a properly filed application for postconviction relief."

(c) Paragraph D of this Article provides that an inmate is required to have a properly filed application for postconviction relief pending that requires documentation for its support before he may seek cost-free copies. See *Landis v. Moreau*, 2000-1157 (La. 2/21/01), 779 So. 2d 691, 695 (stating that this rule exists in order to prevent the State from having to "underwrite an inmate's efforts to overturn his conviction and sentence by providing him generally with documents to comb the record for error"). Additionally, a district court may decline to order production of documents in cases in which the only claims the documents could support are not cognizable on collateral review under the grounds of Article 927.3 or where the limitations period of Article 926 has expired and the application would not satisfy any exception to the prescriptive period. See *State ex rel. Degreat v. State*, 98-0690 (La.7/2/98), 724 So. 2d 205; see also *State ex rel. Fleury v. State*, 93-2898 (La.10/13/95), 661 So. 2d 488.

The Council then turned to Article 928, on page 17 of the "Noncapital" materials, and a motion was made and seconded to adopt the proposed change in bold on lines 18 and 19 to replace "court of appeal" with "appellate court." The motion passed with no objection, and 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 appellate 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.

\* \* \*

Having concluded the materials on noncapital postconviction relief, the Council turned to the "Capital" materials, and motions were quickly made and seconded to adopt Articles 930.1, 930.2, and 930.3 and its Comments, on pages 1 and 2, as presented. These motions passed with no objection, and the adopted proposals read as follows:

### **Article 930.1. Scope of applicability**

The provisions of this Title shall apply to all capital cases that become final under Article 930.2 on or after the effective date of this Act.

### **Article 930.2. Commencement of proceedings on capital postconviction relief**

After a defendant's conviction and death sentence are affirmed by the Louisiana Supreme Court, that judgment becomes final on direct review when either: (1) the defendant fails to timely petition the United States Supreme Court for certiorari; or (2) that Court denies his petition for certiorari. Upon finality, the clerk of court of the Louisiana Supreme Court shall transmit a certified copy of the Louisiana Supreme Court's decree, and a copy of the United States Supreme Court denying certiorari, if any, to the clerk of the district court from which the appeal was taken. The clerk of court shall file these into the trial record of the proceedings and shall forward a copy to the district judge. Capital postconviction proceedings commence when the capital conviction and sentence become final.

### **Article 924 930.3. Definitions**

As used in this Title:

(1) "Application for capital postconviction relief" means a pleading that complies with Article ~~927~~ 930.10 filed by a person in custody under sentence of death seeking to have a criminal conviction and sentence set aside.

(2) "Custody" means involuntary detention or confinement, or probation or parole supervision, after sentence following conviction for the commission of the criminal offense.

(3) "DNA testing" means any method of testing and comparing deoxyribonucleic acid that would be admissible under the Louisiana Code of Evidence.

(4) "Due diligence" means that the applicant ~~has~~ and counsel have made reasonable efforts after conviction to discover in a timely manner any postconviction claims and the facts and evidence upon which those claims may be based. An inquiry by the court as to whether an applicant ~~has~~ and counsel have exercised "due diligence" shall consider all factors, including but not limited to the circumstances of the applicant and counsel, the educational background of the applicant, the applicant's access to counsel, the financial resources of the applicant, the financial resources provided to counsel, the age of the applicant, and the mental abilities of the applicant. The court shall also consider any information properly sought or received from the State.

(5) "Imprisoned" means involuntarily detained or confined in an institution without freedom to leave pursuant to the conviction.

~~(6) "Particularized need" means specific claims of constitutional errors that require the requested documentation for support and have been set out by an applicant in a properly filed application for postconviction relief.~~

~~(7)~~ (6) "Procedural objection" means an assertion by the State of a procedural bar, which, if granted, would preclude the court from considering a claim in an application for capital postconviction relief.

~~(8)~~ (7) "Unknown sample" means a biological sample from an unknown donor constituting evidence of the commission of an offense or tending to prove the identity of the perpetrator of an offense.

#### Comments – 2019

(a) The interests of the State in capital postconviction proceedings may be represented by the District Attorney or Attorney General, or both. "The State" will mean either the District Attorney or the Attorney General and should be applicable to whomever is currently representing the interests of the State in the proceedings.

(b) Inmates who are "imprisoned" as provided in Subparagraph (5) of this Article are a subset of people who are in custody as defined in Subparagraph (2) of this Article.

~~(c) "Particularized need" as provided in Subparagraph (6) of this Article was defined by the Louisiana Supreme Court in *State ex rel. Bernard v. Cr.D.C.*, 94-2274 (La. 4/28/95), 653 So. 2d 1174.~~

~~(d)~~ (c) As used in this Title, and in accordance with Article 5 of this Code, the word "shall" means mandatory.

~~(e)~~ (d) Nothing in this Title shall preclude a court from raising a procedural bar on its own motion.

Next, the Council considered Article 930.4, on page 3 of the "Capital" materials, and Judge Holdridge explained that this provision would change existing terminology referring to "shell petitions" and instead create the preliminary application, which is the initial filing for federal habeas corpus purposes, and the comprehensive application, which is the filing that is ultimately acted upon by the court. It was moved and seconded to adopt this provision and Article 930.5 on the same page as presented, and the motion passed with no objection. The adopted proposals read as follows:

#### **Article 930.4. Preliminary and comprehensive applications for capital postconviction relief**

A. A preliminary application for capital postconviction relief is an original application for capital postconviction relief which complies with Article 930.10, and which states the general grounds upon which relief is sought, but need not specify the factual basis for such relief.

B. A comprehensive application for capital postconviction relief is a substantive application for capital postconviction relief which sets forth the factual basis for each claim, the legal grounds for each claim, and the specific relief sought for each claim.

#### **Article 924.1 930.5. Effect of appeal**

An application for capital postconviction relief shall not be considered if the applicant may appeal the conviction and sentence that he seeks to challenge, or if an appeal is pending.

The Council then turned to Article 930.6, on page 3 of the "Capital" materials, and discussed the requirement on line 28 that two capital postconviction counsel be appointed. The Acting Reporter explained that this requirement was heavily debated by the Committee and that this is the language that was ultimately settled upon. It was then moved and seconded to adopt this provision as presented, and the motion passed with no objection. The Council also considered Article 930.8, on page 4 of the materials, concerning mandatory status conferences between the judge and the parties as well as the mandatory reporting requirement to the Louisiana Supreme Court concerning the status of all capital postconviction relief cases. Judge Holdridge explained that these

status conferences need not take place in person but can be conducted via phone, videoconference, or other remote technology, which prompted one Council member to question whether conversations via electronic must be recorded. The Acting Reporter then agreed to add “but shall be recorded” after “means” on line 16 of page 4. A motion was made and seconded to adopt Article 930.8 as amended, and the motion passed with no objection. The adopted proposals read as follows:

**Article 930.6. Appointment of counsel**

When the applicant's conviction and sentence become final in accordance with Article 930.2, the district court shall issue an order to the Louisiana State Public Defender ordering the appointment of two capital postconviction counsel. All applicants sentenced to death with a final judgment affirming their sentence and conviction in accordance with Article 930.2 shall be presumed indigent for the purposes of capital postconviction relief. This order shall also be served on the prosecuting authority. If the district court is aware of an entity routinely employed by the Louisiana State Public Defender Board to provide representation for applicants in capital postconviction matters, this order shall also be served on that entity. The applicant shall also be served with this order.

\* \* \*

**Article 930.8. Status conferences and reports**

A. Within thirty days of the enrollment of capital postconviction counsel, the district court shall issue an order setting an initial status conference within thirty days of the order. The initial status conference shall involve counsel for the applicant and counsel for the State.

B. Within six months of the initial status conference, and within six months of the previous status conference thereafter, the district court shall schedule a periodic status conference with counsel for the applicant and counsel for the State. The district court shall also report to the Louisiana Supreme Court every six months with respect to the status of the capital postconviction relief case.

C. Unless the district court provides otherwise, the initial and periodic status conferences required by this Article may take place in person or by telephone, video conference, or other remote electronic means but shall be recorded.

**Comments – 2019**

When the applicant's conviction and sentence become final, the clerk of court should file the decree of the Louisiana Supreme Court and the order of the United States Supreme Court denying relief into the record of the district court.

Next, the Council considered Article 930.9, on page 4 of the “Capital” materials, and Judge Holdridge explained that the Committee had determined that applications for capital postconviction relief should be filed in the parish where the applicant was indicted rather than in the parish where he was convicted due to the provisions of the Code of Criminal Procedure on transfer of capital cases. A motion was made and seconded to adopt this provision as presented, and after one Council member questioned whether this was current practice, the Council discussed examples of cases in which different results had been reached, and the Acting Reporter responded by noting that the Committee's intent was to clarify the law on this point. The motion passed with no objection, and the adopted proposal reads as follows:

## **Article 925 930.9. Venue**

Applications for capital postconviction relief shall be filed in the district court in the parish in which the applicant was ~~convicted~~ indicted.

Finally, the Council considered Article 930.10, on page 4 of the "Capital" materials. After the suggestion was made that "convicted" should be replaced with "indicted" on line 33 of page 4, one Council member questioned whether Paragraph B was necessary and instead suggested adding "by written application" between "be" and "filed" on line 28 of page 4. The Acting Reporter agreed, and the Council then agreed to redesignate the following Paragraphs accordingly and to change the cross-reference in the Comments to this provision. A motion was made and seconded to adopt Article 930.10 as amended, and the motion passed with no objection. The adopted proposal reads as follows:

### **Article 930.10. Time for filing preliminary application; form of application**

A. A preliminary application for capital postconviction relief shall be by written application filed within one hundred eighty days of the applicant's conviction and death sentence becoming final under Article 930.2.

B. The preliminary application shall allege:

(1) The name of the applicant.

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

(3) The name of the custodian of the applicant.

(4) In accordance with Article 930.4(A), the general grounds upon which relief is sought, but need not specify the factual basis for such relief.

C. The application shall include a statement signed by the applicant or counsel certifying that the contents of the application are true to the best of the signatory's information and belief.

D. Upon the filing of a preliminary application for capital postconviction relief, the clerk of court shall provide a copy of the application to the district court and serve the State by mail or electronic means.

### **Comments – 2019**

(a) The filing of a preliminary application for capital postconviction relief in accordance with the provision of this Article is intended to preserve an applicant's rights in federal habeas corpus proceedings. The preliminary application shall constitute a "properly filed application for State post-conviction or other collateral review" for the purposes of 28 U.S.C. 2244(d)(2), and tolls the applicant's one-year period of limitation for filing an application for writ of habeas corpus in federal court under 28 U.S.C. 2244(d) from the time it is filed through the litigation of a comprehensive application for capital postconviction relief in both the district court and Louisiana Supreme Court.

(b) Although Paragraph D of this Article requires the clerk of court to provide the district court with a copy of the preliminary application for capital postconviction relief, no action is required to be taken by the district court with respect to the preliminary application other than the issuance of an order setting an initial status conference in accordance with Article 930.8.

Judge Holdridge then concluded his presentation, and the President called on Professor Lonegrass to continue her presentation of materials from the Notaries Committee.

## **Notaries Committee**

Professor Lonegrass reminded the Council of the motion on the floor, which would provide new language for R.S. 35:627(C). Several Council members voiced opposition to the motion, arguing that they wanted the statement to specifically list each party. Other Council members pointed out the aforementioned risk of invalidation for failure to list a mere witness, as well as the fact that a list of parties to the act is not required currently for notarizations. Ultimately, when a vote was taken, the motion carried.

With this revision in place, the Reporter asked the Council to turn its attention back to the motion to approve Subsections A, B, and C of R.S. 35:627, as well as the related definitions. The motion carried and the provisions were approved as follows:

### **R.S. 35:622. Definitions**

#### **A. In this Chapter:**

\* \* \*

(2) "Credential analysis" means a process through which the authenticity of an individual's government-issued identification credential is evaluated by another person through review of public and proprietary data sources.

(3) "Identity proofing" means a process through which the identity of an individual is affirmed by another person:

(a) by means of dynamic knowledge-based authentication such as a review of personal information from public or proprietary data sources; or

(b) by means of analysis of biometric data such as facial recognition, voiceprint analysis, or fingerprint analysis

\* \* \*

### **R.S. 35:627. Procedure for performing remote online notarization**

A. At the time of a remote online notarization, the notary public shall verify the identity of the individual through use of a communication technology and by:

(1) the notary public's personal knowledge of the individual; or

(2) each of the following:

(a) remote presentation by the individual of a government-issued identification credential, including a passport or driver's license, that contains the signature and a photograph of the individual;

(b) credential analysis; and

(c) identity proofing.

B. The notary public shall attach the notary public's digital signature to the remote online notarial act in a manner that renders any subsequent change or modification to the remote online notarial act to be evident.

C. The notary public shall include in the remote online notarial act a statement that it is a remote online notarial act. A remote online notarial act that does not include such a statement is not a notarial act.



The Reporter then moved to Subsection D of R.S. 35:627, noting that there had been some thought as to making this provision its own Section. A motion was made and seconded to approve the provision as its own Section—specifically, as R.S. 35:628. After the provision was read aloud by the Reporter, the motion carried, and the provision was approved as follows:

**R.S. 35:628. Duties of the notary**

The notary public shall take reasonable steps to ensure that:

(1) the communication technology used in the performance of a remote online notarization is secure from unauthorized interception; and

(2) the electronic record before the notary public is the same electronic record in which the individual made a statement or on which the party executed or adopted an electronic signature.

Next, the Reporter asked the Council to turn back to R.S. 35:622(B), providing definitions for “electronic,” “electronic record,” “electronic signature,” and “record” by way of cross-reference to LUETA. A motion was made to approve Subsection B. After this motion, the staff attorney for the Notaries Committee observed that the introductory paragraph of also needed to be approved. Accordingly, the motion was amended to approve both Subsection B as well as the introductory paragraph of Subsection A. The motion was seconded and ultimately carried with all in favor. The provisions were approved as follows:

**R.S. 35:622. Definitions**

A. In this Chapter:

\* \* \*

B. The definitions of “electronic,” “electronic record,” “electronic signature,” and “record” as provided by the Louisiana Uniform Electronic Transactions Act, R.S. 9:2602, apply to this Chapter.

Professor Lonegrass then proceeded to former R.S. 35:628—now redesignated as R.S. 35:629 after R.S. 35:627(D) had become a standalone Section—reading the provision aloud. She provided the Council two points of information. First, she noted, the vendors of remote online notarization technology also provide record storage service. Second, she added that the cost of such storage comes out to a cost of something in the order of around sixty dollars per year. Accordingly, she emphasized, the Council should not view the requirements of R.S. 35:629 as overly burdensome on notaries.

One Council member, pointing out that such recordkeeping was not a requirement for notaries performing traditional, in-person notarizations, wondered why it should be a requirement for remote online notarizations. Accepting the Council member’s point regarding traditional notarization as true, the Reporter listed several reasons for such requirement in the remote online notarization context. First, she put simply, the requirement made sense because such recordkeeping was eminently possible and not particularly burdensome. She also noted that such a record would provide some semblance of a “copy” of the act—something she emphasized as paramount in the electronic, paperless context. Finally, Professor Lonegrass continued, the recordkeeping requirements served as an extra safeguard and were highly recommended by industry experts with experience in the area. Another Council member inquired as to what, exactly, would be recorded. Professor Lonegrass answered that essentially every aspect of the process would be recorded. The Council member expressed concern that these recordings might open up an avenue for collateral attack based on casual, innocuous, and innocent comments made throughout the process. The Council member further worried that the recordings could contain privileged information. The Reporter noted these as valid points.

Nevertheless, a motion was made and seconded to approve the provisions. The motion carried and R.S. 35:629 was approved as follows:

**R.S. 35:629. Electronic copies of remote online notarizations**

**A. The notary public shall:**

(1) maintain electronic copies capable of being printed in a tangible medium of all remote online notarial acts for at least ten years after the date of the remote online notarization;

(2) maintain an audio and video recording of each remote online notarization for at least ten years after the date of the remote online notarization; and

(3) take reasonable steps to secure the records maintained as required by this Section from corruption, loss, destruction, and unauthorized interception or alteration.

**B. The notary public may designate a custodian to maintain the electronic records required by Subsection A of this Section, provided that the notary public has unrestricted access to the electronic records and the custodian meets any standards established by the Secretary of State for the maintenance of electronic records.**

The Reporter moved next to R.S. 35:630, which had formerly been designated as R.S. 35:629. She explained that the provision simply stated that the provisions of the Chapter could not be varied by agreement of the parties. After a friendly amendment was accepted to change the caption of the Section to "No variation by agreement" a motion was made to approve the provision. The motion was seconded and ultimately carried, and the provision was approved as follows:

**R.S. 35:630. No variation by agreement**

The provisions of this Chapter may not be varied by agreement.

Finally, the Reporter asked the Council to take up R.S. 35:621, the short title. A motion was made and seconded to approve the provision. The motion carried and the provision was approved as follows:

**CHAPTER 10. REMOTE ONLINE NOTARIZATION**

**R.S. 35:621. Short title**

This Chapter may be cited as the "Remote Online Notarization Act."

At this time, Professor Lonegrass concluded her presentation, and the February 2019 Council meeting was adjourned.

  
Mallory C. Waller

  
Nick Kunkel