

# LOUISIANA STATE LAW INSTITUTE

## MEETING OF THE COUNCIL

March 8-9, 2019

**Friday, March 8, 2019**

### **Persons Present:**

Alonso, Pam  
Amacker, Dawn  
Baker, Amanda  
Belanger, Kathryn  
Bergstedt, Thomas M.  
Bonaventure, Carla  
Braun, Jessica  
Breard, L. Kent  
Brister, Dorrell  
Carroll, Andrea B.  
Castle, Marilyn  
Comeaux, Jeanne. C.  
Coreil, Jeffrey  
Crigler, James C., Jr.  
Cromwell, L. David  
Davidson, James J., III  
Dawkins, Robert G.  
Dimos, Jimmy N.  
Doguet, Andre'  
Domingue, Billy J.  
Eboulum, Natalie  
Ellison, David M., Jr.  
Forrester, William R., Jr.  
Garofalo, Raymond E., Jr.  
Gasaway, Grace B.  
Gregorie, Isaac M. "Mack"  
Hash, Endya L.  
Hayes, Thomas M., III  
Haymon, Cordell H.  
Hester, Mary C.  
Holdridge, Guy  
Janke, Benjamin West

Jennings, C. Alan  
Kostelka, Robert "Bob" W.  
Kunkel, Nick  
Lee, Amy Allums  
Little, F. A., Jr.  
Lonegrass, Melissa T.  
Maloney, Marilyn C.  
Manning, C. Wendell  
Miller, Gregory A.  
Milazzo, Shane  
Morris, Glenn G.  
North, Donald W.  
Obioha, Violet  
Price, Donald W.  
Richard, Sally Brown  
Riviere, Christopher H.  
Saloom, Douglas J.  
Scalise, Ronald, J., Jr.  
Sole, Emmett C., Jr.  
Stuckey, James A.  
Swensek, Adam  
Talley, Susan G.  
Thibeaux, Robert P.  
Title, Peter S.  
Trahan, J. Randall  
Tucker, Zelda W.  
Veron, J. Michael  
Waller, Mallory  
Weems, Charles S., III  
Wilson, Evelyn L.  
Woodruff-White, Lisa

President Susan G. Talley called the March 2019 Council meeting to order at 10:00 a.m. on Friday, March 8, 2019, at the Lod Cook Alumni Center in Baton Rouge. After asking the Council members to briefly introduce themselves, the President called on Professor Andrea B. Carroll, Reporter of the Marriage-Persons Committee, to begin her presentation of materials.

### **Marriage-Persons Committee**

Professor Carroll began her presentation with the materials on parenting coordinators and reminded the Council that the goals of this continuous revision project were to allow attorneys to serve as parenting coordinators and to make parenting coordinator decisions binding. However, at its January meeting, the Council engaged in a policy discussion regarding whether decisions of parenting coordinators should or should not be binding and ultimately recommitted the project to the Committee for further review and collaboration with the Louisiana Council of Juvenile and Family Court Judges (LCJFCJ). The Committee met and a representative of the LCJFCJ stated that any proposals to make parenting coordinator decisions binding would be opposed at the legislature. To that end, the Committee decided to remove the offensive language and is seeking final approval of minor proposed amendments.

The Reporter explained that proposed changes to R.S. 9:358.1 were approved by the Council in the fall of 2017 and 2018, and the Council then approved the Comment without discussion. The LCJFCJ proposed a change to R.S. 9:358.2 to require the court to additionally determine if there is good cause prior to appointing a parenting coordinator in family violence cases. The Council quickly approved this language and moved to R.S. 9:358.3. Upon further review of this statute, the Committee recommended that the required experience of parenting coordinators be post-licensure and not just post-degree to better ensure that only the most qualified persons serve in this capacity. The Council also approved this change without comment.

Moving to R.S. 9:358.4, the Reporter explained that Subsections A and B have previously been recommitted by the Council pending the decision regarding the binding nature of a parenting coordinator's recommendations. The Committee has removed the binding language and reorganized Subsection A to prioritize the important nature of the illustrative list of issues the parenting coordinator may assist the parents in resolving. Professor Carroll pointed out that at the Council's direction, the Committee added issues related to vehicles, the internet and social media, and tattoos. In Subsection B, the Reporter explained that some members of the Committee felt strongly that the authority of the domiciliary parent to make decisions regarding their child be specifically recognized and cross referenced in this Subpart of the law to ensure that there is no attempt to undermine that authority. The Council questioned the intent of the language "shall consider" and wondered if it weakens the domiciliary parent's authority. The Reporter emphasized that this is already the law and this reference is merely a signal to parenting coordinators who are not lawyers and who may not be aware of other custody laws. Professor Carroll gave an example to better illustrate the intent to the Council, stating that if the domiciliary parent says the child may not get a tattoo, but the parenting coordinator recommends that the child be allowed to get a tattoo, then the court will make the final decision. The Reporter accepted a friendly amendment to more specifically reference the law regarding domiciliary parents. Subsection A was approved as presented and the following was approved as Subsection B:

B. A parenting coordinator shall consider the domiciliary parent's decision making authority in all matters affecting the child in accordance with the standards of R.S. 9:335(B)(3).

The final proposal on parenting coordinators to be considered was R.S. 9:358.4(C). Professor Carroll explained that the Council had previously approved the changes in the fall of 2018, but upon further review, the Committee recommends the deletion of the first paragraph of this provision. Present law prohibits the parenting coordinator from assisting the parties in agreeing to change legal custody, physical custody, or the visitation schedule. Of course, other areas of the law still prohibit certain modifications to court orders, but a key benefit to parenting coordination is lost if facilitators are not allowed to assist the parties in minor decisions regarding issues such as the location of drop off and pickup and the time of exchange. With no discussion, the Council agreed and approved the change.

Having concluded her presentation on the parenting coordinators project, Professor Carroll turned to the materials on continuing tutorship. The Reporter recapped the work previously completed by the Committee in accordance with House Concurrent Resolution No. 2 of the 2017 Regular Session. She also reminded the Council that the author of this resolution, Representative Franklin Foil, had specifically requested that the Committee further consider a mechanism whereby married parents can be appointed as co-tutors. In present law, Civil Code Article 356 requires that upon petition of both parents, one parent is named tutor and the other is named undertutor. The Committee examined the roles and duties of the tutor and undertutor and agreed that married parents petitioning jointly should be named co-tutors, unless the court finds good cause otherwise, to better achieve the goals intended by naming a tutor and an undertutor and to be consistent with the law governing tutorship of minors. Professor Carroll explained that the Committee felt that it may be unlikely that a married couple named tutor and undertutor would truly perform the necessary checks and balances of each other.

The Reporter then noted that first, the Committee is proposing that the language in Civil Code Article 355 be brought up to date regarding who can petition for continuing tutorship. Without any discussion, the Council quickly approved adding parents who have never been married to the list of authorized petitioners. Once the petition is filed, the Committee is recommending changes to who the court appoints as tutor, co-tutor, and undertutor. The Reporter explained that when the parents are married and jointly petition, they shall be named co-tutors unless the court finds good cause otherwise. If the parents are married but do not petition jointly, the court may name the petitioning parent as tutor or each individual petitioner as co-tutor in accordance with the best interest of the child. Finally, if one parent is dead or if one parent has been awarded custody or named tutor or tutrix during the minority of the child, the court shall name that parent as tutor unless good cause requires otherwise.

The Council questioned whether the proposal covers parents who are awarded joint custody. The Reporter stated that Subparagraph (5)(b) covers both a parent with sole custody who petitions and is named tutor and parents with joint custody who may be named co-tutors if each of them petition. This rule is intended to approximate the rules that apply to tutorship during minority. The Council then asked the Reporter to add a Comment regarding joint custody and she readily agreed to do so. The Council also inquired about aunts and uncles who may have been awarded custody of a child during minority because Article 356 only addresses parents. The Reporter noted that the Committee did not feel comfortable with expanding continuing tutorship to other relatives at this point. Rather, any person with custody other than a parent would have to petition for interdiction. Without any additional questions, the Council approved the proposal.

Professor Carroll then concluded her presentation, and the President called on Mr. L. David Cromwell, Reporter of the Security Devices Committee, to begin his presentation of proposed revisions to the Private Works Act.

### **Security Devices Committee**

Mr. Cromwell began his presentation by reminding the Council that this was his seventh time presenting the Committee's proposed revisions to the Private Works Act and that the materials to be considered by the Council included a Projet for the revision containing a comprehensive set of Revision Comments. The Reporter also noted that the "Excerpts" materials contained several stylistic changes to the text as well as suggested provisions for inclusion in the bill that would enact the proposed revisions. He then suggested that the Council first consider the "Excerpts" materials, beginning on page 1 with R.S. 9:4803(B), and explained that many of these proposed semantic changes involved the elimination of hanging conjunctions or disjunctions at the end of provisions. Motions were made and seconded to adopt the proposed changes to R.S. 9:4803(B) and 4809(A), and after one Council member questioned whether "any" should be replaced with "one" on line 13 of page 1, these motions passed with no objection. The adopted proposals read as follows:

#### **§4803. Amounts secured by claims and privileges**

\* \* \*

B. Subject to the additional limitations of amount contained in R.S. 9:4804(B), the ~~The~~ claim or privilege granted the lessor of a movable by R.S. 9:4801(4) or ~~R.S. 9:4802(A)(4)~~ is limited to and secures only that part of the ~~rentals~~ rents accruing during the time the movable is located at the site of the immovable for use in a work. A movable shall be deemed not located at the site of the immovable for use in a work after the occurrence of any of the following:

- (1) The work is substantially completed or abandoned;~~;~~ ~~or~~
- (2) A notice of termination of the work is filed;~~;~~ ~~or~~

\* \* \*

**§4809. Substantial completion and abandonment of work defined**

A. A work is substantially completed when either of the following occurs:

(1) The last work is performed on, or materials are delivered to the site of the immovable or to that area with respect to which a notice of termination is filed under R.S. 9:4822(F).

\* \* \*

Next, the Council considered the proposed changes to R.S. 9:4810(3) and 4820(A), on page 2 of the "Excerpts" materials. Motions were made and seconded to adopt the proposed revisions to both provisions as presented, and the motions passed with no objection. The adopted proposals read as follows:

**§4810. Miscellaneous definitions**

For purposes of this Part:

\* \* \*

(3) A "complete property description" of an immovable" is any description that, if contained in a mortgage of the immovable properly filed for registry, would be sufficient for the mortgage to be effective as to third persons.

\* \* \*

**§4820. Privileges; effective date**

A. Except as otherwise provided in this Part, the ~~The~~ privileges granted by this Part arise and are effective as to third persons when the ~~earlier of the following occurs:~~

(1) Notice of the contract is filed as required by R.S. 9:4811, ~~or~~

\* \* \*

Mr. Cromwell then directed the Council's attention to the proposed changes to R.S. 9:4822, on pages 3 and 4 of the "Excerpts" materials, and explained that the proposed changes in Subsections A, B, and C were similar to those that had previously been adopted by the Council. Motions were made and seconded to adopt these provisions, at which time one Council member questioned why "either of the following" was used on line 7 but not on lines 18 and 32. The Council then engaged in a great deal of discussion with respect to whether "either of the following" was necessary in each of these places, and the Reporter explained that the Paragraphs in each of these Subsections were mutually exclusive in that Paragraph (2) in each case only applies if a notice of termination is not filed. After additional discussion concerning the need for consistency among these provisions, a motion was made and seconded to add "either of the following" after "than" on lines 18 and 32, but the motion failed with only two in favor and all others opposed. A motion was then made and seconded to delete "either of the following occurs" on line 7, and after additional suggestions were made, such as retaining "or" on lines 9 and 21 or collapsing these provisions into a single sentence, the motion passed with no objection. Motions were then made to adopt Subsections A through C as amended, as well as Subsections D and H as presented, and the motions passed with no objection. The adopted proposals read as follows:

**§4822. Preservation of claims and privileges**

A. Except as otherwise provided in Subsections B and C of this Section, a person granted a privilege under R.S. 9:4801 or a claim and privilege under R.S. 9:4802 shall file a statement of his claim and privilege no later than sixty days after:

(1) The filing of a notice of termination of the work.

(2) The substantial completion or abandonment of the work, if a notice of termination is not filed.

B. If a notice of contract is properly and timely filed in the manner provided by R.S. 9:4811, ~~the persons~~ a person to whom a claim or privilege is granted by R.S. 9:4802 shall ~~within thirty days after the filing of a notice of termination of the work~~ file a statement of his claim and privilege and deliver to the owner, if his address is given in the notice of contract, a copy of the statement of claim and privilege, no later than:

(1) ~~File a statement of their claims or privilege. Thirty days after the filing of a notice of termination of the work.~~

(2) ~~Deliver to the owner a copy of the statement of claim or privilege. If the address of the owner is not given in the notice of contract, the claimant is not required to deliver a copy of his statement to the owner. Six months after the substantial completion or abandonment of the work, if a notice of termination is not filed.~~

\* \* \*

C. A general contractor to whom a privilege is granted by R.S. 9:4801 of this Part, and whose privilege has been preserved in the manner provided by R.S. 9:4811, shall file a statement of his privilege no later than:

(1) Sixty days after the filing of a notice of termination of the work.

(2) Seven months after the substantial completion or abandonment of the work, if a notice of termination is not filed.

\* \* \*

~~E.~~ D. A notice of termination of the work:

\* \* \*

(3) Shall certify that the occurrence of one or more of the following:

(a) The work has been substantially completed, ~~or~~

(b) The work has been abandoned by the owner, ~~or~~

(c) ~~A contractor~~ The general contractor is in default under the terms of the contract.

(d) The contract with the general contractor has terminated.

\* \* \*

H. A person granted a claim and privilege under R.S. 9:4802 may give to the owner a notice expressly requesting the owner to notify that person of the substantial completion or abandonment of the work or the

filing of notice of termination of the work. The notice shall state the person's mailing address and shall be given to the owner no later than:

(1) The filing of a notice of termination of the work.

(2) The substantial completion or abandonment of the work, if a notice of termination is not filed.

\* \* \*

Next, the Council considered the proposed changes to R.S. 9:4823(A) and 4832(A) and (B), on page 5 of the "Excerpts" materials. Motions were made and seconded to adopt the proposed changes to both provisions as presented, and the motions passed with no objection. The adopted proposals read as follows:

#### **§4823. Extinguishment of claims and privileges**

A. A privilege provided by R.S. 9:4801, a claim against the owner and the privilege securing it provided by R.S. 9:4802, or a claim against the contractor provided by R.S. 9:4802 is extinguished if any of the following occurs:

(1) The claimant or holder of the privilege does not preserve it as required by R.S. 9:4822;~~; or~~

(2) The claimant or holder of the privilege does not institute an action against the owner for the enforcement of the claim or privilege within one year after filing the statement of claim or privilege to preserve it;~~; or~~

(3) The obligation ~~which~~ that it secures is extinguished.

\* \* \*

#### **§4832. Cancellation of notice of contract**

A. The recorder of mortgages shall cancel from his records a notice of contract upon written request of any person made more than thirty days after the filing of a notice of termination of work performed under the contract if both of the following conditions are satisfied:

(1) A statement of claim or privilege with respect to the work was not filed ~~within~~ before expiration of the thirty day period~~; and~~

\* \* \*

B. If the request for cancellation of a notice of contract does not contain or is not accompanied by the written concurrence or receipt of the contractor, but a statement of claim or privilege was not filed ~~within~~ before expiration of the thirty day period, the recorder of mortgages shall cancel the notice of contract as to all claims and privileges except that of the contractor. The recorder of mortgages shall completely cancel the notice of contract from his records upon written request of any person if either of the following conditions is satisfied:

(1) The request is made more than sixty days after the filing of the notice of termination and the contractor did not file a statement of his claim or privilege ~~within that time~~ before expiration of the sixty day period~~; or~~

\* \* \*

The Council then discussed R.S. 9:4835(A) and 4841, as well as the heading of Subpart F, on pages 5 and 6 of the "Excerpts" materials. Mr. Cromwell explained that in addition to changing "party" to "person" on line 37 of page 5 and line 8 of page 6, the Committee also proposed to amend the heading of Subpart F to be more accurate, correct the cross-reference on line 30 of page 6, and eliminate "or" on line 35 of the same page. Motions were made and seconded to adopt all of these changes as presented, and the motions passed with no objection. The adopted proposals read as follows:

**§4835. Filing of bond or other security; cancellation of statement of claim or privilege or notice of pendency of action**

A. If a statement of claim or privilege or a notice of pendency of action is filed, any interested ~~party~~ person may deposit with the recorder of mortgages either a bond of a lawful surety company authorized to do business in the state, cash, or certified funds to guarantee payment of the obligation secured by the privilege or that portion as may be lawfully due together with interest, costs, and attorney fees to which the claimant may be entitled up to a total amount of one hundred twenty-five percent of the principal amount of the claim as asserted in the statement of claim or privilege or ~~such a suit in the action~~. ~~A surety shall not have the benefit of division or discussion.~~

\* \* \*

**SUBPART F. PROCEDURE FOR ENFORCEMENT; DELIVERY OF COMMUNICATIONS; BURDEN OF PROOF OF DELIVERY OF MOVABLES**

**§4841. Enforcement of claims and privileges; concursus**

A. After the period provided by R.S. 9:4822 for the filing of statements of claims or privileges has expired, the owner or any other interested ~~party~~ person may convoke a concursus and shall cite all persons who have preserved their claims against the owner or their privileges on the immovable, ~~and shall cite the~~ to establish the validity and rank of their claims and privileges. The owner, the contractor, and the surety shall also be cited if they are not otherwise parties to ~~establish the validity and rank of their claims and privileges~~ the concursus.

\* \* \*

D. (1) \* \* \*

(2) A suspensive or devolutive appeal may be taken as a matter of right from an order or judgment issued under Paragraph (1) of this Subsection.

E. (1) The surety who convokes a concursus proceeding shall deposit into the registry of the court an amount equal to the lesser of:

~~(4)~~ (a) The full amount of the bond; ~~or~~

\* \* \*

Next, the Council considered the proposed revisions to Article 3274, on page 7 of the "Excerpts" materials. Mr. Cromwell explained that at the October Council meeting, it was noted that not only was the first sentence subject to exceptions, but the second sentence was as well. As a result, the "except as otherwise provided by law" clause was added in both places, but upon further review, the Committee now recommended adding a separate paragraph that states that the Article is subject to exceptions. The Reporter also explained that the Committee planned to undertake a comprehensive revision of the law of privilege at some point in the future, which is why neither additional changes nor a

Comments were being proposed at this time. A motion was made and seconded to amend Article 3274 as reflected on lines 15 through 23 of page 7, and the motion passed with no objection. The adopted proposal reads as follows:

**Article 3274. Time and place of recordation; effectiveness**

No privilege shall have effect against third persons, unless recorded in the manner required by law in the parish where the property to be affected is situated. It shall confer no preference on the creditor who holds it, over creditors who have acquired a mortgage, unless the act or other evidence of the debt is recorded within seven days from the date of the act or obligation of indebtedness when the registry is required to be made in the parish where the act was passed or the indebtedness originated and within fifteen days, if the registry is required to be made in any other parish of this State. It shall, however, have effect against all parties from date of registry.

The provisions of this Article are subject to exceptions provided by legislation.

At this time, Mr. Cromwell explained that the Projet contained a comprehensive set of Comments to accompany the revision of the Private Works Act and that, perhaps for the first time, the Law Institute would be revising a project that it had previously enacted in 1981. As a result, the Law Institute had the opportunity to treat the existing Comments differently than usual in that, rather than retaining existing Comments and adding new ones, the existing Comments could be suppressed and replaced by a new set of Comments. The Reporter further explained that some of the existing Comments explained changes that were made to the 1926 Act, which are now irrelevant, and others are simply incorrect in light of legislative amendments that have been made since 1981.

A motion was then made and seconded to suppress the existing Comments by adopting Provision #6, on page 9 of the "Excerpts" materials, for inclusion in the bill. One Council member questioned whether the existing Comments would be preserved in some fashion, and Mr. Cromwell responded by explaining that Comment (j) to R.S. 9:4801, on page 3 of the Projet, directs readers who are interested in the existing Comments to the 1981 Act. Another Council member then reiterated that existing Comments have never been suppressed before and articulated the view that perhaps creating this precedent affords the Comments an even greater weight because it looks like we are amending them. In response to this position, several Council members expressed that in their view, the Comments are always just that – Comments – and that it is readily understood that Comments are not the law. Other Council members expressed that as a practical matter, suppressing the existing Comments will eliminate inconsistencies that resulted from patchwork amendments of the Private Works Act. After one Council member also clarified that the existing Comments would not be shown as deleted in the bill like substantive amendments would be, and therefore this would not look like proposed legislation, the motion to suppress the Comments by adopting Provision #6 passed with no objection.

Mr. Cromwell then directed the Council's attention to page 1 of the Projet and explained that the proposed Comments would now be presented for approval by the Council. Motions were made and seconded to adopt the Comments to R.S. 9:4801, 4802, and 4803 as presented, on pages 1 through 9 of the materials, and these motions passed with no objection. Next, the Council considered the Comment to R.S. 9:4804 on pages 10 and 11, and one member questioned whether the parenthetical on lines 35 and 36 should include the owner, as well as whether the references to both the owner and the contractor were necessary on lines 35 and 40 of page 10. The Reporter responded by explaining that Paragraph (B)(1) concerns claims arising under R.S. 9:4802 where the claimant is not in privity of contract with the owner, so the owner is always required to receive notice of the lease, whereas a contractor may be a party to the lease and therefore would not be entitled to receive notice. A motion was then made and seconded to adopt the Comment to R.S. 9:4804 as presented, and the motion passed with no objection. Motions were also made and seconded to adopt the Comments to R.S. 9:4805, 4806, 4807, 4808, 4809, and 4810, on pages 12 through 20, as presented, and these motions passed with no objection.



At this time, the President announced that the Council would adjourn for lunch, during which time there would be a meeting of the Executive Committee. After lunch, the President clarified that although the Council had only received the dates of the October, November, and December 2019 Council meetings, additional dates would be sent once an August or September meeting was scheduled. She then called on Mr. Cromwell to resume his presentation of materials on behalf of the Security Devices Committee.

Mr. Cromwell began by suggesting that the Council return to its previous discussion of the Comment to R.S. 9:4804, on page 10 of the Projet. After rethinking the inclusion of both owner and contractor on line 40 of page 10, as well as recognizing the potential for confusion, the Reporter explained that he would replace "an owner or contractor" with "a person." After additional discussion, a motion was made and seconded to amend the Comment as indicated, and the motion passed with no objection. A motion was then made and seconded to consider the Comments in globo as opposed to on an individual basis, and one Council member suggested that perhaps these Comments should be reviewed with some level of care in light of the precedent that is being set. The motion to consider the Comments in globo ultimately passed over one objection, at which time a motion was made and seconded to adopt all of the proposed Comments to the Private Works Act. Mr. Cromwell noted that a suggestion was made by a Committee member to add the word "See" before "Continental" in Comment (e) to R.S. 9:4813, on line 26 of page 26 of the Projet, and the Council agreed. A vote was then taken to adopt the Comments in globo, and the motion passed with no objection.

The Council then returned to the "Excerpts" materials to consider the proposed provisions for inclusion in the bill, beginning with Provision #1 on page 8. Mr. Cromwell explained that the general rule applicable to the Private Works Act revision is that it will become effective on January 1, 2020 and will apply to works that began on or after that date, unless a notice of contract for the work was filed prior to that date. A motion was made and seconded to adopt Provision #1 as presented, and the motion passed with no objection. The Reporter next explained Provision #2 on page 8, which addresses situations in which notice of contract was filed prior to January 1, 2020 and either notice of termination was filed prior to that date, substantial completion or abandonment occurred prior to that date, or neither notice of termination was filed nor substantial completion or abandonment occurred prior to that date. Mr. Cromwell also explained that the Council had already substantively approved a remedy to the problem that exists under current law where the lien period never begins to run if a notice of contract was filed but no notice of termination was ever filed, but because the revision applies prospectively only, this provision is intended to impose the six- and seven-month deadlines retroactively to ensure that all lien periods begin to run for purposes of curing title. After additional discussion concerning the holding of the *Thompson Tree* case, a motion was made and seconded to adopt Provision #2 as presented, and the motion passed with no objection.

Next, the Council considered Provision #3, on page 8 of the "Excerpts" materials, and the Reporter explained that because the revision changes the manner in which Private Works Act privileges are ranked among themselves, these ranking rules need to be applied retroactively so that multiple ranking schemes are not being applied with respect to the privileges that arise from a given work. However, an exception needs to be made to this retroactive applicability in cases where applying new law would cause the divestiture of vested rights and create constitutional concerns. A motion was made and seconded to adopt Provision #3 as presented, and the motion passed with no objection. The Council then turned to Provision #4 on page 9, and Mr. Cromwell explained that the revisions to R.S. 9:4833 correct an issue involving cancellation by the clerk of statements of claim and privilege where suit is not timely filed, and that this remedy should be applied retroactively. A motion was made and seconded to adopt Provision #4 as presented, and the motion passed with no objection. A motion was also made and seconded to adopt Provision #5, which provides that the Private Works Act revision does not affect pending litigation using the same language that was used in the UCC revision, as presented, and this motion also passed with no objection. Having previously adopted Provision #6, the Council then considered Provision #7 on page 9, and the Reporter explained that the redesignation of these provisions had already been approved in conjunction with consideration of the substantive amendments. A motion was made and seconded to adopt Provision #7 as presented, and the motion passed with no objection.

At this time, the Council expressed its appreciation to Mr. Cromwell for his excellent work in accomplishing a comprehensive revision of the Private Works Act, and the Reporter, in turn, expressed his appreciation to both the members and the special advisors of the Committee for their invaluable input. Mr. Cromwell then concluded his presentation, and the President called on Professor Melissa T. Lonegrass, Reporter of the Notaries Committee, to begin her presentation of materials.

### **Notaries Committee**

Professor Lonegrass began her presentation by noting to the Council that it had already substantively approved essentially the entirety of the draft she was presenting, and that today she was simply seeking approval of some minor semantic changes that had since been made. She noted that she would tackle these changes in chronological order. The Reporter first asked the Council to turn its attention to the very minor change on line 5 of page 1, moving a period outside of quotation marks. A motion was made and seconded to approve the change, and the motion passed without discussion. The provision was approved as follows:

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

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

The Reporter then moved to lines 19 through 26 of page 1, explaining that the changes here were simply to bring the list into line with legislative drafting conventions. A motion was made and seconded to approve the changes, and the motion passed. R.S. 35:622(A)(3) was approved as follows:

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

(a) Dynamic knowledge-based authentication such as a review of personal information from public or proprietary data sources.

(b) Analysis of biometric data such as facial recognition, voiceprint analysis, or fingerprint analysis.

Next, Professor Lonegrass turned to the changes in Paragraphs (A)(4) and (5) of R.S. 35:622. She noted that the changes here—replacing “a notarial act” with “an instrument” and adding the phrase “before a notary public” in two instances—were slightly more substantive than the prior changes but were still minor. She explained that, at the February Council meeting, the Council had discussed whether the term “notarial act” should be defined and ultimately decided in the negative. Accordingly, in order to avoid use of a vague and undefined term, the Committee replaced “notarial act” with “instrument executed before a notary public.” One Council member raised the question whether there ought to be some distinction made between the “execution” of an act and the “acknowledgment” of an act. The Reporter explained that this issue had been discussed at the Committee level, and that the Committee had ultimately decided that such a distinction was unnecessary. The reason for this, she continued, was the fact that, when the “action” being taken is acknowledgment, the acknowledgment itself can still correctly be said to have been “executed.” The Council agreed with this explanation. A motion was made and seconded to approve these changes. The motion passed and the provisions were approved as follows:

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

(5) “Remote online notarization” means the process through which an instrument is executed before a notary public by means of communication technology that meets the standards adopted under this Chapter.

The Reporter next took up the change to Subsection A of R.S. 35:623 on page 1, line 45. She noted that this change was the same as the most recently approved changes. A motion to approve the provision was made and seconded, and R.S. 35:623(A) was adopted as follows:

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 instrument. In all other respects, a remote online notarial act shall comply with other applicable law governing the manner of the execution of that act.

Professor Lonegrass then turned the Council's attention to Subsection B of proposed R.S. 35:623. She noted that the changes to this provision included some of the same things previously approved—"acts" being changed to "instruments"—as well as the change of the term "performed" to "executed." In addition to these, she continued, the format of the list was being changed to follow legislative drafting conventions, and "or acknowledgments thereof" was being appended to the provision pertaining to acts modifying, waiving, or extinguishing an obligation of spousal support. The latter of these additional changes, the Reporter explained, was because the Committee's intent all along—intent that had been approved by the Council—had been to prevent the execution of any of these categories of instruments via remote online notarization. Thus, because such instruments are valid as acts under private signature duly acknowledged, it followed that "or acknowledgments thereof" ought to be added. A motion was made and seconded to approve Subsection B. The motion passed, and R.S. 35:623(B) was approved as follows:

B. The following instruments shall not be executed by remote online notarization:

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

Next, the Reporter asked the Council to turn its attention to Subsection C of R.S. 35:623. She pointed out that the changes made here were simple—"perform" again became "execute" and "or an acknowledged act" was appended to the end of the sentence—and were made so as to clarify that an attempted authentic act that failed due to being attempted through remote online notarization could still be valid and have the legal effect of an acknowledged act. A motion was made and seconded to approve the changes to Subsection C. One Council member inquired as to why the language had reverted to using the word "act" after previously using "instrument." Professor Lonegrass explained that this was an artifact of referencing the Civil Code and using its language. Another Council member wondered whether Subsection C ought to refer back to Subsection B. The Council member urged that it should be made clear that, although a failed authentic act could still be valid as an acknowledged act, this nevertheless did not allow for instruments from Subsection B to be accomplished via remote online notarization. Professor Lonegrass considered this suggestion and opined that such cross-reference might be redundant. Other Council members agreed with Professor Lonegrass regarding the redundancy, but nevertheless liked the suggestion. A Council member suggested simply adding the phrase "Except as otherwise provided in Subsection B" at the beginning of the second sentence of Subsection C. A motion was made and seconded to make this change, and the motion passed. The Council then returned to the motion to approve Subsection C—now, with the attendant modification—and the motion passed. R.S. 35:623(C) was approved as follows:

C. Remote online notarization may not be used to execute an authentic act as defined in Civil Code article 1833. Except as otherwise provided in Subsection B of this Section, an act that fails to be authentic as a result of being executed by remote online notarization may still be valid as an act under private signature or an acknowledged act.

The Reporter then moved to page 3, directing the Council's attention to proposed R.S. 35:627. She began by pointing to line 33, explaining that the change here was reflective of the discussion from the February Council meeting—that the provision should make clear that verification is necessary for both parties and witnesses. A Council member inquired as to whether the word “and” was necessary at line 34. Specifically, the Council member wondered whether the verification was two-fold—requiring use of communication technology *and* one of the following means—or if it was all simply part of a single requirement. Professor Lonegrass clarified that she did, in fact, believe the word “and” to be necessary, adding that she wanted to be clear that these were separate requirements. This led to a brief discussion over the wording of the provision. One Council member suggested changing “either” to “one” to help clear things up. After the Reporter accepted this suggestion as a friendly amendment, another Council member pointed out an issue of ambiguity as to whether “through the use of communication technology” was modifying “person or witness appearing remotely.” A third Council member then suggested the addition of the word “both” to clarify the two-fold nature of the verification requirement while also eliminating the aforementioned ambiguity, and this suggestion was also accepted by the Reporter as a friendly amendment.

Next, a Council member inquired as to whether changing “individual” to “party or witness” was simply a matter of clarification. The Reporter confirmed that it was. Another Council member wondered whether the use of “party or witness” in this context was consistent with the use of “party” in other places throughout the draft. In response, the Reporter pointed out that, in other instances, the witness would be a party to the instrument in question—an acknowledgment. The Council member accepted this explanation.

With no more discussion on the changes to lines 33 and 34 of page 4, a motion was made and seconded to approve the introductory paragraph of Subsection A. The motion passed, and the introductory paragraph was approved as follows:

A. At the time of a remote online notarization, the notary public shall verify the identity of any party or witness appearing remotely both through use of a communication technology and by one of the following means:

Moving on, the Reporter explained that the remainder of the changes to Subsection A were semantic in nature, again made in an effort to bring the list into accordance with legislative drafting conventions. With respect to Subsection B, she continued, the changes were two-fold: first, a change in formatting—formerly separate provisions became a list—and new language was added. Professor Lonegrass explained that the idea behind the new language was to make clear that electronic signatures and digital signatures were two separate and distinct concepts, and to make clear that both were requirements, here. A motion to approve Subsection B and the remainder of Subsection A was made and seconded. The motion passed, and the provisions were approved as follows:

A.       \*       \*       \*

(1) The notary public's personal knowledge of the individual.

(2) A process that includes all 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.

(c) Identity proofing.

B. The notary public shall do all of the following:

(1) Include in the remote online notarial act a statement that it is a remote online notarial act.

(2) Attach to or cause to be logically associated with the remote online notarial act the notary public's electronic signature, together with all other information required to be included by other applicable law.

(3) Digitally sign the remote online notarial act in a manner that renders any subsequent change or modification to the remote online notarial act to be evident.

The Reporter then moved to proposed R.S. 35:628, explaining that the changes here included formatting and replacing "individual" with "party". She explained that the latter of these changes was made because, here, we actually *mean* party—a term inclusive of the person making the acknowledgment. A motion was made and seconded to approve the changes to R.S. 35:628. The motion passed and the provision was approved as follows:

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

The notary public shall take reasonable steps to ensure both of the following:

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

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

Finally, Professor Lonegrass turned the Council's attention to R.S. 35:629. Again, she pointed out the familiar list-formatting changes. She also noted that the Committee had replaced "Electronic copies" in the heading with "Records" to reflect the extra requirements that had been added subsequent to the initial drafting of the heading. A motion was made and seconded to approve the changes to R.S. 35:629. One Council member asked whether any of the requirements listed in this provision were required with respect to "traditional" notarizations. The Reporter answered in the negative but reminded the Council member that no changes had been made to the substance of the provision, which had already been approved by the Council. A vote was taken, and the provision was approved as follows:

**R.S. 35:629. Records of remote online notarizations**

A. The notary public shall do all of the following:

(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.

(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.

Professor Lonegrass then concluded her presentation, and the President called on Judge Guy Holdridge, Acting Reporter of the Criminal Code and Code of Criminal Procedure Committee, to begin a brief presentation of materials.

### **Criminal Code and Code of Criminal Procedure Committee**

Judge Holdridge began his presentation by asking the Council to turn to the materials on capital postconviction relief and explaining that he would only be presenting proposed articles that were almost identical to articles on noncapital postconviction relief that had already been approved by the Council. The first of these provisions, he explained, was Article 930.13 on page 10 of the "Capital" materials. A motion was made and seconded to adopt Article 930.13 as presented, and the motion passed with no objection. The adopted proposal reads as follows:

#### **Article 927.2 930.13. Burden of proof**

The applicant in an application for capital postconviction relief shall have the burden of proving that relief should be granted.

The Council then considered Articles 930.17 and 930.18, on pages 16 and 17 of the "Capital" materials. Motions were made and seconded to adopt both of these articles as presented, and the motions passed with no objection. The adopted proposals read as follows:

#### **Article 927.5 930.17. Privilege waiver**

If an application for capital postconviction relief is based in whole or in part upon a claim of ineffective assistance of counsel or breach of duty by ~~an attorney~~ counsel for the applicant, the attorney-client privilege is waived for the limited information necessary to respond to the claim.

#### **Article 927.8 930.18. Procedural objections**

A. If it is required to respond, the State may file any procedural objection alleging that a procedural bar precludes the court from considering the merits of that claim in the application for capital postconviction relief. Any procedural objection shall set forth the factual basis for the objection. The objection shall be filed at any time prior to the answer or with the answer.

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

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

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

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

(4) The application contains a claim that is untimely pursuant to Article ~~926~~ 930.11, in which case the claim shall be dismissed.

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

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

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

The Council then turned to Articles 930.22 and 930.24, on pages 20 and 21 of the "Capital" materials, and motions were made and seconded to adopt these provisions as presented. The motions passed with no objection, and the adopted proposals read as follows:

**Article ~~927.12~~ 930.22. Evidentiary hearing; factual development**

A. If the court determines that there are questions of fact that cannot properly be resolved pursuant to Articles ~~927.6 and 927.11~~ 930.16 and 930.21, the court may order oral depositions of any witness, including the applicant, under conditions specified by the court; order requests for admissions of fact and genuineness of documents; or require a party to provide evidence of the authenticity of any record submitted to the court.

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

C. Although the rules provided in the Code of Evidence shall not strictly apply, the district court should consider those rules in determining the applicability of testimonial privileges and in assessing the reliability of evidence.

**Comments – 2019**

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

(b) Pursuant to Article ~~927.13(A)~~ 930.23(A), the applicant shall be physically present at any evidentiary hearing conducted in accordance with Paragraph B of this Article.

\* \* \*

**Article ~~927.15~~ 930.24. Rendition of judgment**

A. The district court shall render judgment within sixty days of submission of the case on the merits. A copy of the judgment granting or denying relief shall be supported by written or oral reasons setting forth the grounds on which the judgment is based. A copy of the judgment and the written or transcribed reasons shall be furnished to the applicant, his attorney counsel, the State, and the custodian pursuant to Article 930.12.

B. If the court determines pursuant to Article ~~927.11 or 927.12~~ 930.21 or 930.22 that the application for capital postconviction relief has merit, the court may order a new trial, order a new sentencing hearing, or order a guilty plea to be withdrawn. In the event that the applicant is entitled to an out-of-time appeal under Article ~~927.3(4)~~ 930.14(4), the court shall order that the applicant have the right to appeal the conviction.

Next, Judge Holdridge directed the Council's attention to Articles 930.26 and 930.27, on page 22 of the "Capital" materials. Motions were made and seconded to adopt both of these provisions as presented, and these motions passed with no objection. The adopted proposals read as follows:

**Article ~~927.18~~ 930.26. Departure from this Title**

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

**Comments – 2019**

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

**Article ~~928~~ 930.27. Review of district court judgments**

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

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

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

Finally, Judge Holdridge explained that Article 931, on pages 22 through 26 of the "Capital" materials, had been amended to include the corresponding references to the articles on capital postconviction relief but was otherwise unchanged from the version that the Council had previously adopted. It was moved and seconded to adopt Article 931 as presented, and the motion passed with no objection.

At this time, Judge Holdridge concluded his presentation, and the President reminded the Council that the Annual Banquet would be held that night in the Noland/Laborde Ballroom of the Lod Cook Alumni Center, with cocktails beginning at 6:30 p.m. and dinner beginning at 7:30 p.m. The Friday session of the March 2019 Council meeting was then adjourned.



# LOUISIANA STATE LAW INSTITUTE

## MEETING OF THE COUNCIL

March 8-9, 2019

**Saturday, March 9, 2019**

### **Persons Present:**

Adams, E. Pete	Little, F. A., Jr.
Bergstedt, Thomas M.	Maloney, Marilyn C.
Breard, L. Kent	Manning, C. Wendell
Brister, Dorrell	McWilliams, Ford
Clements, Gary P.	Maw, Emily
Crigler, James C., Jr.	Nelson, Sherika
Cromwell, L. David	North, Donald W.
Dawkins, Robert G.	Obioha, Violet
Di Giulio, John E.	Price, Donald W.
Dimos, Jimmy N.	Richardson, Sally Brown
Doguet, Andre'	Scalise, Ronald J., Jr.
Domingue, Billy J.	Sole, Emmett C., Jr.
Eboulum, Natalie	Talley, Susan G.
Forrester, William R., Jr.	Tate, George J.
Garofalo, Raymond E., Jr.	Thibeaux, Robert P.
Hash, Endya L.	Tucker, Zelda W.
Holdridge, Guy	Veron, J. Michael
Kostelka, Robert "Bob" W.	Waller, Mallory
Lampert, Loren	Weems, Charles S., III
Lee, Amy Allums	Wilson, Evelyn L.

President Susan G. Talley called the Saturday session of the March 2019 Council meeting to order at 9:00 a.m. on Saturday, March 9, 2019, at the Lod Cook Alumni Center in Baton Rouge. She then called on Judge Guy Holdridge, Acting Reporter of the Criminal Code and Code of Criminal Procedure Committee, to resume his presentation from yesterday.

### **Criminal Code and Code of Criminal Procedure Committee**

After thanking the members of the Code of Criminal Procedure Committee for their diligent work, Judge Holdridge began his presentation by asking the Council to turn to the only article on noncapital postconviction relief that had not yet been approved – Article 927.3, on page 7 of the "Noncapital" materials. After explaining Subparagraphs (1) through (5), Judge Holdridge explained that Subparagraph (6) was the Committee's proposed addition of a ground for postconviction relief based on new evidence of actual innocence, which was narrowly tailored to apply only to scientific, physical, or nontestimonial documentary evidence and would require that the applicant not only be factually innocent of the crime for which he was convicted, but also of any felony offense that was responsive to the crime. At this time, a motion was made and seconded to adopt the proposed revisions to Article 927.3.

One Council member questioned why the ground based on double jeopardy was being deleted on line 35 of page 7 of the "Noncapital" materials, and the Acting Reporter explained that the Committee had determined that existing Subparagraphs (3) and (6) were unnecessary because they were subsumed in Subparagraph (1) concerning constitutional violations. Other Council members questioned why the concept that the evidence must be "new" appeared so frequently throughout Subparagraph (6), as well as whether a cell phone video would constitute physical or documentary evidence. Judge Holdridge explained that this language represented a compromise between both sides and that yes, a cell phone video is exactly the type of evidence that was contemplated by the Committee. Other Council members then expressed their agreement with the Committee's policy decision that eyewitness testimony alone should not be sufficient for

purposes of proving actual innocence, particularly in light of concerns with respect to the credibility of witnesses and the potential to open the floodgates to litigation, thereby delaying consideration of claims with merit. The Council then approved Subparagraphs (1) through (5) and Subsubparagraph (6)(a) as presented.

The Council then turned to Subsubparagraph (6)(b), on lines 7 through 10 of page 8 of the “Noncapital” materials, and one Council member suggested that “new” be deleted on line 8 of page 8. After a Committee member explained that many applicants for noncapital postconviction relief are pro se litigants, and that this language was not as repetitive as it may initially seem, the Council decided to retain this language. The Council did agree, however, to replace “conclusive” with “clear and convincing” on line 7 of page 8 and to approve Subsubparagraph (6)(b) as amended. Judge Holdridge then explained that since actual innocence is a new ground for noncapital postconviction relief, Subsubparagraph (6)(c) was drafted as an exception to the usual time limitations applicable to this provision to give all applicants a year and a half within which to file a claim on this basis. The Council approved this provision as presented before turning to Subsubparagraph (6)(d), on lines 17 through 20 of page 8. One Council member questioned the “serve as a bar to further applications” language on line 19 of page 8, and a Committee member explained that actual innocence itself is an exception to the otherwise applicable time limitations, and that essentially this provision just serves as a reminder to pro se litigants. A motion was made and seconded to adopt this provision as presented, and the motion passed over two objections.

Finally, the Council considered Article 927.3(6)(e), on lines 22 through 24 of page 8 of the “Noncapital” materials, and the Acting Reporter explained that this provision is intended to ensure that applicants who are found actually innocent of the crime for which they were convicted are not tried again for the same crime; at the same time, the provision gives prosecutors the discretion to institute a new action for a different offense based on the same facts. Judge Holdridge gave the example of an applicant who was convicted and later found actually innocent of murder but was also committing a drug offense at the same time, a charge which the prosecution did not pursue initially because it was so minor compared to the murder charge. He also noted that in these situations, the applicant is unlikely to serve any additional jail time because he will be given credit for the time he previously served. One Council member then questioned whether a reference to offenses that are responsive to the crime for which the applicant was convicted should be included here as well, since under Subsubparagraph (6)(a), the applicant will have already proven his innocence of those crimes. The Council then engaged in a great deal of discussion with respect to this issue, and several suggestions for revisions to Subsubparagraph (6)(e) were made, including incorporating language such as “the same criminal episode,” “the same series of acts or transactions,” “the same facts and circumstances constituting the offense,” and “a different offense arising out of the same arrest.” Ultimately, however, the Council agreed to add “or for any felony offense that was a responsive verdict at the time of the conviction” after “convicted” on line 23 of page 8 and to replace “a different offense based on the same facts” with “any other offense” on lines 23 and 24 of the same page. A motion was then made and seconded to adopt Subsubparagraph (6)(e) as amended, and the motion passed over one objection. A motion was also made and seconded to approve the Comments to Article 927.3, and after the Council agreed to rewrite Comment (e) to provide that “The reference to Article 576 in Subsubparagraph (6)(e) is intended to refer only to the time limitations provided by that Article,” the motion passed with no objection. Article 927.3 as adopted by the Council reads as follows:

#### **Article ~~930.3~~ 927.3. Grounds**

If the ~~petitioner~~ applicant is in custody after sentence for conviction for an offense, relief shall be granted only on the following grounds:

(1) The conviction was obtained in violation of the ~~constitution~~ Constitution of the United States of America or the ~~state~~ Constitution of Louisiana;

~~(2) The court exceeded its jurisdiction;~~

~~(5)(2) The statute creating the offense for which he the applicant was convicted and sentenced is unconstitutional; or violates the Constitution of the United States of America or the Constitution of Louisiana.~~

~~(3) The conviction or sentence subjected him to double jeopardy;~~

~~(7)(3) The results of DNA testing performed pursuant to an application granted under Article 926.1 proves the provisions of Article 931 prove by clear and convincing evidence that the petitioner applicant is factually innocent of the crime for which he the applicant was convicted.~~

~~(4) The applicant was improperly deprived of the right to appeal.~~

~~(4)(5) The limitations on the institution of prosecution had expired;~~

~~(6) The conviction or sentence constitute the ex post facto application of law in violation of the constitution of the United States or the state of Louisiana.~~

(6)(a) The applicant presents new, reliable, and exculpatory scientific, physical, or nontestimonial documentary evidence that was not known or discoverable at or prior to trial and that, when viewed in light of all the relevant evidence, proves by clear and convincing evidence that the applicant is factually innocent of the crime for which the applicant was convicted and of any felony offense that was a responsive verdict at the time of the conviction.

(b) The clear and convincing evidence necessary to support a claim for actual innocence under this Subparagraph shall be new, material, and noncumulative. A recantation of prior sworn testimony without the corroborating evidence required by Subsubparagraph (a) of this Subparagraph shall not be sufficient to overcome the presumption of a valid conviction.

(c) An applicant's first claim of actual innocence pursuant to this Subparagraph that would otherwise be barred from review on the merits by the time limitations provided in Article 926 or the procedural objections provided in Article 927.8 shall not be barred if the claim is contained in an application filed on or before December 31, 2020.

(d) An unsupported allegation of innocence made in a new application filed in accordance with this Subparagraph may be denied by the trial court without the necessity of an answer or hearing and shall thereafter serve as a bar to further applications for postconviction relief in accordance with Article 927.8.

(e) An applicant who is determined to be actually innocent may not be tried again for the same crime for which the applicant was convicted or for any felony offense that was a responsive verdict at the time of the conviction. A new prosecution for any other offense may be instituted within the time established by Article 576.

### **Comments – 2019**

(a) Included among the claims that may be raised in an application for postconviction relief are claims of ineffective assistance of trial and appellate counsel in violation of constitutional standards. Claims of ineffective assistance of counsel are often reserved for collateral proceedings. See *Massaro v. United States*, 538 U.S. 500, 505, 123 S.Ct. 1690, 1694, 155 L.Ed. 714 (2003). Ineffective assistance claims often depend on evidence outside the trial record. Direct appeals without expansion of the record may not be as effective as other proceedings for

developing the factual basis for the claim. Appellate counsel's performance can also form the basis of a claim for ineffective assistance of counsel. See *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). See also *Woods v. Etherton*, --- U.S. ---, 136 S.Ct. 1149 (2016).

(b) The fourth ground for relief is intended to codify *State v. Counterman*, 475 So. 2d 336 (La. 1985) and its progeny.

(c) The removal of the words "and sentenced" from Subparagraph (2) of this Article is intended to make the provision consistent with prior jurisprudence. This Article continues to recognize that sentencing-related claims, including but not limited to challenges to habitual offender proceedings, are not cognizable grounds for postconviction review. See *State ex rel. Melinie v. State*, 93-1380 (La. 1/12/96), 665 So. 2d 1172; *State v. Shepard*, 2005- 1096 (La. 12/16/05), 917 So. 2d 1086; *State v. Cotton*, 09-2397 (La. 10/15/10), 45 So. 3d 1030. Collateral review of sentences that have become final is governed by Article 882.

(d) The deletion of the separate double jeopardy ground under this Article does not preclude an applicant from alleging a double jeopardy violation under Subparagraph (1) of this Article.

(e) The reference to Article 576 in Subsubparagraph (6)(e) is intended to refer only to the time limitations provided by that Article.

Having concluded the materials on noncapital postconviction relief, Judge Holdridge then directed the Council's attention to Article 930.14, on page 10 of the "Capital" materials, concerning grounds for capital postconviction relief. The Council first discussed the need to make the same changes as were made in the noncapital context, including replacing "conclusive" with "clear and convincing" on line 34 of page 10, amending the language of Subsubparagraph (5)(e) on lines 5 and 6 of page 11, and replacing the Comment on lines 1 through 3 of page 12. The Council also agreed to amend the language of the introductory paragraph of Subsubparagraph (6)(a), on lines 8 and 9 of page 11, to read as follows: "The applicant proves by clear and convincing evidence of the nature described in Subsubparagraph (5)(a) of this Article that he is factually innocent of all of the applicable elements within R.S. 14:30 other than both of the following." A motion was then made and seconded to adopt Article 930.14 as amended, and the motion passed with no objection. The adopted proposal reads as follows:

#### **Article 927.3 930.14. Grounds**

~~If the applicant is in custody after sentence for conviction for an offense,~~ Capital postconviction relief shall be granted only on the following grounds:

(1) The conviction or death sentence was obtained in violation of the Constitution of the United States of America or the Constitution of Louisiana.

(2) The statute creating the offense or penalty for which the applicant was convicted or sentenced violates the Constitution of the United States of America or the Constitution of Louisiana.

(3) The results of DNA testing performed pursuant to the provisions of Article 931 prove by clear and convincing evidence that the applicant is factually innocent of the crime for which the applicant was convicted.

(4) The applicant was improperly deprived of the right to appeal.

~~(5) The limitations on the institution of prosecution had expired.~~

(5)(a) The applicant presents new, reliable, and exculpatory scientific, physical, or nontestimonial documentary evidence that was not known or discoverable at or prior to trial and that, when viewed in light of all the relevant evidence, proves by clear and convincing evidence that the applicant is factually innocent of the crime for which the applicant was convicted and of any felony offense that was a responsive verdict at the time of the conviction.

(b) The clear and convincing evidence necessary to support a claim for actual innocence under this Subparagraph shall be new, material, and noncumulative. A recantation of prior sworn testimony without the corroborating evidence required by Subsubparagraph (a) of this Subparagraph shall not be sufficient to overcome the presumption of a valid conviction.

(c) An applicant's first claim of actual innocence pursuant to this Subparagraph that would otherwise be barred from review on the merits by the time limitations provided in Article 926 930.11 or the procedural objections provided in Article 927.8 930.18 shall not be barred if the claim is contained in an application filed on or before December 31, 2020.

(d) An unsupported allegation of innocence made in a new application filed in accordance with this Subparagraph may be denied by the trial court without the necessity of an answer or hearing and shall thereafter serve as a bar to further applications for postconviction relief in accordance with Article 927.8 930.18.

(e) An applicant who is determined to be actually innocent may not be tried again for the same crime for which the applicant was convicted or for any felony offense that was a responsive verdict at the time of the conviction. A new prosecution for any other offense may be instituted within the time established by Article 576.

(6)(a) The applicant proves by clear and convincing evidence of the nature described in Subsubparagraph (5)(a) of this Article that he is factually innocent of all of the applicable elements within R.S. 14:30 other than both of the following:

(i) That the applicant committed the killing of a human being.

(ii) That the applicant had specific intent to kill or to inflict great bodily harm.

(b) If postconviction relief is granted under this Subparagraph, the relief is that the offender shall be punished by life imprisonment without benefit of parole, probation, or suspension of sentence.

#### **Comments – 2019**

The reference to Article 576 in Subsubparagraph (6)(e) is intended to refer only to the time limitations provided by that Article.

Next, the Council considered Articles 930.7 and 930.8, on pages 3 and 4 of the "Capital" materials, and motions were quickly made and seconded to adopt both provisions as presented. The motions passed with no objection, and the adopted proposals read as follows:

#### **Article 930.7. Enrollment of counsel**

A. Within thirty days of the filing of the district court's order for appointment, or the final deadline for assignment of counsel if an extension

is obtained, the Louisiana State Public Defender Board's assigned counsel shall file a motion to enroll as counsel of record on behalf of the applicant.

B. The State may be represented by the district attorney for the district in which the application was convicted, the Attorney General, or both. Whichever prosecutorial entity prosecuted the applicant at trial is presumed to represent the State in capital postconviction proceedings absent an order of recusal or similar order. Within thirty days of the filing of the district court's order, the State shall file a notice designating counsel for the State.

#### **Comments – 2019**

Consistent with Code of Civil Procedure Article 1880, the Attorney General must be served by a party who seeks to challenge the constitutionality of any state law with the written, particularized pleading in which the challenge is made and afforded notice and an opportunity to be heard. See *State v. Schoening*, 770 So. 2d 762, 765-66 (La. 2000).

#### **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. The lack of a recording shall not be grounds for capital postconviction relief under Article 930.14 for either party.

The Council then turned to Article 930.11, on page 6 of the "Capital" materials, and Judge Holdridge explained that a time limitation of four years had been added in Paragraphs A and D, which was an improvement over the average amount of time it presently takes to file the true application for capital postconviction relief. The Council then considered the remaining Paragraphs of Article 930.11, and after members agreed to move "only" to after "supplemented" on line 9 of page 6, a motion was made and seconded to adopt the provision as amended. The motion passed over one objection, and the adopted proposal reads as follows:

#### **Article 926 930.11. Time limitations for comprehensive application; exceptions; prejudicial delay**

A. A comprehensive application for capital postconviction relief shall be considered timely if it is filed within four years after the judgment of conviction and sentence has become final under the provisions of Article 930.2.

B. An existing claim in the comprehensive application may be supplemented only with leave of court. The State shall be entitled to have a reasonable opportunity to respond to the applicant's supplement.

C. A comprehensive application for capital postconviction relief may not be supplemented with additional claims unless either of the following apply:

(1) The supplemental claim is submitted no later than one hundred eighty days after the filing of the original comprehensive application, and leave of court is granted for good cause shown following a contradictory hearing.

(2) The supplemental claim meets the criteria listed in Paragraph D of this Article.

D. No comprehensive application for capital postconviction relief, including an application that seeks an out of time appeal, shall be considered if it is filed more than two ~~four~~ years after the judgment of conviction and sentence has become final under the provisions of Articles 914 or 922 Article 930.2, unless any of the following apply:

(1) The application alleges, and the applicant proves or the State admits, that the facts upon which the claim is predicated were not known to the 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. 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 and his counsel 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 interests 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.~~

(b) The application raises a new or different claim that was not inexcusably omitted from a prior application.

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

E. If the district court considers dismissing a claim or application for failure of the applicant to meet one of the exceptions, the court shall order the applicant to state why he meets an exception. If the court finds that the applicant meets an exception, the district court shall consider the merits of the claim.

~~B. An~~ F. A claim or application for capital postconviction relief that is timely filed, or 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 of material prejudice to its ability to respond to, negate, or rebut the allegations of the application, and that the prejudice has been caused by events not under the control of the State that have transpired since the date of original conviction. 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 court shall inform the defendant of the two-year prescriptive period for 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.~~

Next, the Council considered Article 930.12, on page 9 of the "Capital" materials, and a motion was made and seconded to adopt the proposed provision as presented. The motion passed with no objection, and the adopted proposal reads as follows:

**Article ~~927.4~~ 930.12. Service**

~~A. The State may be represented by the district attorney for the district in which the applicant was convicted, the Attorney General, or both. Initial service of an application for capital postconviction relief shall be made on the District Attorney unless the Attorney General is representing the State. All subsequent filings or orders shall be served on whoever represents the State in the capital postconviction litigation.~~

~~B. If counsel appears for the applicant in the postconviction litigation, service of filings and orders on the applicant shall be made to both the applicant and his counsel, unless such service is waived by the applicant in writing.~~

~~C. Unless otherwise provided, all filings made during the course of the postconviction litigation shall be served by the filing party on the opposing party.~~

~~D. B. All other service on the applicant or his counsel shall be made by mail, in open court, or by electronic means, if available. Within fifteen days of the filing, the clerk of court shall serve all orders, notices, and dispositions on the applicant by mail at the institution where he is imprisoned, or, if represented by counsel, through counsel for the applicant counsel. The clerk shall simultaneously serve counsel for the State.~~

Judge Holdridge then asked the Council to consider Article 930.15, on page 12 of the "Capital" materials, concerning the production of information. After he explained that Paragraph A concerns public records requests and that Paragraph B is identical to the corresponding provision in the noncapital context, a motion was made and seconded to adopt these provisions as presented, and the motion passed with no objection. The Acting Reporter then explained Paragraph C concerning subpoenas duces tecum, particularly Subparagraph (C)(3) providing for the ex parte adjudication of motions for subpoenas duces tecum. Judge Holdridge explained that the provision would require the party requesting the ex parte adjudication to provide a general description of the requested information and that, absent good cause as provided in Subparagraph (C)(4), the other party would have the opportunity to oppose proceeding ex parte. At this time, the Council agreed to redesignate Subparagraph (C)(3) by making the first sentence the introductory paragraph, adding "as follows:" after "ex parte" on line 42 of page 13, and designating the remainder of lines 42 through 45 of the same page as Subsubparagraph (a). The Council also agreed to delete the introductory phrase on lines 12 and 13 of page 14, to capitalize "where" on line 13, and to add "Where" on line 18 of the same page. Motions were then made and seconded to adopt Subparagraphs (C)(3) and (4) as amended, and the motions passed with no objection. Motions were also made and seconded to adopt Subparagraph (C)(5) and Paragraphs D and E as presented, and those motions also passed with no objection. The adopted proposal reads as follows:



**Article 927.4 930.15. 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.~~

A. After the conviction of a capital crime and the imposition of a sentence of death have become final, a person is entitled to receive one copy free of cost of all records within the file of the prosecution team that have not been previously produced and would constitute public records under Public Records Law, R.S. 44:1 et seq. Any records produced pursuant to this Paragraph may be produced electronically.

~~B. (1) 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.~~

~~(2) B.~~ 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 counsel, and the State.

~~(3)(a) 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:~~

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

~~(ii) The documents cannot be obtained from prior counsel pursuant to Subparagraph (2) of this Paragraph.~~

~~(b) A motion for production of documents filed in accordance with Subsubparagraph (a) 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.~~

~~(c) 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.~~

~~(4) 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.~~

~~(5) 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.~~

C.(1) At any time following the filing of a preliminary application for capital postconviction relief, a court may, for good cause, issue a subpoena duces tecum ordering a person to produce any books, papers, documents, data or any other tangible things in his possession or under his control the subpoena designates. The court may designate the time, manner, and place of production, including production at a hearing, or within a designated time period, and may direct the person to produce the items directly to the requesting party.

(2) The subpoena shall be served in accordance with Article 734 or 735, and a return shall be made by the sheriff in accordance with Article 736. The party requesting the subpoena shall also provide notice of the request to the opposing party. Either the opposing party or the person subject to the subpoena may file a motion to vacate or modify the subpoena if compliance would be unreasonable or oppressive.

(3) A motion for a subpoena duces tecum may be filed and adjudicated, and the subpoena may be issued, ex parte as follows:

(a) Prior to the issuance of the subpoena, the opposing party shall be given notice of the filing of the ex parte motion with a general description of the requested information and provided an opportunity to be heard in order to oppose the ex parte subpoena, except for good cause as provided in Subparagraph (4) of this Paragraph.

(b) If the opposing party opposes the ex parte subpoena, the district court shall conduct an in camera review to determine whether disclosing the information to the opposing party would be fundamentally unfair. If the court makes such a determination, the court shall also provide written or transcribed reasons. If the court fails to make such a determination and instead determines that the ex parte subpoena is not necessary, the requesting party may withdraw the motion for the subpoena; otherwise, the opposing party shall be allowed to participate in the hearing as to whether the subpoena should be issued.

(4)(a) "Good cause" for the issuance of an ex parte subpoena duces tecum shall be met, and the proceedings shall be conducted ex parte, in either of the following cases:

(i) Where the requesting party submits a legally valid release of information signed by the relevant individual and satisfies all legal requirements for production of that information, or the requesting party is otherwise entitled to the requested information without court order.

(ii) Where the requesting party is the applicant and the subpoena requires the production of the applicant's confidential, personal, private, or privileged information.

(5) When an ex parte subpoena is issued, the court shall order that the requested information be produced directly to the requesting party. The ex parte motion, order, and subpoena duces tecum shall be filed under seal.

G. D. 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 Law, R.S. 44:1 et seq.

E. For good cause, oral depositions of witnesses may be taken under conditions specified by the court. The court may authorize requests for admissions of fact and genuineness of documents. In such matters, the court shall be guided by the Code of Civil Procedure. The determination of "good cause" may be based upon an ex parte showing.

### **Comments – 2019**

(a) The term "prosecution team" as used in Paragraph A of this Article refers to the investigative and prosecutorial personnel who have acted on the government's behalf in the case. See *State v. Louviere*, 833 So. 2d 885, 896-97 (La. 2002).

(b) The "general description of the requested information" required by Subsubparagraph (C)(3)(a) of this Article is intended to provide the State with sufficient information to determine whether to object to the issuance of an ex parte subpoena. The general description will not necessarily require disclosure of the recipient of the subpoena.

(c) Paragraph E of this Article gives the district court flexibility to authorize the use of some of the well-known civil discovery procedures to complete the record. The determination of "good cause" to employ such devices rests largely with the district court and may be based upon an ex parte showing.

Next, the Council turned to Article 930.16, on page 15 of the "Capital" materials, and a motion was made and seconded to adopt this provision as presented. The motion passed without objection, as did motions to approve Article 930.19 on page 18, Article 930.20 on page 19, Article 930.21 on pages 19 and 20, and Article 930.23 on page 21, all as presented. The adopted proposals read as follows:

#### **Article ~~927.6~~ 930.16. Action required by district court after application is filed**

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

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

(a) The applicant raises a claim which, if established, would not entitle the applicant to relief, or which fails to state a ground upon which relief can be granted pursuant to Article ~~927.3~~ 930.14.

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

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

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

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

~~(3) (2) Order the State to respond. If the court does not grant a order dismissal based upon the pleadings pursuant to Subparagraphs (1) or (2) Subparagraph (1) of this Paragraph, the court shall order the State to respond within sixty days one year from the date of the order by filing a request for a more definite statement under Article 927.7, a procedural objection under Article 927.8, or an answer on the merits of the claims for relief under Article 927.10 930.20. In lieu of filing an answer to a specific claim, the State may file a procedural objection as to that claim within six months of the order. The court may grant an extension of time for good cause shown.~~

B. A copy of any order shall be in writing and furnished to the applicant, his attorney counsel, the State, and the custodian pursuant to Article 930.12.

#### **Article 927.9 930.19. Disposition of procedural objections**

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

B. The court shall dispose of the procedural objections no sooner than sixty ninety-five days nor longer than one hundred twenty days from the date on which the procedural objections were filed, ~~except that the court may dispose of the procedural objections sooner than ninety-five days if the court has received from the applicant a response to the procedural objections or a waiver of the right to file such a response or if an extension of time is granted for the applicant to respond to the procedural objections, no sooner than five days nor longer than thirty days from the date on which the applicant's response is filed. The court may grant an extension of time for good cause shown.~~ Procedural objections shall be disposed of in the following manner:

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

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

(3) If the court cannot dispose of the procedural objections or the application in accordance with Subparagraphs (1) and (2) of this Paragraph, the court shall defer disposition of any procedural objections and shall issue an order to both the State and the applicant scheduling further proceedings

pursuant to Article ~~927.42~~ 930.22 for factual development of the procedural objections that cannot be disposed of summarily. Within thirty days of the completion of these proceedings, the court shall rule on all procedural objections together.

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

D. The court shall rule in writing on each procedural objection. A copy of the order granting or denying a dismissal upon procedural objections shall be furnished to the applicant, his attorney counsel, the State, and the custodian pursuant to Article 930.12.

### **Comments – 2019**

Under Paragraph C of this Article, except as provided by agreement of the parties or in the interests of justice, an evidentiary hearing on the merits is only required after the final disposition of any and all procedural objections filed by the State and a determination by the court that summary disposition on the merits is not appropriate.

### **Article ~~927.10~~ 930.20. Answer and responses**

A. ~~If a more definite statement is not requested, or if the application for postconviction relief is not dismissed upon procedural objections, the court shall order the State to file an answer on the merits of each claim that was not dismissed. The State shall file its answer within sixty days from the date of the order the time period set in Article 930.16(A)(2). In the event that the State elected to file procedural objections and there is a final order denying those objections, the State shall file an answer within sixty days with respect to any claim for which all procedural objections have been denied if it has not already done so. The court may grant an extension of time for good cause shown.~~

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

### **Article ~~927.11~~ 930.21. Summary disposition**

A. If the court determines that the factual and legal issues can be resolved based upon the application, answer, response, and supporting documents, including relevant transcripts, depositions, and other reliable documents submitted by either party or available to the court, the court shall grant or deny relief as to an individual claim without further proceedings no sooner than ~~sixty~~ ninety-five days nor longer than ~~ninety one hundred twenty~~ one hundred twenty days from the date on which the answer was filed, ~~except that the court may grant or deny relief sooner than ninety-five days if the court has received from the applicant a response to the answer or a waiver of the right to file such a response or if an extension of time is granted for the applicant to respond to the answer, no sooner than five days nor longer than thirty days from the date on which the applicant's response to the answer is filed. The court may grant an extension of time for good cause shown.~~

B. If the court grants or denies relief as to an individual claim pursuant to this Article, the court's ruling shall include a ruling on all matters that the court determines can be disposed of summarily. A copy of the order granting or denying relief shall be furnished to the applicant, his attorney counsel, the State, and the custodian pursuant to Article 930.12.

#### Comments – 2019

(a) This Article continues to recognize that an evidentiary hearing is not required in all cases. Rather, in some cases the record will clearly sustain or refute the applicant's allegations, the contested factual matter may not be significant to the outcome, or the expansion of the record without an evidentiary hearing will provide a sufficient basis for disposition of the claims raised in the application for capital postconviction relief.

~~(b) Under Paragraph A of this Article, the court may grant an extension of time if the applicant shows good cause for failing to respond to the State's answer within the time period provided. If the court grants such an extension and the applicant files a response within this additional time period, the court shall grant or deny relief as quickly thereafter as possible.~~

(b) If the court cannot determine the factual issues pursuant to summary disposition, an evidentiary hearing shall be held in accordance with Article 930.22.

#### **Article 927.13 930.23. Attendance by the applicant**

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

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

Finally, the Council considered Article 930.25, on pages 21 and 22 of the "Capital" materials, concerning custody pending retrial. One Council member questioned whether "final" on line 43 of page 21 should be "final and definitive," but after discussion, it was determined that "final and definitive" is not used in the Code of Criminal Procedure. The Council did agree that "it appears" should be changed to "the court finds" on lines 43 and 44 of page 21 and that the same change should be made in the corresponding provision in the articles on noncapital postconviction relief. A motion was then made and seconded to adopt Article 930.25 as amended, and the motion passed with no objection. The adopted proposal reads as follows:

#### **Article 927.16 930.25. Custody pending retrial**

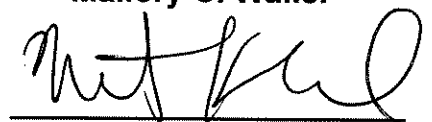
A. If a court grants relief under an application for capital postconviction relief ~~vacating the conviction and reverses the underlying conviction,~~ the court shall order that the applicant be held in custody pending the State's appeal or application for supervisory writs. ~~After the court's ruling becomes final, the court shall order that the applicant be held in custody pending a new trial if the court finds that there are legally sufficient grounds upon which to reprosecute the applicant.~~

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

C. If the court grants relief on an application for capital postconviction relief and reverses the underlying sentence, the court shall order that the

applicant be held in custody pending the State's appeal or application for supervisory writs. After the court's ruling becomes final, the court shall order that the applicant be held in custody pending a new penalty phase proceeding.

At this time, Judge Holdridge concluded his presentation, and the March 2019 Council meeting was adjourned.

  
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**Jessica G. Braun**  
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**Mallory C. Waller**  
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**Nick Kunkel**