LOUISIANA STATE LAW INSTITUTE

MEETING OF THE COUNCIL

February 7-8, 2020

Friday, February 7, 2020

Persons Present:

Becker, Kelly Brechtel
Braun, Jessica
Bergstedt, Thomas M.
Bowers, Clinton M.
Breard, L. Kent
Brister, Dorrell, J.
Comeaux, Jeanne C.
Coreil, Jeffrey
Crigler, James C., Jr.
Crigler, John D.
Cromwell, L. David
Daniels, Timothy F.
Dawkins, Robert G.
Dimos, Jimmy N.
Doguet, Andre'
Domingue, Billy J.
Eagan, Jennifer
Forrester, William R., Jr.
Gray, Darrinisha
Hallstrom, Kären
Hamilton, Leo C.
Handy, Christopher R.
Hayes, Thomas M., III
Haymon, Cordell H.
Hester, Mary
Hogan, Lila T.
Holdridge, Guy
Janke, Benjamin West
Jewell, John Wayne
Lampert, Loren M.
Lavergne, Luke A.
Lawrence, Quintillis Kenyatta
Manning, C. Wendell
Mengis, Joseph W.
Norman, Rick J.
Papillion, Darrel James
Price, Donald W.
Saloom, Douglas J.
Simien, Eulis, Jr.
Talley, Susan G.
Thomas, Kacy Collins
Vance, Shawn D.
Walker, Katy
Waller, Mallory
White, H. Aubrey, III
Wilson, Evelyn L.
Ziober, John David

President Rick J. Norman called the February 2020 Council meeting to order at 10:00 a.m. on Friday, February 7, 2020 at the Lod Cook Alumni Center in Baton Rouge. After making a couple of administrative announcements and asking the Council members to introduce themselves, the President called on Judge Guy Holdridge to begin his presentation of materials on behalf of the Code of Civil Procedure Committee.

Code of Civil Procedure Committee

Judge Holdridge began by explaining to the Council that he would be presenting materials from two Subcommittees of the Code of Civil Procedure Committee – In Forma Pauperis and Recusal – of which he served as Chair and Reporter respectively. Beginning with the "In Forma Pauperis" materials, Judge Holdridge explained that two resolutions had been passed during the most recent legislative session asking the Law Institute to study Louisiana's laws on in forma pauperis proceedings. He noted that these resolutions were requested by the Louisiana State Bar Association's Access to Justice Committee, and that the two primary issues identified by the In Forma Pauperis Subcommittee for immediate revision were to require that written reasons be provided when an application to proceed in forma pauperis is denied and to provide that the applicant is entitled to receive a copy of any judgment or order that is filed.

Judge Holdridge then directed the Council's attention to the first of these issues – the requirement that written reasons be provided when an application to proceed in forma pauperis is denied – and explained that the Subcommittee revised Code of Civil Procedure Article 5183 to require the trial court to do one of three things: grant the application, deny the application and provide written reasons for the denial, or set the matter for contradictory hearing. Judge Holdridge also provided examples of these written reasons, such as that the application was not properly completed or that the applicant

does not qualify to proceed in forma pauperis because the applicant's income is too high. A motion was then made and seconded to adopt the proposed changes to Paragraph A and Subparagraph (B)(1) on lines 3 through 30 of the materials.

One Council member questioned the language concerning whether the clerk of court's office "feels" that the litigant is indigent, and Judge Holdridge responded that the Subcommittee plans to consider all of the provisions on in forma pauperis in the future but is limiting the scope of its present revisions to the two issues previously mentioned. Another Council member asked how quickly written reasons could be provided by the trial judge, and the Chair responded by noting that the Subcommittee's intent was for these reasons to be provided simultaneously with the denial of the application. The Council member then suggested that perhaps "on the order" should be added on line 28 of page 1, but another Council member who is also a judge cautioned against this addition, noting that some judges may want to provide their own reasons rather than being forced to use a form in the order. A vote was then taken on the motion to adopt Article 5183(A) and (B)(1), and that motion passed with no objection.

Next, the Council considered the proposed addition of the sentence in Subparagraph (B)(2), on lines 35 through 37 of page 1 of the materials. Judge Holdridge explained that if an application to proceed in forma pauperis is denied despite the rebuttable presumption that is created, this language would require the court to provide the applicant with justification as to why that decision was made. The Council then discussed whether "provide to the applicant" should be replaced with "file into the record," at which time one Council member expressed that in his view, the language as presently drafted seemed repetitive of the requirement in Subsubparagraph (B)(1)(b) on line 28. Other Council members agreed, expressing that this sentence should be rewritten to require the court to provide written reasons that explain why the presumption had been overcome or rebutted rather than why the application was denied. The Council considered several suggestions before a motion was ultimately made and seconded to substitute the language on lines 35 through 37 with the following: "If the court finds that the presumption has been rebutted, it shall provide written reasons for its finding." The motion passed over one objection, and the Council also agreed to change "and provides" to "with" on line 28 of page 1. A vote was then taken on the motion to adopt Subparagraph (B)(2) as amended, and the motion passed with no objection. The Council also approved the proposed changes in Subparagraph (B)(3), on lines 1 and 2 of page 2, as well as the Comment to Article 5183 after redrafting the last sentence to read as follows: "The form and contents of these written reasons are left to the discretion of the court." The adopted proposal reads as follows:

Article 5183. Affidavits of poverty; documentation; order

A. A person who wishes to exercise the privilege granted in this Chapter shall apply to the court for permission to do so in his first pleading, or in an ex parte written motion if requested later, to which ~~he~~ the applicant shall annex the following:

(1) His affidavit that he is unable to pay the costs of court in advance, or as they accrue, or to furnish security therefor, because of his poverty and lack of means, accompanied by any supporting documentation.~~; and~~

(2) The affidavit of a third person other than his attorney that he knows the applicant, knows his financial condition, and believes that he is unable to pay the costs of court in advance, or as they accrue, or to furnish security therefor.

(3) A recommendation from the clerk of court's office as to whether or not it feels the litigant is in fact indigent, and thus unable to pay the cost of court in advance, or as they accrue, or to furnish security therefor, if required by local rule of the court.

B.(1) ~~When~~ Upon the filing of the completed application and supporting affidavits ~~are presented to the court~~, ~~it~~ the court shall ~~inquire into the facts, and if satisfied that the applicant is entitled to the privilege granted in this Chapter it shall~~ render an order ~~permitting~~ that does one of the following:

(a) Grants the application and allows the applicant to litigate~~,~~ or to continue the litigation ~~of, the action or proceeding~~ without the paying of the costs in advance~~, or as they accrue, or furnishing security therefor~~.

(b) Denies the application with written reasons for such denial.

(c) Sets the matter for a contradictory hearing.

(2) The submission by the applicant of supporting documentation that the applicant is receiving public assistance benefits or that the applicant's income is less than or equal to one hundred twenty-five percent of the federal poverty level shall create a rebuttable presumption that the applicant is entitled to the privilege granted in this Chapter. If the court finds that the presumption has been rebutted, it shall provide written reasons for its finding.

(3) The court may reconsider ~~such an~~ its original order granting the application on its own motion at any time in a contradictory hearing.

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Comments – 2020

Paragraph B of this Article has been amended to require the court to do one of three things after a person has filed a completed application, and the requisite supporting affidavits, to proceed in forma pauperis: (1) grant the application and allow the applicant to proceed in forma pauperis, (2) deny the application and provide written reasons for such denial, or (3) set the matter for a contradictory hearing. The requirement under this provision that written reasons be provided by the court upon the denial of an application is intended to provide the applicant with additional information necessary to, for example, correct a deficiency in the application. The form and contents of these written reasons are left to the discretion of the court.

Next, the Council considered Code of Civil Procedure Article 5185, on page 2 of the "In Forma Pauperis" materials. Judge Holdridge first explained that "or expires" had been added on line 22 to address the rules of some local courts that provide for the expiration of an in forma pauperis order after a certain period of time. A motion was made and seconded to approve this proposed change, as well as the other technical corrections made in Subparagraphs (A)(1) through (3), and the motion passed with no objection.

Turning to Subparagraph (A)(4), Judge Holdridge explained that the proposed revisions address the second issue mentioned earlier concerning the ability of the applicant to obtain a copy of any judgment or order that is issued in the case. The Council discussed that present law covers pleadings but not judgments, as well as the problems that arise with respect to this issue particularly in the family law context, where the party proceeding in forma pauperis is unable to obtain a copy of the judgment of divorce because the costs have not been paid by the other party. One Council member then questioned why there was an exception with respect to contingency fee cases, and Judge Holdridge responded that the ability to proceed in forma pauperis in contingency fee cases is a controversial issue that the Subcommittee is planning to continue studying. The Council discussed that the party proceeding in forma pauperis could be the plaintiff or the defendant, as well as that the clerks of court and the public are bearing the burden of these costs right now and that the intent is to deter the filing of frivolous lawsuits. A motion was then made and seconded to remove "Except in contingency fee cases" from line 1 of page 3, and the motion passed with no objection. The Council then adopted

Subparagraph (A)(4) as amended, as well as the change in Paragraph B and the proposed Comment. The adopted provision reads as follows:

Article 5185. Rights of party permitted to litigate without payment of costs

A. When an order of court permits a party to litigate without the payment of costs until this order is rescinded or expires, ~~he~~ the party is entitled to:

(1) All services required by law of a sheriff, clerk of court, court reporter, notary, or other public officer in, or in connection with, the judicial proceeding, including but not limited to the filing of pleadings and exhibits, the issuance of certificates, the certification of copies of notarial acts and public records, the issuance and service of subpoenas and process, the taking and transcribing of testimony, and the preparation of a record of appeal.~~;~~

(2)(a) The right to the compulsory attendance of not more than six witnesses for the purpose of testifying, either in court or by deposition, without the payment of the fees, mileage, and other expenses allowed these witnesses by law. If a party has been permitted to litigate without full payment of costs and is unable to pay for witnesses desired by him, in addition to those summoned at the expense of the parish, ~~he~~ the party shall make a sworn application to the court for the additional witnesses. The application ~~must~~ shall allege that the testimony is relevant and material and not cumulative and that the defendant cannot safely go to trial without it. A short summary of the expected testimony of each witness shall be attached to the application.

(b) The court shall make a private inquiry into the facts and, if satisfied that the party is entitled to the privilege, shall render an order permitting the party to subpoena additional witnesses at the expense of the parish. If the application is denied, the court shall state the reasons for the denial in writing, which shall become part of the record.

(3) The right to a trial by jury and to the services of jurors, when allowed by law and applied for timely.~~; and~~

(4) The right to have any judgment or order filed and to receive one certified copy of the judgment or order.

(5) The right to a devolutive appeal, and to apply for supervisory writs.

B. ~~He~~ The party is not entitled to a suspensive appeal, or to an order or judgment required by law to be conditioned on his furnishing security other than for costs, unless ~~he~~ the party furnishes the necessary security therefor.

C. No public officer is required to make any cash outlay to perform any duty imposed on him under any Article in this Chapter, except to pay witnesses summoned at the expense of the parish the witness fee and mileage to which they are entitled.

Comments – 2020

Paragraph (A)(4) of this Article has been added to provide an applicant proceeding in forma pauperis with the right to have a judgment or order filed and to receive a certified copy of such judgment or order, regardless of whether the costs of court have been paid. See *Carline v.*

Carline, 644 So. 2d 835 (La. App. 1 Cir. 1994) (holding that it was improper to require a plaintiff proceeding in forma pauperis to pay court costs before providing a certified copy of the judgment rendered in the proceedings).

Having concluded the materials on in forma pauperis, Judge Holdridge asked the Council to turn to the "Continuous Revisions" materials prepared by the Code of Civil Procedure Committee, specifically Article 5001 on page 2. Judge Holdridge explained that this article was being amended to remove the exception that required appeals from judgments rendered by a parish or city court in the Nineteenth Judicial District to be taken to the district court rather than to the court of appeal. A motion was made and seconded to adopt the proposed changes as presented, and the motion passed with no objection. The adopted proposal reads as follows:

Article 5001. Appeals from city and parish courts

A. ~~Except as provided in Paragraph B of this Article, an~~ An appeal from a judgment rendered by a parish court or by a city court shall be taken to the court of appeal.

B. ~~Appeal from a judgment rendered by a city court located in the Nineteenth Judicial District shall be taken to the district court of the parish in which the court of original jurisdiction is located.~~

~~C.~~ Appeal shall be on the record and shall be taken in the same manner as an appeal from the district court.

Next, Judge Holdridge asked the Council to consider Article 1561(A), on page 1 of the materials, and a handout containing additional revisions to the proposed Comment was distributed. Judge Holdridge explained that the Council had previously approved a version of this provision that allowed consolidation for trial or pretrial purposes and had later expanded the scope of this amendment to include consolidation "for all purposes." However, the Code of Civil Procedure Committee worried that this might be interpreted as requiring an "all or nothing" approach to consolidation and had therefore recommended that the provision be amended to allow consolidation for "all or specifically limited purposes" as reflected on line 8 of page 1. Turning to the handout, Judge Holdridge noted that the proposed addition to the Comment on page 3 would clarify that later actions and filings would be consolidated into the first action and that only one judgment would be rendered. One Council member questioned what this would mean for purposes of appeals, and Judge Holdridge responded that if the actions were consolidated for all purposes, there would be only one appeal. Other Council members then expressed concerns with respect to the cost of filing an appeal in this situation, as well as the divestiture of jurisdiction pending the appeal.

After additional discussion concerning other factual scenarios with respect to the consolidation of actions for all purposes as opposed to only certain purposes, one Council member suggested replacing "specifically limited" with just "limited" in all places, and Judge Holdridge accepted that change. Members of the Council also discussed the requirement that a contradictory hearing be held, and some Council members suggested that perhaps additional consideration should be given when the consolidation will take place for all purposes, requiring "due consideration" in these circumstances. A great deal of discussion then ensued with respect to whether the unanimous consent of all parties should be required to consolidate actions for all purposes. Ultimately, one Council member suggested that "all or specifically limited purposes," now "all or limited purposes," be replaced with "trial or other limited purposes" on lines 3, 8, and 18 of page 1 of the materials, and the Council agreed. One Council member also suggested that a Comment be added clarifying that this provision is not intended to allow consolidation for appeals. The Council agreed to reject the proposed Comment to Article 1561 on page 3 of the handout but to approve the proposed change to Code of Civil Procedure Article 253.2 as presented. Motions were then made and seconded to adopt both of these provisions, and the motions passed with no objection. The adopted proposals read as follows:

Article 1561. Consolidation for trial or other limited purposes

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

* * *

Comments – 2020

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

Article 253.2. Transfer and reassignment of pending cases

After a case has been assigned to a particular section or division of the court, it may not be transferred from one section or division to another section or division within the same court, unless agreed to by all parties, or unless it is being transferred to effect a consolidation ~~for purpose of trial~~ pursuant to Article 1561. However, the supreme court, by rule, may establish uniform procedures for reassigning cases under circumstances where an expeditious disposition of cases may be effectuated.

Next, Judge Holdridge directed the Council's attention to the proposed revisions on recusal, explaining that the Recusal Subcommittee had worked with the Supreme Court to attempt to remedy the inconsistencies between Canon 3C of the Code of Judicial Conduct and the provisions of the Code of Civil Procedure. Specifically, Judge Holdridge explained that Canon 3C allows judges to recuse themselves when there would be an appearance of impropriety, but Article 151 does not presently include this as a ground for recusal, instead requiring that the judge be unable to conduct fair and impartial proceedings due to bias or prejudice. To achieve consistency between these two provisions, then, the Subcommittee proposed to amend Article 151 to add a new ground for recusal when the judge would reasonably be prevented from conducting the matter fairly and impartially, as well as to suggest that Canon 3C be amended to allow judges to recuse themselves "as provided by law."

Judge Holdridge then explained that another issue considered by the Subcommittee was the uncomfortable situation in which judges hearing motions to recuse found themselves, often sitting on the same bench as the judge who is the subject of the motion with no guidance as to whether they have an obligation to report their colleague for violating the Code of Judicial Conduct. The Reporter also mentioned the delicate balance between allowing judges to recuse themselves for legitimate reasons and enforcing their judicial duties by preventing them from recusing simply to avoid a bad case or because erroneous decisions were made throughout the matter. Finally, Judge Holdridge explained that the Subcommittee had also imposed time limitations with respect to the filing of motions to recuse in the hopes of alleviating concerns with respect to these motions essentially being used as continuances of the case.

With that introduction, Judge Holdridge asked the Council to turn to Article 151 on page 1 of the "Recusal" materials. After the Reporter explained that the proposed changes in Paragraphs (A)(1) through (4) were technical in nature, a motion was made and seconded to approve these provisions as presented, and the motion passed with no objection. Turning next to Paragraph B, Judge Holdridge explained that the language on

lines 24 through 26 represented a compromise among the stakeholders to codify a ground for recusal that is similar to Canon 3C but is less vague. Members of the Council discussed the types of factual circumstances that would constitute "a substantial and objective basis," such as if the judge's daughter-in-law is employed by a firm involved in the case, or if the judge is treated by a doctor who testified as an expert witness in the case. After discussing that Paragraph B is intended to act as an additional mandatory ground for recusal, one Council member questioned why this provision was not designated as Subparagraph (A)(5). Judge Holdridge responded that the Subcommittee considered this but ultimately decided that it should be a separate paragraph to draw attention to the fact that it is intended to serve as a catchall with respect to the other mandatory grounds for recusal. Another Council member then took issue with the "reasonably prevent" language, arguing that this should really say something like "reasonably be expected to prevent," and Judge Holdridge agreed. A motion was then made and seconded to approve Paragraph B as amended, and the motion passed with no objection.

Turning next to Article 151(C), on pages 2 and 3 of the materials, Judge Holdridge explained that "recusation" had simply been replaced with "recusal" in this provision and throughout the other articles in this Chapter. One Council member questioned whether "alone" should be added after "not" on line 1 of page 3 to address situations in which the judge is a member of the religious body or religious corporation but there is some additional reason as to why the judge should be recused. Another Council member expressed concern with respect to this suggestion, noting that "alone" would modify not only membership in religious bodies or corporations but also citizenship of the state or residency in the political subdivision. Ultimately, the Council agreed to redraft this provision to address the state and political subdivision portion in one sentence and the religious body or religious corporation portion in a second sentence, adding "alone" with respect to the latter of these. A motion was then made and seconded to adopt Paragraph C as amended, and the motion passed with no objection. A motion was also made and seconded to make conforming changes in the Comment to Article 151 and to include Comment (c) on page 1 of the handout, and that motion also passed with no objection. Article 151 as adopted by the Council reads as follows:

Article 151. Grounds

A. A judge of any trial or appellate court~~, trial or appellate,~~ shall be recused ~~when he~~ upon any of the following grounds:

(1) ~~Is~~ The judge is a witness in the cause.~~;~~

(2) ~~Has~~ The judge has been employed or consulted as an attorney in the cause or has previously been associated with an attorney during the latter's employment in the cause, and the judge participated in representation in the cause.~~;~~

(3) ~~Is.~~ The judge is the spouse of a party, or of an attorney employed in the cause or the judge's parent, child, or immediate family member is a party or attorney employed in the cause.~~; or~~

(4) ~~Is~~ The judge is biased, prejudiced, or interested in the cause or its outcome or biased or prejudiced toward or against the parties or the parties' attorneys or any witness to such an extent that ~~he~~ the judge would be unable to conduct fair and impartial proceedings.

B. A judge of any trial or appellate court shall also be recused when a substantial and objective basis exists that would reasonably be expected to prevent the judge from conducting any aspect of the cause in a fair and impartial manner.

~~B. A judge of any court, trial or appellate, may be recused when he:~~

~~(1) Has been associated with an attorney during the latter's employment in the cause;~~

~~(2) At the time of the hearing of any contested issue in the cause, has continued to employ, to represent him personally, the attorney actually handling the cause (not just a member of that attorney's firm), and in this case the employment shall be disclosed to each party in the cause;~~

~~(3) Has performed a judicial act in the cause in another court; or~~

~~(4) Is related to: a party or the spouse of a party, within the fourth degree; an attorney employed in the cause or the spouse of the attorney, within the second degree; or if the judge's spouse, parent, child, or immediate family member living in the judge's household has a substantial economic interest in the subject matter in controversy sufficient to prevent the judge from conducting fair and impartial proceedings in the cause.~~

C. In any cause in which the state~~,~~ or a political subdivision thereof~~,~~ ~~or a religious body or corporation~~ is interested, the fact that the judge is a citizen of the state or a resident of the political subdivision, or pays taxes thereto, ~~or is a member of the religious body or corporation,~~ is not a ground for ~~recusation~~ recusal. In any cause in which a religious body or religious corporation is interested, the fact that the judge is a member of the religious body or religious corporation is not alone a ground for recusal.

Comments – 2020

(a) Former Paragraph B of this Article, which set forth permissive grounds for recusal, has been deleted, and its substance has been moved to a new provision, Article 152, which provides for the mandatory disclosures that a judge must make to all parties and attorneys in the cause.

(b) In its place, a new Paragraph B has been added to provide an additional mandatory ground for recusal when a substantial and objective basis exists that would reasonably be expected to prevent the judge from conducting any aspect of the cause in a fair and impartial manner. This provision is intended to serve as a catch-all to the mandatory grounds for recusal set forth in Paragraph A and to incorporate a clearer, more objective standard than the language of Canon 3C of the Code of Judicial Conduct, which provides that a judge should recuse himself when "the judge's impartiality might reasonably be questioned."

(c) With the addition of this ground for recusal in new Paragraph B, this Article is intended to set forth the exclusive grounds for the recusal of a judge in a civil proceeding.

Judge Holdridge then briefly explained Article 152, on page 3 of the "Recusal" materials, explaining that the Subcommittee had taken the previous permissive grounds for recusal and instead made them mandatory disclosures that can then become the basis for recusal if the provisions of Article 151 are satisfied. Judge Holdridge also noted that, as explained in Comment (c) on page 1 of the handout, Subparagraph (A)(5) on lines 35 and 36 of the materials had been amended to remove the requirement that the family member is living in the same household as the judge, noting that this should not matter if the family member has a substantial economic interest in the case.

The President then announced that the Council would adjourn for lunch, during which time there would be a meeting of the Executive Committee.

After lunch, Judge Holdridge resumed his presentation by directing the Council back to the proposed revisions on recusal, specifically to Article 152 on page 3 of the materials. One Council member questioned whether the "trial or appellate court" language on line 20 of page 3 would include city court judges, and after discussion, the Council

ultimately agreed to add a Comment (d) that explains that "judge of any trial court" is intended to include district, parish, and city court judges as well as justices of the peace. A motion was then made and seconded to approve Article 152 as presented, along with Comment (c) on page 1 of the handout and Comment (d) as discussed by the Council, and the motion passed with no objection. The adopted proposal reads as follows:

Article 152. Disclosures

A. A judge of any trial or appellate court shall disclose, to the best of his information and belief, any of the following to all parties and attorneys in the cause:

(1) The judge has been associated with an attorney during the latter's employment in the cause.

(2) At the time of the hearing of any contested issue in the cause, the judge has continued to employ, to represent him personally, the attorney actually handling the cause or a member of that attorney's firm.

(3) The judge performed a judicial act in the cause in another court.

(4) The judge is related to a party or the spouse of a party, within the fourth degree, or an attorney employed in the cause or the spouse of the attorney, within the second degree.

(5) The judge's spouse, parent, child, or immediate family member has a substantial economic interest in the subject matter in controversy.

B. Upon disclosure, any party may file a motion that sets forth a ground for recusal under Article 151.

Comments – 2020

(a) This Article is new, but its substance is taken from former Paragraph B of Article 151, which previously set forth permissive grounds for recusal. The information listed in Paragraph A is now required to be disclosed by the judge to all parties and attorneys in the cause. If the information in such disclosures gives rise to a ground for recusal under Article 151, any party may file a motion to recuse the judge pursuant to the procedure set forth in Article 154.

(b) Under Paragraph (A)(4), the judge must disclose whether he is related to an attorney or the spouse of an attorney within the second degree, which includes the judge's children, grandchildren, parents, grandparents, and siblings. The judge must also disclose whether he is related to a party or the spouse of a party within the fourth degree, which includes the family members previously listed as well as the judge's nieces and nephews, aunts and uncles, first cousins, great-grandchildren, great-grandparents, and great-aunts and uncles, among others. For an explanation of how to determine the degree of relationship between the judge and an attorney or party and their spouses, see Civil Code Articles 900 and 901.

(c) Paragraph (A)(5) of this Article was taken from former Article 151(B)(4) and requires a judge to disclose if his spouse, parent, child, or immediate family member has a substantial economic interest in the subject matter in controversy. Such disclosure shall now be made in all cases regardless of whether the judge's immediate family member is "living in the judge's household" as was provided under the previous provision.

(d) This Article's requirement that a judge of any "trial" court make certain disclosures to all parties and attorneys in the cause is intended to apply not only to district court judges, but also to parish and city court judges as well as justices of the peace.

The Council then considered Article 153, on page 4 of the "Recusal" materials, and agreed to change "report" to "provide a copy of" on line 27. After one Council member questioned the applicability of these provisions with respect to criminal cases, Judge Holdridge responded that the scope of these articles is limited to civil proceedings but that the Code of Criminal Procedure Committee plans to revise the provisions of that Code as well. The Council also discussed whether the requirement to provide written reasons for recusal would be palatable to judges, as well as the fact that unnecessary self-recusal has become a huge problem on the trial bench. A motion was then made and seconded to approve Article 153 as amended, as well as the Comment on pages 1 and 2 of the handout, and that motion passed with no objection. The adopted proposal reads as follows:

Article ~~152~~ 153. ~~Recusation~~ Recusal on court's own motion ~~or by supreme court~~

A. A judge may recuse himself in any cause in which a ground for recusal exists, whether or not a motion for his ~~recusation~~ recusal has been filed by a party ~~or not, in any cause in which a ground for recusation exists~~.

B. A district judge may recuse himself in any cause objecting to the candidacy or contesting the election for any office in which the district or jurisdiction of such office lies wholly within the judicial district from which the judge is elected.

C. ~~On the written application of a district judge, the supreme court may recuse him for any reason which it considers sufficient.~~ Prior to the cause being allotted to another judge, a judge who recuses himself for any reason shall contemporaneously file in the record the order of recusal and written reasons that provide the factual basis for recusal under Article 151. The judge shall also provide a copy of the recusal and the written reasons therefor to the judicial administrator of the supreme court.

~~D. If a judge recuses himself pursuant to this Article, he shall provide in writing the specific grounds under Article 151 for which the recusal is ordered within fifteen days of the rendering of the order of recusal.~~

Comments – 2020

Paragraph C of this Article is new and requires the judge to file written reasons containing the factual basis for the judge's recusal prior to the cause being allotted to another judge. This provision also requires the judge to provide a copy of both the recusal and the written reasons for the recusal to the judicial administrator of the supreme court. This reporting requirement reflects the countervailing considerations of a judge's duty to sit and his obligation to recuse when a valid ground for recusal exists. A judge is "not at liberty, nor does he have the right, to take himself out of a case and burden another judge with his responsibility without good and legal cause." In re Lemoine, 686 So. 2d 837 (La. 1997).

~~**Article 153. Judge may act until recused or motion for recusation filed**~~

~~Until a judge has recused himself, or a motion for his recusation has been filed, he has full power and authority to act in the cause. The judge to whom the motion to recuse is assigned shall have full power and authority to act in the cause pending the disposition of the motion to recuse.~~

Next, Judge Holdridge directed the Council's attention to Article 154, on pages 4 and 5 of the "Recusal" materials, and one Council member questioned how the appointment process under Paragraph B would work in the event that the recusal occurred in the middle of trial. The Council then discussed that these appointments are routinely made by the Supreme Court and that the process occurs very efficiently, often within the hour. With respect to Paragraph C, the Council agreed to replace "dismiss" with "deny" on line 13 of page 5 as well as to add "but shall provide written reasons for the denial" at the end of the provision. A motion was then made and seconded to approve Article 154 as amended as well as the Comment on page 5 of the materials with the changes reflected on page 2 of the handout. The motion passed with no objection, and the adopted proposal reads as follows:

Article 154. Procedure for ~~recusation~~ recusal of district court judge

A. A party desiring to recuse a judge of a district court shall file a written motion therefor assigning the ground for ~~recusation~~ recusal under Article 151. This motion shall be filed ~~prior to trial or hearing unless the party discovers the facts constituting the ground for recusation thereafter, in which event it shall be filed immediately after these facts are discovered, but prior to judgment~~ no later than thirty days after discovery of the facts constituting the ground upon which the motion is based, but in all cases prior to the scheduling of the matter for trial. In the event that the facts constituting the ground upon which the motion to recuse is based occur after the matter is scheduled for trial or the party moving for recusal could not, in the exercise of due diligence, have discovered such facts, the motion to recuse shall be filed immediately after such facts occur or are discovered.

B. If ~~a valid ground for recusation is set forth in~~ the motion to recuse sets forth a ground for recusal under Article 151, the judge shall either recuse himself~~,~~ or ~~refer the motion to another judge or a judge~~ make a written request to the supreme court for the appointment of an ad hoc judge~~,~~ as provided in ~~Articles~~ Article ~~155 and 156, for a hearing~~ 155.

C. If the motion to recuse is not timely filed in accordance with Paragraph A of this Article or fails to set forth a ground for recusal under Article 151, the judge may deny the motion without the appointment of an ad hoc judge or a hearing but shall provide written reasons for the denial.

Comments – 2020

(a) Paragraph A of this Article has been amended to require a motion to recuse to be filed no later than thirty days after discovery of the facts constituting the ground upon which the motion is based, but in all cases prior to the scheduling of the matter for trial. This time limitation has been imposed to prevent the parties from delaying the proceedings by using a late-filed motion to recuse as a manner of obtaining a continuance of the case. This provision recognizes that in some cases, the facts constituting the ground upon which the motion to recuse is based occur after, or could not have been discovered before, the matter is scheduled for trial. In cases that fall under this exception, Paragraph A provides that the motion to recuse shall be filed immediately after such facts occur or are discovered.

(b) Paragraph B of this Article has been amended to provide that when a motion setting forth a ground for recusal has been timely filed, the judge who is the subject of the motion shall either recuse himself or request in writing that the supreme court appoint an ad hoc judge to hear the motion to recuse.

(c) If the motion to recuse is not timely filed or fails to set forth a ground for recusal, Paragraph C of this Article permits the judge who is the subject of the motion to deny it without the appointment of an ad hoc judge

or a hearing, provided that the judge gives written reasons for such denial. If a party disagrees with the judge's denial of the motion to recuse pursuant to Paragraph C, the party may apply for a supervisory writ or emergency supervisory writ seeking review of the judge's decision.

At this time, the Council agreed to temporarily table the discussion of the proposed revisions pertaining to recusal so that other presentations could be made, beginning with the materials prepared by the Code of Criminal Procedure Committee.

Code of Criminal Procedure Committee

As the Acting Reporter of the Code of Criminal Procedure Committee, Judge Holdridge explained that the Committee had received a letter on behalf of the Louisiana Parole Board requesting an amendment to R.S. 15:574.12 with respect to pre-parole investigation reports. Specifically, Judge Holdridge explained that these reports are relied upon by the Parole Board in making their determinations with respect to granting or denying parole and that the reports are made available to everyone except the applicant and his attorney. Judge Holdridge further explained that the Committee had discussed the issue and had agreed that this report should be made available to the applicant, provided that certain information with respect to the victim, the victim's family, and other witnesses is redacted. The amendment to R.S. 15:574.12(B) on lines 18 through 28 of page 1 of the materials therefore represented a compromise among the stakeholders with respect to this issue.

One Council member questioned whether the Committee had considered issues pertaining to due process, and the Acting Reporter reminded the Council that this is occurring after the conviction and that this information is not currently being provided to the applicant at all. Another Council member questioned whether "docketed" on line 19 was a term of art, and Judge Holdridge responded in the affirmative. After additional discussion, the Council agreed to add "excepted" before "information" on line 24 for purposes of clarity, as well as to change "person from whom the information is sought" to "person whose information is sought." A motion was then made and seconded to adopt R.S. 15:574.12(B) as amended, and the motion passed with no objection. The adopted proposal reads as follows:

R.S. 15:574.12. Information as to offenders and ex-offenders; confidentiality

* * *

B. Information may be released upon request without special authorization, subject to other restrictions that may be imposed by federal law or by other provisions of state law, to the Board of Parole, the Board of Pardons, the governor, the sentencing judge, counsel for the juvenile in a delinquency matter, a district attorney or law enforcement agency, the personnel and legal representatives of the Department of Public Safety and Corrections, corrections services and youth services, including student interns, appropriate governmental agencies, or officials when access to such information is imperative for discharge of the responsibilities of the requesting agency, official, or court officer and the information is not reasonably available through any other means, and court officers with court orders specifying the information requested. Upon request, an offender docketed for a pardon or parole hearing or the offender's counsel shall, prior to the commencement of any such hearing, be provided with the information described in Subsection A of this Section and any other information compiled and given to the boards of pardons and parole pertaining to the requesting offender, with the exception of any information provided by, on behalf of, or pertaining to the victim, the victim's family members, or non-law enforcement individuals who request that their identity not be disclosed to the requesting offender. Such excepted information shall remain confidential and not subject to disclosure unless expressly authorized by the person whose information is sought. Any mental health evaluation of the

requesting offender prepared for the purpose of his pardon or parole consideration shall be provided to the requesting offender or his counsel and to the district attorney or his designee.

* * *

At this time, Judge Holdridge concluded his presentation on behalf of the Code of Criminal Procedure Committee, and the President called on Ms. Kären Hallstrom, Reporter of the Children's Code Committee, to begin her presentation of materials.

Children's Code Committee

Ms. Hallstrom began by informing the Council that House Resolution No. 306 of the 2019 Regular Session asked the Law Institute to study the issue of changing the period of time for finalizing an adoption and to include in its report a summary of the time periods under the laws of other states. Louisiana generally requires one year in placement prior to finalization with a shorter six-month period in instances where the relationship is inherently more stable, such as in agency adoptions or when a relative is adopting. During discussions, the Committee noted the additional requirements built into the waiting period in Louisiana law by the Child Placing Agency Standards adopted by the Department of Children and Family Services to ensure the permanency of adoptions and successful outcomes for adopted children. Therefore, any change to the waiting period should be made only with additional simultaneous protections for the health and safety of children and for the stability of adoptive families. The Reporter's fifty-state research revealed that six months in placement prior to finalization is the most prevalent time period nationally, but the comparison is not necessarily "apples to apples" because some states do not allow private adoptions at all or they require specific protections in the pre-finalization process. Without question, the Council approved the report.

Ms. Hallstrom next turned the Council's attention to the housekeeping materials and noted that these various issues had been brought to the Committee for cleanup over the past several years. First, Children's Code Article 606 had been amended three times to seemingly add grounds upon which a child can be adjudicated a child in need of care. In actuality, the "grounds" already exist in the definition of "abuse" in Article 603. Therefore, the Committee is proposing a merger and repeal of the redundant provisions. A motion was made and seconded to approve the proposal, and the motion passed.

Second, it was brought to the Committee's attention that although due process rights are acknowledged throughout the Children's Code, they are not specifically articulated in the disposition hearing articles. This was an oversight from the time the Code of Juvenile Procedure was redrafted to become the Children's Code. The Committee recommended adding the right to testify, confront and cross-examine witnesses, and present evidence as well as the right to counsel. The Council approved. Thirdly, the Children's Code requires registered mail for service to nonresident parents in adoptions but authorizes either registered or certified mail for all other proceedings. The Council further noted that the Code of Civil Procedure likewise authorizes service by registered or certified mail and adopted the proposal on page 6 of the materials.

Finally, the Reporter documented 12 references in present law to the old Code of Juvenile Procedure. The Council approved changing these references to the Children's Code. Ms. Hallstrom then concluded her presentation, and the President called on Mr. Bill Forrester, Reporter of the Code of Civil Procedure Committee, to continue that Committee's presentation.

Code of Civil Procedure Committee

Mr. Forrester asked the Council to turn back to the "Continuous Revision" materials to consider R.S. 13:3661 on page 3 concerning witness fees. He reminded the Council that the amounts provided under current law to witnesses who are compelled to attend trials or hearings are woefully inadequate, providing only $5/day for hotel and meal expenses and an attendance fee of $25/day when the federal provision provides for $40/day. As a result, the Committee recommended that these amounts be increased to

require witnesses to be paid an attendance fee of $50/day and travel expenses at a rate of $0.40/mile. A motion was made and seconded to approve the proposed revisions to R.S. 13:3661 and the Comment, and after the Council agreed to change "revision" to "provision" on line 35, the motion passed with no objection.

Mr. Forrester then explained that during the Committee meeting, he had also suggested that another Subsection be added to R.S. 13:3661 to address cases of extreme hardship, specifically to allow the court to increase these fees and expenses or to require that the testimony of the witness be taken electronically in exceptional cases. The Reporter noted that the Committee had voted against including such a provision, but he questioned whether the Council agreed with this determination. One member of both the Committee and the Council expressed practical concerns with respect to such an exception and noted that provisions concerning the taking and presentation of testimony electronically already exist elsewhere in the Code. After additional discussion, a suggestion was made that a Subsection E be added to provide that in cases of exceptional hardship, the court may increase the travel expenses paid to the witness. A motion was made and seconded to approve R.S. 13:3661 with the addition of this provision, as well as the proposed change to Code of Civil Procedure Article 1352 on pages 3 and 4 of the materials, and the motion passed with no objection. The adopted proposals read as follows:

R.S. 13:3661. Attendance compulsory in civil cases; witnesses ~~outside parish but~~ within state; deposit

A. Witnesses in civil cases who reside or who are employed in this state may be subpoenaed and compelled to attend trials or hearings wherever held in this state.

B. Witnesses who are subpoenaed to attend a trial or hearing shall be paid their travel expenses to and from the courthouse at the rate of forty cents per mile and an attendance fee of fifty dollars for each day that the witness has been required to appear in court.

~~B.(1)~~ C. No witness ~~residing and employed outside of the parish and more than twenty-five miles from the courthouse where the trial or hearing is to be held~~ shall be subpoenaed to attend ~~court personally~~ a trial or hearing unless the party who ~~desired~~ desires the testimony of the witness has deposited with the clerk of court ~~a sum of money sufficient to cover:~~ the estimated attendance fee and travel expenses.

~~(a) Reimbursement of the traveling expenses of the witness in traveling to the court and returning, at the rate of twenty cents a mile.~~

~~(b) The witness' fee at the rate of twenty-five dollars a day.~~

~~(c) Hotel and meal expenses at the rate of five dollars a day.~~

~~(2) Such a~~ D. The witness shall be paid ~~his expenses and~~ the attendance fee and travel expenses immediately by the clerk of court when the witness has answered the subpoena and has appeared for the purpose of testifying.

E. In cases of exceptional hardship, the court may increase the travel expenses paid to the witness.

Comments – 2020

This Section has been amended to increase the witness attendance fee from twenty-five dollars per day to fifty dollars per day, and the travel expense reimbursement from twenty cents per mile to forty cents per mile. The prior provision for reimbursement of hotel and meal expenses at the rate of five dollars per day has been eliminated, and a new provision has

been added to provide the court with the discretion to increase the amount paid to witnesses in cases of exceptional hardship.

Article 1352. Restrictions on subpoena

A witness, whether a party or not, who resides or is employed in this state may be subpoenaed to attend a trial or hearing wherever held in this state. No subpoena shall issue to compel the attendance of such a witness ~~who resides and is employed outside the parish and more than twenty-five miles from the courthouse where the trial or hearing is to be held,~~ unless the provisions of R.S. 13:3661 are complied with.

At this time, Judge Holdridge returned to the podium to continue his presentation of proposed revisions to the articles of the Code of Civil Procedure on recusal. He asked the Council to turn to Article 155, on pages 5 and 6 of the "Recusal" materials, which requires the Supreme Court to appoint a judge to hear the motion to recuse rather than simply allowing the motion to be heard by another member of the same bench. A motion was made and seconded to adopt this provision as presented along with the proposed Comments on page 2 of the handout, and the motion passed with no objection. The adopted proposal reads as follows:

Article 155. ~~Selection~~ Appointment and authority of judge to try motion to recuse; ~~court having two or more judges~~

~~A. In a district court having two judges, the judge who is sought to be recused shall have the motion to recuse referred to the other judge of the court for trial of the motion to recuse.~~

~~B. In a district court having more than two judges, the motion to recuse shall be referred to another judge of the district court for trial through the random process of assignment in accordance with the provisions of Code of Civil Procedure Article 253.1.~~

Once a motion that sets forth a ground for recusal under Article 151 is referred for hearing, the supreme court shall appoint a judge to hear the motion to recuse, and only the judge to whom the motion is assigned shall have the power and authority to act in the cause pending disposition of the motion.

Comments – 2020

(a) This Article has been amended to provide that in all cases where a motion to recuse has been referred for hearing, the motion shall be heard by a judge appointed by the supreme court. This revision is intended to increase confidence in Louisiana's judicial system by reducing or eliminating the potential for impartiality or bias in allowing a judge of the same court as the judge who is the subject of the motion to hear the motion.

(b) Once a motion to recuse has been referred for hearing, this Article continues the rule that the judge who is the subject of the motion to recuse can no longer take any action in the cause. Rather, the judge who is appointed by the supreme court shall have the power and authority to act in the cause until the motion to recuse is decided.

Next, the Council considered Article 156, on page 6 of the "Recusal" materials. After Judge Holdridge explained the provision, the Council discussed clarifying the meaning of Paragraph B by adding "to hear the cause" after "ad hoc judge" on line 30 of page 6 and changing "the judge" and "the recusal" to "a judge" and "a recusal" on line 31 of the same page. Motions were then made and seconded to adopt Article 156 as amended, as well as Article 157 on page 7 as presented, and both motions passed with no objection. The adopted proposals read as follows:

Article 156. ~~Same; court having single judge~~ Selection of judge after recusal

~~When a ground assigned for the recusation of the judge of a district court having a single judge is his interest in the cause, the judge shall appoint a district judge of an adjoining district to try the motion to recuse. When any other ground is assigned for the recusation of such a district judge, he may appoint either a district judge of an adjoining district, or a lawyer domiciled in the judicial district who has the qualifications of a district judge, to try the motion to recuse.~~

~~The order of court appointing the judge ad hoc shall be entered on its minutes, and a certified copy of the order shall be sent to the judge ad hoc.~~

A. When a district court judge voluntarily recuses himself or is recused after a motion to recuse is filed, the cause shall be randomly assigned to another division or section of that court.

B. When a district court judge in a single judge district voluntarily recuses himself, the judge shall make a written request to the supreme court for the appointment of an ad hoc judge to hear the cause. When a judge appointed by the supreme court to hear a recusal grants the motion to recuse, that judge shall request that an ad hoc judge be appointed to hear the cause.

~~Article 157. Judge ad hoc appointed to try cause when judge recused; power of judge ad hoc~~

~~A. After a trial judge recuses himself under the authority of Article 152(A), a judge ad hoc shall be assigned to try the cause in the manner provided by Articles 155 and 156 for the appointment of a judge ad hoc to try the motion to recuse. When a trial judge is recused after a trial of the motion therefor, the case shall be reassigned to a new judge for trial of the cause under the provisions of Code of Civil Procedure Articles 155 and 156.~~

~~B. After a trial judge recuses himself under the authority of Article 152(B) he shall make written application to the supreme court for the appointment of another district judge as judge ad hoc to try the cause. The supreme court shall appoint a judge from a judicial district other than the judicial district of the recused judge as judge ad hoc to try the cause.~~

~~C. The judge ad hoc has the same power and authority to dispose of the cause as the recused judge has in cases in which no ground for recusation exists.~~

~~Article 158. Supreme court appointment of district judge to try cause when judge recused~~

~~In a cause in which the district judge is recused, even when a judge ad hoc has been appointed for the trial of the cause under Article 157, a party may apply to the supreme court for the appointment of another district judge as judge ad hoc to try the cause. If the supreme court deems it in the interest of justice, such appointment shall be made.~~

~~The order of the supreme court appointing a judge ad hoc shall be entered on its minutes. The clerk of the supreme court shall forward two certified copies of the order, one to the judge ad hoc appointed and the other to the clerk of the district court where the cause is pending, for entry in its minutes.~~

Article ~~159~~ 157. ~~Recusation~~ Recusal of supreme court justice

A. A party desiring to recuse a justice of the supreme court shall file a written motion therefor assigning the ground for recusal under Article 151. When a written motion is filed to recuse a justice of the supreme court, ~~he~~ the justice may recuse himself or the motion shall be heard by the other justices of the court.

B. When a justice of the supreme court recuses himself, or is recused, the court may do either of the following:

(1) ~~have~~ Have the cause argued before and disposed of by the other justices.~~, or~~

(2) ~~appoint~~ Appoint a sitting or retired judge of a district court or a court of appeal having the qualifications of a justice of the supreme court to act for the recused justice in the hearing and disposition of the cause.

Judge Holdridge then directed the Council's attention to Article 158, on pages 7 and 8 of the "Recusal" materials. After the Council agreed to delete Subparagraph (B)(1) to instead require the court to randomly allot another judge to sit on the panel, motions were made and seconded to approve Article 158 as amended and Article 159 on page 8 as presented. These motions passed with no objection, and the adopted proposals read as follows:

Article ~~160~~ 158. ~~Recusation~~ Recusal of judge of court of appeal

A. A party desiring to recuse a judge of a court of appeal shall file a written motion therefor assigning the ground for recusal under Article 151. When a written motion is filed to recuse a judge of a court of appeal, ~~he~~ the judge may recuse himself or the motion shall be heard by ~~the other judges on the panel to which the cause is assigned, or by all judges of the court, except the judge sought to be recused, sitting en banc~~ a judge appointed by the supreme court.

B. When a judge of a court of appeal recuses himself, or is recused, the court ~~may (1) have the cause argued before and disposed of by the other judges of the panel to which it is assigned, or (2) appoint~~ shall randomly allot another of its judges~~, a judge of a district court or a lawyer having the qualifications of a judge of a court of appeal to act for~~ to sit on the panel in place of the recused judge ~~in the hearing and disposition of the cause~~.

Article ~~161~~ 159. ~~Recusation~~ Recusal of ad hoc judge ~~ad hoc~~

~~A~~ An ad hoc judge ~~ad hoc~~ appointed to try a motion to recuse a judge, or appointed to try the cause, may be recused on the grounds and in the manner provided in this Chapter for the ~~recusation~~ recusal of judges.

Next, the Council considered the provisions concerning recusal of parish and city court judges and justices of the peace – Articles 4861 through 4866 – on pages 8 and 9 of the materials. Motions were made and seconded to approve Articles 4861 and 4862 as presented, and those motions passed with no objection. The adopted proposals read as follows:

Article 4861. ~~Recusation~~ Recusal of judges

A parish court or city court judge or justice of the peace may recuse himself or be recused for the same reasons and on the same grounds as provided in Article 151.

Article 4862. Motion to recuse

When a written motion is made to recuse a parish court or city court judge or a justice of the peace, ~~he~~ the judge or justice of the peace shall either recuse himself, or the motion to recuse shall be tried in the manner provided by Article 4863.

In Article 4863, on page 8 of the "Recusal" materials, the Council agreed to delete "and, if the judge is recused, the cause shall be tried by another judge of the same court" on lines 31 and 32 and "and, in the event of recusal, to try the cause" on lines 32 and 33. In Article 4864, the Council agreed to change "when judge recuses himself" to "after recusal" on line 39 of page 8. The Council also agreed to add "or is recused" after "himself" on line 41 of the same page and "by the supreme court" after "appointed" on line 3 of page 9. Motions were made and seconded to approve these provisions as amended, and both motions passed with no objection. The adopted proposals read as follows:

Article 4863. Determination of ~~recusation~~ recusal; appointment of judge ad hoc

A. In a parish or city court having more than one judge, the motion to recuse shall be tried by another judge of the same court~~, and, if the judge is recused, the case shall be tried by another judge of the same court~~. The manner in which the judge is selected to try the recusal ~~and, in the event of recusal, to try the case,~~ shall be provided by rule of court.

B. In all other cases, the motion shall be tried by ~~the district court and, if the judge is recused, the district court shall try the case or shall appoint another judge of a district, parish, or city court to try the case~~ a judge appointed by the supreme court.

Article 4864. Appointment of judge ad hoc ~~when judge recuses himself~~ after recusal

A. When a judge of a parish or city court recuses himself or is recused, ~~he shall appoint~~ another judge of the same ~~parish or city~~ court shall be appointed to try the cause, if that court has more than one division~~; otherwise, he shall appoint either a parish or city court judge from an adjoining parish or, as judge ad hoc, an attorney domiciled in the parish who has the qualifications of a parish or city court judge~~. The manner in which the judge is selected to try the cause shall be provided by rule of court. In all other cases, a judge shall be appointed by the supreme court to try the cause.

B. When a justice of the peace recuses himself, ~~he shall appoint~~ another justice of the peace shall be appointed by the supreme court to try the ~~case~~ cause.

Motions were also made and seconded to adopt Articles 4865 and 4866 on page 9 of the "Recusal" materials as presented, and these motions passed with no objection. The adopted proposals read as follows:

Article 4865. Appointment of judge ad hoc in event of temporary inability of parish or city court judge

When a parish or city court judge is unable to preside due to temporary absence, incapacity, or inability, he may appoint a judge ad hoc, who may be another judge or who may be a lawyer domiciled in the parish who possesses the qualifications of the judge he replaces. Appointment shall be by order, which shall reflect the term of and reasons for the appointment, and which shall be entered into the minutes of the court.

Article 4866. Power and authority of judge ad hoc

A judge ad hoc appointed under the provisions of Articles 4861 through 4865 shall have the same power and authority to act on the ~~cases~~ causes or on the dates to which appointed as the judge whom he replaces would have.

At this time, the Council briefly discussed the authority of the Supreme Court in these cases. One Council member questioned the language of Article 157(B)(2) concerning the qualifications of justices of the Supreme Court, and the Council discussed that there were additional requirements with respect to years of service for these justices as opposed to other judges. Another Council member then asked about the frequency with which motions are filed to recuse judges of the courts of appeal, and the Council discussed cases in which the entire panels of courts of appeal were recused en banc. Judge Holdridge then concluded his presentation, and the Friday session of the February 2020 Council meeting was adjourned.

LOUISIANA STATE LAW INSTITUTE

MEETING OF THE COUNCIL

February 7-8, 2020

Saturday, February 8, 2020

Persons Present:

Bergstedt, Thomas M.
Bowers, Clinton M.
Breard, L. Kent
Brister, Dorrell, J.
Crigler, James C., Jr.
Crigler, John D.
Cromwell, L. David
Daniels, Timothy F.
Dawkins, Robert G.
Dimos, Jimmy N.
Domingue, Billy J.
Hamilton, Leo C.
Holdridge, Guy
Janke, Benjamin West
Jewell, John Wayne
Kunkel, Nick
Kutcher, Robert A.
Lavergne, Luke A.
Norman, Rick J.
Philips, Harry "Skip", Jr.
Price, Donald W.
Vance, Shawn D.
Waller, Mallory
White, H. Aubrey, III
Wilson, Evelyn L.

President Rick J. Norman called the Saturday session of the February 2020 Council meeting to order at 9:00 a.m. on Saturday, February 8, 2020 at the Lod Cook Alumni Center in Baton Rouge. He then called on Mr. Donald Price, Co-Chair of the Torts and Insurance Committee, to begin his presentation of materials.

Mr. Price began by noting that proposed R.S. 22:1973 represented the Torts and Insurance Committee's work to synthesize and homogenize the two competing bad faith statutes currently found in Title 22. He also explained that the day's presentation would be a follow-up to the January 24th Council session, during which the Council approved the bulk of the Committee's work. Mr. Price noted that the primary focus of the day would be the penalty provisions contained in Subsection C of proposed R.S. 22:1973. Additionally, he noted, the Committee would be seeking approval of some minor semantic- and consistency-related changes.

The Chair first turned the Council's attention to Subsection A of the draft, asking members to approve the several small grammatical changes proposed throughout. After Mr. Price noted the changes made on lines 6, 7, 10, and 11 of page 1 of the materials, a motion was made and seconded to approve the revisions. The motion passed with all in favor, and Subsection A of R.S. 22:1973 was approved as follows:

> A.(1) ~~An~~ All insurers~~, including but not limited to a foreign line and surplus line insurer, owes~~ owe to ~~his~~ their insureds ~~a duty~~ duties of good faith and fair dealing, including~~. The insurer has an affirmative duty to adjust claims fairly and promptly and a~~ the duty to make a reasonable effort to adjust and settle claims fairly and promptly. ~~with the insured or the claimant, or both. Any~~
>
> (2) In addition to the duties of good faith and fair dealing that insurers owe to their insureds, all insurers owe to the insured and third-party claimants the duty to adjust and settle claims in accordance with Subsection B of this Section. ~~who breaches these duties shall be liable for any damages sustained as a result of the breach~~.

Next, Mr. Price asked the Council to move to Subsection C of proposed R.S. 22:1973, on page 2 of the materials, emphasizing that this Subsection represented the day's primary focus, comprising the entirety of the substantive changes for which the Committee sought approval. He pointed out that, under current law, the duties set forth had separate, individualized penalty provisions which provided for disparate amounts. He

explained that the Committee wished to make these penalties uniform. Mr. Price further noted that the Committee had sought to make attorney fees and costs mandatory, in addition to the award for damages. The final component of this remedy provision, he continued, was the penalty. Mr. Price noted that, in consideration of attorney fees and costs now being made recoverable in all scenarios, the Committee had reduced the penalty from 200% to 50% of the amount the insurer would have been liable to pay under the terms of the policy at issue, with a floor of $5,000. He further explained that the Committee had elected to make the penalty discretionary in nature in order to avoid inequity in scenarios where, for example, an insurer paid a settlement one day late. Finally, the Chair pointed toward Paragraph (C)(3), noting the exclusivity of Subsection C's remedies. He reminded the Council that this provision had been added in response to concerns the Council had expressed when the Torts and Insurance Committee had last presented.

With the Chair's introduction and overview of Subsection C completed, a motion was made and seconded by the Council to approve the provision. One Council member, pointing to the language "insurer who violates Subsections *A or B*" (emphasis added), wondered whether it was possible to violate both Subsections simultaneously. Mr. Price answered that this was, presumably, the case. Next, another Council member inquired as to whether, in a jury case, it would be the jury that would decide whether an insurer's conduct was arbitrary or capricious. The Council member further queried whether there were other instances of law where it was the province of the jury to set a penalty. Mr. Price noted that the Committee had discussed this very issue and decided that the jury should indeed determine the penalty. In response, the Council member wondered whether the language of Subsection C in fact provided as such. Another Council member noted that typically it would be the *court* that set the penalty. The Chair noted his uncertainty as to whether there was any specific law on the issue. Mr. Skip Philips, the other Co-Chair of the Torts and Insurance Committee, pointed out that attorney fees, for example, are set by the court – noting that awards are made for "*reasonable* attorney fees," and that such "reasonableness" was an issue left to the court. Agreeing with Mr. Philips on this point, Mr. Price offered that he would be completely accepting of such a change to the language of the proposal if the Council so desired.

Accordingly, the President asked for a vote. After a motion was made to amend the language to provide for the court to set the penalty, another Council member suggested that, in light of such change, further language should be added to clarify that the actual determination of conduct as arbitrary or capricious would nevertheless be left to the jury. With the Council in agreement on this suggestion, the motion was so amended and seconded. Ultimately, all voted in favor of adding language providing that the amount of the penalty would be determined by the court and clarifying that the determination of whether conduct was arbitrary or capricious would be left the trier of fact.

Discussion next turned to how to go about accomplishing these twin goals. After several Council suggestions providing for further division of Paragraphs (C)(1) and (2) were declared adequate but inelegant solutions, one Council member put forth a series of simple insertions that would accomplish the stated goal with no reorganization necessary. In particular, the Council member suggested three insertions and one revision: (1) on line 8, between "the" and "insurer", the phrase "trier of fact determines that" would be inserted; (2) on line 17, the phrase ", as determined by the court" would be inserted immediately following the word "costs"; (3) on line 19, "trier of fact" would be replaced with "court"; and (4) on line 20, the phrase "trier of fact determines that" would be inserted immediately preceding the word "insurer's". This suggestion was met with unanimous support from the Council and was accordingly accepted by the Chair as a friendly amendment. Returning briefly to an earlier question, a Council member suggested that the phrases "Subsections A or B" on lines 7 and 19 be made singular. This was also met with Council support and accepted by Mr. Price as a friendly amendment.

With the above language issues sorted out, the Council returned to the motion on the table to approve Subsection C of proposed R.S. 22:1973. Before a vote could be held, a Council member asked the Chair to explain the logic behind the penalty's reduction from 200% to 50%. Mr. Price reiterated that this change was made in consideration of the fact that attorney fees and costs had now been made recoverable in all cases.

Emphasizing that these two changes were made in concert with each other, he noted that the resulting compromise had been discussed and agreed upon by the full Committee, which comprised both defense and plaintiffs' attorneys. Noting his understanding of and satisfaction with this explanation, the Council member thanked Mr. Price. With no remaining questions, the motion was put to a vote. The motion carried unanimously, and Subsection C was approved as follows:

C. (1) In addition to the insured loss, any insurer who violates Subsections A or B of this Section where the trier of fact determines that the insurer's conduct is arbitrary, capricious, or without reasonable cause shall be liable for each of the following:

(a) Any general and special damages caused by the violation.

(b) Reasonable attorney fees and costs, as determined by the court.

(2) At the discretion of the court, any insurer who violates Subsection A or B of this Section where the trier of fact determines that the insurer's conduct is arbitrary, capricious, or without reasonable cause may also be liable for a penalty not to exceed fifty percent of the amount that the insurer would have been liable to pay under the terms of the insurance policy or other agreement, but not less than five thousand dollars.

(3) This Subsection shall provide the sole and exclusive remedies for violations of Subsections A and B of this Section.

~~general or special damages to which a claimant is entitled for breach of the imposed duty, the claimant may be awarded penalties assessed against the insurer in an amount not to exceed two times the damages sustained or five thousand dollars, whichever is greater. Such penalties, if awarded, shall not be used by the insurer in computing either past or prospective loss experience for the purpose of setting rates or making rate filings.~~

The Chair then moved to Subsection D, noting that the only change made since the Council had approved the provision in January was non-substantive in nature and was made to clarify the cross-reference on line 36 of page 2 of the materials. A motion was made and seconded to approve Subsection D. The motion carried unanimously, and Subsection D was approved as follows:

D. (1) The period set forth in Subsection B for payment of losses resulting from fire and the penalty provisions for nonpayment within the period shall not apply where the loss from fire was arson related and the state fire marshal or other state or local investigative bodies have the loss under active arson investigation. The provisions relative to time of payment and penalties shall commence to run upon certification of the investigating authority that there is no evidence of arson or that there is insufficient evidence to warrant further proceedings.

(2) The provisions relative to suspension of payment due to arson shall not apply to a bona fide lender which holds a valid recorded mortgage on the property in question.

(3) Whenever a property damage claim is on a personal vehicle owned by the third-party claimant and as a direct consequence of the inactions of the insurer and the third-party claimant's loss the third-party claimant is deprived of use of the personal vehicle for more than five working days, excluding Saturdays, Sundays, and holidays, the insurer responsible for payment of the claim shall pay, to the extent legally responsible, for reasonable expenses incurred by the third-party claimant in obtaining alternative transportation for the entire period of time during which the third-party claimant is without the use of his personal vehicle. Failure to

make such payment within thirty days after receipt of satisfactory written proof and demand therefor, when such failure is found to be arbitrary, capricious, or without reasonable cause shall subject the insurer to, in addition to the amount of such reasonable expenses incurred, a reasonable penalty not to exceed ten percent of such reasonable expenses or one thousand dollars whichever is greater together with reasonable attorney fees for the collection of such expenses.

(4) When an insurance policy provides for the adjustment and settlement of first-party motor vehicle total losses on the basis of actual cash value or replacement with another of like kind and quality, and the insurer elects a cash settlement based on the actual cost to purchase a comparable motor vehicle, such costs shall be derived by using one of the following:

(a) A fair market value survey conducted using qualified retail automobile dealers in the local market area as resources. If there are no dealers in the local market area, the nearest reasonable market can be used.

(b) The retail cost as determined from a generally recognized used motor vehicle industry source; such as, an electronic database, if the valuation documents generated by the database are provided to the first-party claimant, or a guidebook that is available to the general public. If the insured demonstrates, by presenting two independent appraisals, based on measurable and discernable factors, including the vehicle's preloss condition, that the vehicle would have a higher cash value in the local market area than the value reflected in the source's database or the guidebook, the local market value shall be used in determining the actual cash value.

(c) A qualified expert appraiser selected and agreed upon by the insured and insurer. The appraiser shall produce a written nonbinding appraisal establishing the actual cash value of the vehicle's preloss condition.

(d) For the purposes of this Paragraph, local market area shall mean a reasonable distance surrounding the area where a motor vehicle is principally garaged, or the usual location of the vehicle covered by the policy.

Mr. Price then moved to the proposed Comments. Pointing first to Comment (a), he noted that an error had been discovered prior to his presentation. To remedy this error, he stated that the language "of good faith and fair dealing" on line 45 of page 4 would be deleted, and the phrase "to both" on line 45 would be replaced with "with both". Having made these minor revisions, Mr. Price explained that the balance of the Comments served simply to explain the revisions that were being proposed. He then opened the floor to questions from the Council.

Beginning the discussion, a Council member asked whether Comment (a) was a "fancy" way of stating that the proposed revisions represented no substantive change in the law, and if so, whether such a statement was true. The Chair answered that the Council member's statement was *not* necessarily the case and explained that the Committee had deliberately avoided making such a statement in Comment (a). After rereading the Comment, the Council member agreed. Another Council member then turned to Comment (f), wondering whether the language on line 24 of page 5 should be revised so as to track the *proposed* statutory language, as opposed to the *current* statutory language. The Chair agreed that it should and accepted a friendly amendment to replace the phrase "an insurer acts unreasonably" with "an insurer's conduct is arbitrary, capricious, or without reasonable cause".

Attention turned next to Paragraph (B)(1)'s use of the language "or any party in interest" on line 18. Referencing this language and discussions held at the January 24th Council meeting, a Council member wondered whether such language should be carried over to the corresponding Comment. Mr. Price explained that, because the Comment at issue discussed persons to whom duties are owed – whereas "any party in interest" in Paragraph (B)(1) referred simply to someone who may have provided proof of loss – the suggested change was unnecessary. Noting his understanding and agreement, the Council member withdrew the suggestion. Returning briefly to the prior discussion regarding Comment (f), a Council member pointed out that the reference to "the discretion of the trier of fact" on lines 28 and 29 of page 5 should be changed in light of the corresponding revisions made to Subsection C. Mr. Price accepted this suggestion to replace the phrase "trier of fact" on line 29 with the word "court".

With no more questions or comments, a motion was made and seconded to approve the Comments in their entirety. The motion carried unanimously, and the Comments were approved as follows:

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(a) The purpose of this revision is to combine and harmonize the statutory rules contained in former R.S. 22:1892 and 1973 governing extracontractual liability for violations of the insurer's duties both insureds and third-party claimants.

(b) Paragraph (A)(1) sets forth the duties of good faith and fair dealing owed by insurers to their insureds. *See* Civil Code Article 1983. These duties include the duty of liability insurers to act reasonably in attempting to settle claims within policy limits, the violation of which can give rise to a claim for damages for any excess judgment that may be rendered. *See, e.g.*, *Smith v. Audobon*, 679 So. 2d 372 (La. 1996). This revision is not intended to affect that cause of action.

(c) Paragraph (A)(2) reflects the narrower duty owed to both insureds and third-party claimants in adjusting and settling claims, as set forth in Subsection B.

(d) Subsection B compiles the specific statutory rules set forth in former R.S. 22:1892 and 1973. Pursuant to the Supreme Court's decision in *Theriot v. Midland Risk*, 694 So. 2d 184 (La. 1997), the duties to third-party claimants set forth in Subsection B are exclusive. This revision is not intended to affect that rule.

(e) Subsection C establishes the requisite standard of conduct to create extracontractual liability for violations of Subsections A and B, and it sets forth the sole and exclusive remedies available when an insurer violates those provisions. The courts have applied an overall standard of reasonableness, which this revision adopts. The "arbitrary, capricious, or without reasonable cause" language maintains the interpretation that courts have applied. Former R.S. 22:1973 set out an "arbitrary, capricious, or without *probable* cause" standard. This revision substitutes "reasonable cause" for "probable cause" in order to avoid undue confusion with the criminal law standard "probable cause," but is not intended to change the substantive standard at issue.

(f) When an insurer's conduct is arbitrary, capricious, or without reasonable cause in violation of Subsections A and B, Subsection C provides the exclusive remedies available to insureds and third-party claimants. This subsection harmonizes the remedies provisions of the former statutes by reducing the maximum penalty but providing for recovery of reasonable attorney fees and costs by both insureds and third-party

claimants. The award of the penalty and the amount thereof is committed to the discretion of the court.

(g) Subsections D through G retain existing law, with only semantic changes to make these Subsections consistent with the language used in Subsections A, B, and C.

Prior to concluding his presentation, Mr. Price noted that the Council technically still needed to approve the Committee's proposed repeal of R.S. 22:1892. He reminded the Council that the statute was not being repealed insofar as its substance was concerned, but rather was being merged with R.S. 22:1973 as approved by the Council today. A motion was made and seconded to approve the repeal of R.S. 22:1892, and the motion carried with all in favor.

At this time, Mr. Price concluded his presentation, and the February 2020 Council meeting was adjourned.

Jessica Braun

Nick Kunkel

Mallory Waller