Thirty-Nine Distinctions Between the Louisiana Code of Evidence and the Federal Rules of Evidence

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I. INTRODUCTION


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largely modeled it after the Federal Rules of Evidence of 1975, and upon first glance, it might appear as though the two sets of rules are substantially identical. Upon closer review, however, there are distinct differences in the rules. The Louisiana Code contains several provisions that are not included in the Federal Rules, several of Louisiana’s provisions are more detailed regarding how a rule should be applied, and other provisions reflect a recognition of the greater protections provided to the citizens of the state by the Louisiana Constitution of 1974. Thus, the rules should not be referred to interchangeably, and great care should be taken in relying upon federal case law to aid the interpretation of Louisiana’s provisions. This Article will explain some, but not all, of the distinctions between the Louisiana Code of Evidence and the Federal Rules of Evidence.

4. See Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (codified as amended in scattered rules of Fed. R. Evid.). The Federal Rules of Evidence were restyled in 2011 to make them more understandable and to standardize style and terminology. The changes were intended to be stylistic only and were not intended to change the result in any ruling on the admissibility of evidence.

5. See, e.g., La. Code Evid. Ann. art. 412.1 (Supp. 2016) (victim’s attire in sexual assault cases); id. art. 412.3 (2006) (statements made in human trafficking); id. art. 413 (settlement or tender); id. art. 414 (workers’ compensation); id. art. 415 (act of contacting an attorney); id. art. 801(D)(1)(d) (initial complaint of sexual assault); id. art. 801(D)(4) (things said and done); id. art. 803(24) (2006 & Supp. 2016) (testimony as to age); id. art. 803.1 (2006) (foreign business records); id. art. 804(B)(6) (2006 & Supp. 2016) (complaint of sexually assaultive behavior).

6. See, e.g., id. art. 404(B)(2) (Supp. 2016) (character of the victim); id. art. 803(8) (public records exception to the hearsay rule).

7. See id. art. 102 cmt. (b) (2006) (“In various particulars the Louisiana Constitution of 1974 goes further than its federal counterpart in protecting the interests of the accused and the general citizenry against governmental and private abuses, intrusions, and improprieties. Compare La. Const. Art. I (1974) (Declaration of Rights) with U.S. Const. Amends. 1-10, (Bill of Rights).”); e.g., id. art. 404(B) (requiring the higher standard of “clear and convincing” evidence for the admissibility of prior bad acts for nonpropensity purposes as compared to the comparable Federal Rule of Evidence, which allows the admissibility of such evidence by a showing of a “preponderance of the evidence,” discussed infra Part III.B.3); id. art. 405(A) (permitting parties to prove character by “general reputation only,” as compared to the comparable Federal Rule 405, which allows evidence of character by testimony as to reputation as well as opinion, discussed infra Part III.B.4); id. art. 410 (relating to statements made in plea negotiations, discussed infra Part III.B.5); id. art. 611(B) (discussing cross-examination of witnesses, discussed infra Part III.D.5); id. art. 704 (explaining the different standards for testimony regarding an accused's mental state in criminal proceedings, discussed infra Part III.E.2); id. art. 705 (regarding disclosure of basis of expert opinions, discussed infra Part III.E.3).

8. But see id. art. 102 cmt. (a) ("[W]here the language of the Louisiana Code is identical or virtually identical with that used by other states or in the federal rules, Louisiana courts now have available a body of persuasive authority which may be instructive in interpreting the Louisiana Code.").
II. A BRIEF HISTORY OF THE DEVELOPMENT OF THE LOUISIANA CODE OF EVIDENCE

The Louisiana and federal evidentiary rules are closely related. In fact, even though there had been efforts to develop a code of evidence for Louisiana for more than 150 years before a code was enacted, it was not until after the United States Congress enacted the Federal Rules of Evidence in 1975 that Louisiana had a sufficient model from which to develop its own state code.

The creation of the Code began as early as 1822, “when the Louisiana legislature appointed Edward Livingston to prepare a penal code for the state,” which would include a code of evidence. Livingston produced a code of evidence that applied to both civil and criminal cases, but for reasons that are unclear, the legislature never enacted his code.

For more than a century after Livingston’s failed attempt, Louisiana courts continued to use the general common law of evidence in both civil and criminal cases. Several of the rules were set out in various statutes in Title 15 of the Louisiana Revised Statutes, the Louisiana Civil Code, the Louisiana Code of Criminal Procedure, and the Louisiana Code of Civil Procedure; however, courts primarily relied upon judicial decisions for guidance and to aid in their interpretation of the various provisions.

The confusion and inconsistencies in the law led to a second attempt to enact a code of evidence, which began in 1956 when the Louisiana legislature commissioned the Louisiana State Law Institute.
(Law Institute) to develop a code.\textsuperscript{16} This effort also proved to be controversial, and after more than ten years, this attempt was also abandoned.\textsuperscript{17} By the mid-1960s, drafters had already begun developing the Federal Rules of Evidence and, with it, the potential to provide guidance for the development of a code for Louisiana.\textsuperscript{18}

After the enactment of the Federal Rules of Evidence in 1975, the Louisiana legislature again expressed interest in developing an evidentiary code modeled after the Federal Rules and in 1979 directed the Judicial College\textsuperscript{19} to draft a code to present to the Law Institute for recommendations.\textsuperscript{20} While this effort also proved to be fruitless, the enactment of the Federal Rules generated a new belief that Louisiana could develop its own code.

Only two years later, in 1981, the Law Institute again decided to undertake the task of developing a code of evidence.\textsuperscript{21} The reporters charged with the task of developing the code considered the Federal Rules, Louisiana’s existing law, and the model rules; after much debate, additions, deletions, and modifications, the “\textit{proposed Louisiana Code of Evidence was published and submitted to the legislature in 1986.”}\textsuperscript{22}

The legislature failed to enact the code in the 1986 and 1987 legislative sessions amid controversy from competing factions.\textsuperscript{23} In fact, by 1987, the Louisiana District Attorneys Association (LDAA), which had requested additional time to study the proposed code in 1986, introduced its own proposed code during the 1987 legislative session.\textsuperscript{24}

In 1988, the Louisiana legislature “was again presented with two codes of evidence, one prepared by the Louisiana State Law...
Institute, and the other sponsored by the Louisiana District Attorneys Association. Following a special session that lead to several last-minute amendments the evening before it was considered by the Senate committee, the legislature enacted the Louisiana Code of Evidence in 1988. It became effective on January 1, 1989.

III. DISTINCTIONS BETWEEN THE LOUISIANA CODE OF EVIDENCE AND THE FEDERAL RULES OF EVIDENCE

In enacting the Louisiana Code of Evidence, drafters and legislators occasionally strayed from the Federal Rules because of underlying state public policy interests, such as the greater protection provided to Louisiana citizens under the state constitution. The Code otherwise follows the Federal Rules of Evidence. In fact, prior to preparing the Code, both the Advisory Committee and the Council of the Law Institute agreed . . . that policy considerations should generally take precedence over uniformity with the Federal Rules of Evidence, but that where there [were] no substantial difference between Louisiana and federal policy decisions as to a particular rule of evidence, to avoid picky, meaningless distinctions that might thereafter be inferred, the Louisiana rule generally [w]ould be stated in the same word formula used in the Federal Rules of Evidence.

Thus, distinctions from the Federal Rules were both intentional and policy-based.

This Article will discuss thirty-nine distinctions between the Louisiana Code of Evidence and the Federal Rules of Evidence. While this is not a comprehensive list of the distinctions between the federal and Louisiana rules, this Article includes a list of some of the most significant distinctions in the rules, as well as some minor distinctions, including Louisiana articles not contained in the Federal Rules.


26. See Pugh, Force, Rault & Triche, supra note 9, at 693 (noting that representatives from organizations that had been active throughout the process, including the LDAA, the LTLA, the LACDL, the Louisiana Coalition Against Domestic Violence, and the Women’s Lobby Network, attended the special compromise session); Rault, supra note 9, at 699.


28. See id.


30. Pugh, Force, Rault & Triche, supra note 9, at 691.
Specifically, this Article will address provisions of the Louisiana Code of Evidence that contain at least one aspect or component that should be applied and/or interpreted differently than the corresponding federal rule. The distinctions are addressed in the order in which they appear in the Code, with the exception of the last section, which contains ten articles found in the Louisiana Code of Evidence that have no counterparts in the Federal Rules of Evidence. Each section begins with a basic summary of how the law is applied under Louisiana law, followed by a discussion of how the corresponding federal rule differs. The provisions containing distinctions in this Article are:

1. Article 103: Rulings on Evidence
2. Article 404(A)(1): Character of the Accused
3. Article 404(A)(2): Character of the Victim
4. Article 404(B): Nonconformity (Other Crimes, Wrongs, or Acts)
5. Article 405: Methods of Proving Character
6. Article 410: Inadmissibility of Pleas, Plea Discussions, and Related Statements
7. Article 411: Liability Insurance
8. Article 412: Victim’s Past Sexual Behavior in Sexual Assault Cases
9. Article 412.2: Evidence of Similar Crimes, Wrongs, or Acts in Sex Offense Cases
10. Chapter 5: Privileges
11. Article 601: General Rule of Competency
12. Article 607: Attacking and Supporting Credibility Generally
13. Articles 608/404(A)(3): Attacking or Supporting Credibility by Character Evidence
15. Article 611: Mode and Order of Interrogation and Presentation
16. Article 701: Opinion Testimony by Lay Witnesses
17. Article 704: Opinion on Ultimate Issue
18. Article 705: Disclosure of Facts or Data Underlying Expert Opinion; Foundation
21. Article 801(D)(2)-(3): Admissions
22. Article 803(3): Then Existing Mental, Emotional, or Physical Condition
23. Article 803(4): Statements for Purposes of Medical Treatment and Medical Diagnosis in Connection with Treatment
24. Article 803(5): Recorded Recollection/Article 612: Writing Used To Refresh Memory
25. Article 803(6)-(7): Records of Regularly Conducted Business Activity
26. Article 803(8): Public Records and Reports/Article 803 (10): Absence of Public Record or Entry
27. Article 803(16): Statements in Ancient Documents
28. Article 804(B)(1): Former Testimony

Additionally, the Louisiana Code of Evidence contains ten provisions that do not have a counterpart in the Federal Rules of Evidence:

1. Article 412.1: Victim’s Attire in Sexual Assault Cases
2. Article 412.3: Statements Made by Victims of Trafficking During Investigations
3. Article 413: Settlement or Tender
4. Article 414: Workers’ Compensation Payments
5. Article 415: Act of Contacting or Retaining an Attorney
6. Article 801(D)(1)(d): Initial Complaint of Sexually Assultive Behavior
7. Article 801(D)(4): Things Said and Done
8. Article 803.1: Foreign Records of Regularly Conducted Activity
9. Article 803(24): Testimony as to Age
10. Article 804(B)(5): Complaint of Sexually Assaultive Behavior

A. Chapter 1: General Provisions

Louisiana Code of Evidence article (article) 103 sets forth the standard that Louisiana appellate courts use when deciding whether a trial court erred in evidentiary rulings. Specifically, article 103(A) provides that if a party is challenging the admission of evidence, the following requirements must be met: (1) the party must make “a timely objection or motion to admonish the jury to limit or disregard appears of record,” (2) the party must state the specific grounds upon which he objects, and (3) a substantial right of the party must be
32. See id. art. 103; see also L.A. CODE CRIM. PROC. ANN. art. 841(A) (2008) (discussing the Louisiana Code of Evidence’s authority in criminal trials); L.A. CODE CIV. PROC. ANN. art. 1635 (2003) (explaining the Louisiana Code of Evidence’s authority in civil cases in terms of the procedure for preserving issues for appeal); L.A. CODE CRIM. PROC. ANN. art. 841 (providing that, in a criminal case, a contemporaneous objection to a judge’s ruling on a written motion is unnecessary to preserve the issue for appeal).
33. L.A. CODE EVID. ANN. art. 103(A).
34. See, e.g., State v. Spears, 350 So. 2d 603, 607 (La. 1977) (finding that an objection to photographs of the victim, which was made not when the prosecution introduced them into evidence, but when the State attempted to show them to the jury, was not timely).
35. L.A. CODE EVID. ANN. art. 103(A)(1).
36. ROBERT FORCE & GERARD A. RAULT, JR., HANDBOOK ON LOUISIANA EVIDENCE LAW art. 103 authors’ note (1), at 341 (2014 ed. 2014); see also Tartar v. Hymes, 94-758, p. 10 (La. App. 5 Cir. 5/30/95); 656 So. 2d 756, 760 (“[W]e will not review the defendants’ allegation that the medical bills constituted hearsay because it raises a different ground for the objection than that given at trial.”).
37. See, e.g., State v. Tillery, 14-429, p. 15 (La. App. 5 Cir. 12/16/14); 167 So. 3d 15, 24 (“The failure to raise an objection to the admissibility and reliability of an expert’s testimony constitutes a waiver of such an objection.”); State v. Morgan, 2012-2060, p. 19 (La. App. 1 Cir. 6/7/13); 119 So. 3d 817, 830 (finding that the defendant waived any error based on allegations of prosecutorial misconduct by failing to make a contemporaneous objection); State v. Herron, 2003-2304, p. 10 (La. App. 1 Cir. 5/14/04); 879 So. 2d 778, 786 (affirming denial of motion based on an untimely objection).
objects differs from the comparable Federal Rule of Evidence (Rule 103(a)(1)(B)). Under the Federal Rules, an objecting party does not need to state the specific grounds for the objection if “it was apparent from the context.” However under Louisiana law, even if the grounds are obvious, to preserve an issue for appeal on a ruling that admits evidence, the specific grounds upon which a party objects must be stated.

Similarly, under Rule 103(a)(2), a party offering excluded evidence does not need to make an offer of proof if “the substance was apparent from the context.” However, in all instances, Louisiana’s article 103(B) requires that the substance of excluded evidence be made known to the court to preserve the issue for review.

B. Chapter 4: Relevancy and Its Limits

1. Character of the Accused [Article 404(A)(1)]

Article 404(A) precludes evidence of a person’s character or character trait from being offered against him to prove that the person acted in conformity with that particular character trait on a particular occasion. This general rule applies in both civil and criminal cases. However, article 404(A)(1)-(3) contains three exceptions to this rule that apply in criminal cases. One such exception pertains to character evidence of an accused.

Article 404(A)(1) provides that the accused may offer evidence of a pertinent trait of his own character, such as a moral quality, “provided that such evidence shall be restricted to showing those moral qualities pertinent to the crime with which he is charged.” Thus, while the prosecution cannot place the defendant’s character at issue, if a defendant chooses to, he may offer evidence of his own character relative to a pertinent character trait in the trial. By doing so, the
defendant puts his character at issue, which not only opens the door to the prosecution’s cross-examining him about any of his prior bad acts, convictions, or arrests that are relevant to said character trait, 43 but also permits the prosecution to offer rebuttal character evidence. 44 The article further provides that any character evidence offered by the accused cannot outweigh conclusive evidence of guilt. 45

Character evidence offered by the accused under this provision must be in accordance with the procedures outlined in article 405 and the applicable case law that provides guidelines for questioning character witnesses. 46

Federal Rules of Evidence Distinction. Like Louisiana’s article 404(A), Rule 404(a)(1) similarly precludes character evidence from being offered against a person to prove action in conformity therewith in both civil and criminal cases. 47 Rule 404(a)(2)(A) also contains an exception in criminal cases that allows the accused to offer evidence of his own pertinent character trait. 48 However, unlike Louisiana’s article 404(A)(1), which specifically provides that “character evidence cannot destroy conclusive evidence of guilt,” 49 the federal Rule does not contain such a provision. In fact, under Rule 404(a)(2)(A), some federal courts allow the trial court to instruct the jury that evidence of the defendant’s good character, standing alone, may be sufficient evidence to create reasonable doubt; 50 however, the accused is not entitled to such an instruction. 51 Most courts agree that “like all other

43. See id. art. 405(A); State v. Johnson, 389 So. 2d 372, 376 (La. 1980) (setting forth guidelines for the prosecution when cross-examining character witnesses offered by the accused).
44. LA. CODE EVID. ANN. art. 404(A)(1); see Johnson, 389 So. 2d at 376.
45. See LA. CODE EVID. ANN. art. 404(A)(1).
46. See infra Part III.B (discussing methods of proving character).
49. LA. CODE EVID. ANN. art. 404(A)(1).
50. See United States v. Cramer, 447 F.2d 210, 219 (2d Cir. 1971) (“[U]nder certain circumstances [character] testimony alone may raise a reasonable doubt as to the defendant’s guilt, and in the federal courts the defendant is entitled to such an instruction.” (alteration in original) (quoting United States v. Minieri, 303 F.2d 550, 555 (2d Cir. 1962))).
51. See United States v. Pujana-Mena, 949 F.2d 24, 31 (2d Cir. 1991) (“[W]hether or not a defendant rests his case solely on character evidence, an instruction to the jury that such evidence ‘standing alone’ may create a reasonable doubt is not required. It is sufficient for the trial judge to instruct the jury to consider character evidence along with all the other evidence in determining whether the prosecution has proven guilt beyond a reasonable doubt.” (footnote omitted)); see also id. at 28 n.2 (holding that the defendant is not entitled to a “standing alone” charge); cf. United States v. Foley, 598 F.2d 1323, 1336-37 (4th Cir. 1979) (recognizing that in some circumstances, the accused is entitled to an instruction regarding
evidence, character evidence may be deemed sufficient to engender a reasonable doubt. . . . But such evidence must be considered in conjunction with all the evidence received at the trial, not in and of itself.”

In accordance with Louisiana’s provision specifically providing that character evidence cannot outweigh conclusive evidence of guilt, the courts have held that the prosecution is entitled to a limiting instruction providing that the jury may not assume the defendant’s innocence because of the character evidence he offers. Thus, in federal court, evidence of the accused’s character has the potential to more significantly impact a case than in a Louisiana court.

2. Character of Victim [Articles 404(A)(2) and 404(B)(2)]

A second exception to the general rule excluding character evidence from being offered to prove action in conformity therewith is the admissibility of evidence of a victim’s character under certain circumstances. Pursuant to article 404(A)(2), the accused in a criminal trial may offer evidence of any pertinent trait of the character of the victim of the crime charged, except for “dangerous character” in certain circumstances, to prove that the victim acted in conformity with the character trait at the time of the incident in question.

The accused may only offer evidence of the dangerous character of the victim if he can first show appreciable “evidence of a hostile demonstration or an overt act on the part of the victim at the time of the offense charged.” When an accused has offered such evidence, in addition to a character trait for dangerousness, he may also introduce evidence of the following specific instances: evidence of the victim’s prior threats against accused and evidence of the accused’s state of mind regarding the dangerousness of victim, which would include threats, his reputation, and other specific acts against the accused or others. When evidence is offered “to show the accused’s state of
mind, it must be shown that the [accused] knew of the victim’s prior threats or reputation” for dangerousness.\textsuperscript{58}

The evidence of the dangerous character of the victim, threats, and violent acts are relevant to a plea of self-defense for two purposes: “(1) to show the defendant’s reasonable apprehension of danger which would justify her conduct . . . and (2) to help determine who was the aggressor in the conflict.”\textsuperscript{59} An overt act, as it relates to self-defense, means “any act of the victim which manifests to the mind of a reasonable person a present intention on his part to kill or do great bodily harm.”\textsuperscript{60}

Additionally, article 404(A)(2)(a) and article 404(B)(2) both contain a domestic violence exception to the rule governing the admissibility of the dangerous character of the victim of an offense. The exception relaxes the requirement that the accused first show a hostile demonstration or overt act prior to offering such evidence when the incident in question arose out of domestic violence.

To introduce such evidence, the accused must meet three requirements: (1) he must plead self-defense, (2) there must be “a history of assaultive behavior between the victim and the accused,” and (3) “the accused [must have] lived in a familial or intimate relationship” with the victim.\textsuperscript{61} If the accused meets all three requirements, he may introduce the following types of evidence, relating to the victim’s character: (1) dangerous or violent character, (2) specific violent acts against the accused or others, (3) incidents of domestic violence, (4) prior threats against the accused, and (5) state of mind evidence (including specific instances of conduct, threats, and character traits that accused knew about).\textsuperscript{62}

This evidence is also admissible for the same two purposes for which character evidence of other victims may be offered: “(1) to show the defendant’s reasonable apprehension of danger which would justify [his] conduct [i.e., his state of mind] and (2) to help determine who was the aggressor in the conflict.”\textsuperscript{63}

In either situation, “in order for evidence to be admissible to show the defendant’s reasonable apprehension of danger” or his state of mind, “it must be shown that the defendant knew of the victim’s prior

\textsuperscript{58} Edwards, 420 So. 2d at 670.

\textsuperscript{59} Id.

\textsuperscript{60} Id. at 669 (citing State v. Brown, 133 So. 383, 386 (La. 1931)).

\textsuperscript{61} LA. CODE EVID. ANN. art. 404(A)(2)(a), (B)(2).

\textsuperscript{62} Id. art. 404(A)(2), (B)(2); see State v. Lee, 331 So. 2d 455, 461 n.5 (La. 1976); State v. Terry, 94-0622, pp. 12-13 (La. App. 1 Cir. 4/7/95); 654 So. 2d 455, 462.

\textsuperscript{63} Terry, 94-0622 at pp. 12-13; 654 So. 2d at 462.
acts of violence or reputation for violence.”

In determining which party was the first aggressor, “there is no requirement that the defendant have knowledge of the victim’s prior acts or reputation.” Additionally, “an expert’s opinion as to the effects of the prior assaultive acts on the accused’s state of mind is admissible.”

Moreover, this article provides, “Evidence of a character trait of peacefulness of the victim [may be] offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.”

Federal Rules of Evidence Distinction. Rule 404(a)(2) lacks the complexity and detail of the comparable Louisiana article. It merely provides that the accused may offer evidence of a pertinent character trait of the victim in a criminal case; that in a homicide case, the prosecution may rebut such evidence offered by the accused; and that the prosecution may also offer evidence of the character trait of peacefulness of the victim to rebut evidence that the victim was the first aggressor. The federal Rule does not provide specific requirements that must be met to offer evidence of the dangerous character of the victim, any threats by the victim, specific instances of the victim’s conduct, or the state of the mind of the victim, nor does it contain a domestic violence exception. Further, unlike Louisiana’s article 404(B)(2), which also contains a provision detailing the admissibility of specific instances of conduct of the victim (including threats and state of mind), the federal Rule does not have a comparable provision, and all rules applicable to the admissibility of a victim’s character are built into Rule 404(a)(2)(c) only.

Another significant distinction between the two provisions is that Rule 404(a)(2)(B)(ii) provides that if the accused offers evidence of a

64. Id. (emphasis added).
65. Id.
67. Id. art. 404(A)(2)(b).
72. While Rule 404(a)(2)(B) does not provide for the admissibility of evidence of the accused’s knowledge of specific acts of the victim to show the accused’s state of mind, federal case law provides for the admissibility of such evidence; however, such evidence is not included in Rule 404(a)(2)(B) because it is not considered to be evidence of a victim’s character. See United States v. Saenz, 179 F.3d 686, 688-89 (9th Cir. 1999) (“[A] defendant claiming self-defense may show his own state of mind by testifying that he knew of the victim’s prior acts of violence.”).
trait of character of the victim, the prosecution may offer evidence of that same character trait of the accused.\textsuperscript{73} Louisiana’s Code does not contain such a provision.

3. Nonconformity (Other Crimes, Wrongs, or Acts) [Article 404(B)]

While the nonconformity rule generally precludes evidence of a person’s character from being offered to prove that the person acted in conformity therewith on a particular occasion, article 404(B) generally extends the nonconformity rule to exclude evidence of specific instances of conduct from being offered against a person to prove that he acted in conformity therewith.\textsuperscript{74} This provision applies in both civil and criminal cases.\textsuperscript{75}

While the article generally excludes specific instances of conduct from being offered against a person for conformity purposes, article 404(B) contains an exception permitting the admission of such evidence to prove other relevant purposes in the case, such as “motive, opportunity, intent, preparation, plan, knowledge, identity,” or other relevant purposes that the circumstances may present.\textsuperscript{76}

The admissibility requirements as set forth in article 404(B) and applicable case law provide that upon request by the accused,\textsuperscript{77} the prosecution in a criminal case shall provide reasonable notice in advance of trial of its intent to use such crimes, specifying the purpose for which the evidence will be offered.\textsuperscript{78} Thereafter, a court must hold a hearing to determine the admissibility of the other crimes, applying the safeguards established in State v. Prieur.\textsuperscript{80}

\textsuperscript{73} Fed. R. Evid. 404(a)(2)(B)(ii).
\textsuperscript{74} See LA. CODE EVID. ANN. art. 404(B) (2006).
\textsuperscript{75} See, e.g., Cerniglia v. French, 2000-2768, pp. 8-9 (La. App. 4 Cir. 4/3/02); 816 So. 2d 319, 324-25; Brown v. Dep’t of Transp. & Dev., 572 So. 2d 1058, 1065 (La. App. 5 Cir. 1990).
\textsuperscript{76} LA. CODE EVID. ANN. art. 404(B) (containing an illustrative, but not exhaustive, list).
\textsuperscript{77} See State v. Prieur, 277 So. 2d 126, 129-30 (La. 1973); State v. Davis, 08-165, pp. 14-18 (La. App. 5 Cir. 7/29/08); 993 So. 2d 295, 303-05.
\textsuperscript{78} The requirement that notice be “upon request by accused” was added by Act 51 of the 1994 Third Extraordinary Legislative Session. Act 51, 1994 La. Acts 821 (codified at LA. CODE EVID. ANN. art. 404(B)). Although the statute appeared to conflict with the requirements of State v. Prieur, the Louisiana Supreme Court has clarified the issue, determining that Prieur remains viable and that the State must give the accused notice that such evidence will be offered against him, whether he requests notice or not. See State v. Blank, 2004-0204, p. 39 (La. 4/11/07); 955 So. 2d 90, 123.
\textsuperscript{79} See Prieur, 277 So. 2d at 130.
\textsuperscript{80} See id.
The safeguards are designed to protect a defendant’s constitutional right to confront and cross-examine his accusers and to protect him from unfairly prejudicial evidence.\(^{81}\) As established by the court in *Prieur*, there are four requirements: (1) the prosecution must provide written notice to the defendant in advance of trial of its intention to use such evidence, along with the specific purpose for which it will be used; (2) the court must make a preliminary determination that the evidence will serve the purpose for which it will be offered, which the prosecution must be able to prove with clear and convincing evidence; (3) if requested, the court will instruct the jury to limit its consideration of the evidence to the purpose for which it is offered; and (4) in its final charge to the jury, the court must instruct the jury as to the limited purpose for which the evidence may be considered and that the jury may not convict the accused of any crime other than the one with which he is charged or one responsive to it.\(^{82}\)

The prosecution must demonstrate by “clear and convincing evidence” that the accused committed the other crime, wrong, or act\(^{83}\) and that the evidence is admissible subject to an article 403 balancing test.\(^{84}\)

Article 404(B) further provides for the admissibility of “integral part” evidence. Integral part evidence is evidence of another crime that forms a part of the sequence of events leading to the charged offense.\(^{85}\) It is evidence so “related [to] and intertwined with the charged offense to such an extent that the state could not have accurately presented its case without reference to it.”\(^{86}\) Integral-part evidence typically “forms [a] continuous chain of events leading to the

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81. See HARGES & JONES, supra note 53, art. 404 authors’ cmt. (c).
82. See Prieur, 277 So. 2d at 130; see also FORCE & RAULT, supra note 36, art. 404 authors’ note (4) (detailing safeguards).
83. Section 2 of Act 51 of the 1994 Third Extraordinary Legislative Session, codified at LA. CODE EVID. ANN. art. 1104 (2006), specifically provided that “[t]he burden of proof in a pretrial hearing held in accordance with State v Prieur shall be identical to the burden of proof required by Federal Rules of Evidence Article 404,” which appeared to have provided for a preponderance of the evidence standard, as applied under the Federal Rules. See Huddleston v. United States, 485 U.S. 681, 690 (1988). However, the Louisiana Supreme Court has clarified that the requirement of *Prieur* for a “clear and convincing evidence” standard remains good law. Blank, 2004-0204 at p. 39; 955 So. 2d at 123 (upholding the clear and convincing standard that the state must meet in proving that the other bad act occurred); State v. Carr, 620 So. 2d 288, 293 (La. App. 1 Cir. 1993) (allowing hearsay evidence to establish clear and convincing evidence that the other prior bad act occurred).
84. See Prieur, 277 So. 2d at 128; see also Blank, 2004-0204 at p. 39; 955 So. 2d at 123 (requiring courts to weigh the probative value against the prejudicial effect).
85. See HARGES & JONES, supra note 53, art. 404 authors’ cmt. (e).
defendant’s arrest. The prosecution does not need to give notice of its intent to use integral part evidence. Because of its close connection to the instant offense in both time and place, the defendant is deemed to reasonably anticipate its admissibility in connection with the instant offense.

**Federal Rules of Evidence Distinction.** Rule 404(b) has two key distinctions from Louisiana’s article 404(B). While Louisiana courts have stressed the importance of making the admissibility determination of other crimes, wrongs, or acts for nonpropensity purposes pretrial, the Rule provides that such notice may also occur “during trial if the court, for good cause, excuses lack of pretrial notice.” Thus, in a federal court, a defendant could be apprised that the prosecution would be offering evidence of prior bad acts during or immediately prior to the trial, which would affect an accused’s ability to address the evidence and present a defense.

Further, unlike Louisiana’s article 404(B), which has been held to require that the prior bad act be proven by “clear and convincing” evidence, under the Federal Rules, the prior crime need only be proven by a preponderance of the evidence—a lower standard. Thus, Louisiana courts provide greater protection for the accused than do federal courts concerning the admissibility of prior bad acts for nonconformity purposes.

Another distinction between the two provisions is that Rule 404(b)(2) does not contain language specifically providing for the admissibility of other crimes that forms an “integral part” of the crime charged as provided for under Louisiana law. However, federal case law provides for the admissibility of evidence of other crimes that are inextricably intertwined with the charged offense.

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88. State v. Besse, 11-230, p. 10 (La. App. 5 Cir. 12/28/11); 83 So. 3d 257, 264.

89. See Prieur, 277 So. 2d at 128-30 (requiring a pretrial determination of the admissibility of other crimes, wrongs, or bad acts as a safeguard designed to help protect the defendant from unfairly prejudicial evidence).


91. See, e.g., United States v. Lopez-Gutierrez, 83 F.3d 1235, 1240-41 (10th Cir. 1996) (permitting notice one day before trial commenced because the evidence was not previously known to the government).

92. See HARGES & JONES, supra note 53, art. 404 authors’ cmt. (e).


4. Proving Character [Article 405(A)]

While character evidence is generally inadmissible, in cases in which evidence of a person’s character is admissible, it must be proven by testimony of a person’s general reputation only. Prior to giving reputation testimony, “a foundation must be established that the witness is familiar with that reputation.” A person’s character may not be proven by specific instances of conduct or by a person’s opinion of another person’s character, but rather by the accused’s reputation in the community. The relevant community might be the person’s work, church, school, or any other community in which the witness would have had an opportunity to learn of the person’s reputation for the particular character trait. Further, when character evidence is admissible, the trait offered must be pertinent.

Once a witness has testified about a particular character trait of a person, that witness may then be cross-examined about relevant specific instances of conduct that go to that same character trait. The specific instances in question do not need to be convictions; they may include arrests that did not result in a conviction, as well as other bad acts for which the person was not arrested. When cross-examining a character witness about specific instances of conduct, the questions must be phrased in terms of whether the witness “has heard” about each of the specific instances of conduct.

To minimize the prejudice to a defendant when a character witness is cross-examined about the defendant’s prior bad acts, arrests, or convictions, the Louisiana Supreme Court established safeguards in *State v. Johnson*. As established in *Johnson*, the Louisiana Supreme

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96. *Id.* art. 405(A). The Code provides exceptions for sexual assault victims, *id.* art. 412 (2006 & Supp. 2016), and in cases in which character is an essential element of a charge, claim, or defense for which character may also be proven by specific instances of conduct, *id.* art. 405(B) (2006).
97. *Id.* art. 405(C) (2006).
98. See *id.* art. 405 cmt. (b); *see also* State v. Clark, 402 So. 2d 684, 687 (La. 1981) (“[A]ny substantial community of people among whom he is well known, such as the group with whom he works, does business or goes to school.”).
99. LA. CODE EVID. ANN. art. 404(A)(1).
100. *Id.* art. 405(A).
101. See State v. Warner, 2012-0085, p. 22 (La. App. 4 Cir. 5/1/13); 116 So. 3d 811, 822 (allowing cross-examination of character witness about prior arrests).
103. *Id.* (requiring that the examination “be conducted in the proper form, that is: ‘Have you heard,’ etc., not ‘Do you know,’ etc.”) (quoting State v. Steensen, 113 A.2d 203, 206 (N.J. Super. Ct. App. Div. 1955)).
104. *See* id.
Court requires a preliminary hearing, commonly referred to as a “Johnson hearing,” in which the court ensures that the specific instances referred to are in fact relevant to assessing the credibility of the character witness, that the cross-examiner has credible grounds for asking the questions, and that these questions are not merely a bad-faith attempt to present potentially highly prejudicial information before the jury.

Finally, once a party has called a character witness to testify to a pertinent character trait, the opponent may offer rebuttal evidence of the person’s character through another character witness. All of the procedures discussed above that apply to the original witness also apply to the rebuttal character witness.

**Federal Rules of Evidence Distinction.** Significant distinctions exist between article 405(A) and Rule 405(a). The Federal Rule provides that evidence of a person’s character “may be proved by testimony about the person’s reputation or by testimony in the form of an opinion.” Thus, in federal court, either an expert witness or a lay witness can testify to his opinion of the person’s pertinent character trait. As with reputation, a witness must be sufficiently familiar with the person to be qualified to express an opinion as to the person’s character. Additionally, as in Louisiana, the character witness may be cross-examined about “relevant specific instances of the person’s conduct.” However, under the federal Rule, the witness may be questioned on cross-examination by asking either, “Have you heard?”, “Do you know?”, or even “Were you aware?” of the specific relevant instances.

105. See, e.g., State v. Henderson, 31-986, p. 8 (La. App. 2 Cir. 8/18/99); 740 So. 2d 240, 245-46; State v. Houghton, 619 So. 2d 765, 768-69 (La. App. 4 Cir. 1993) (referring to the hearing where a court complies with the requirements of Johnson as a “Johnson Hearing”).

106. See Johnson, 389 So. 2d at 376 (setting forth specific safeguards when determining on which prior acts a character witness may be cross-examined).


108. FED. R. EVID. 405(a) (emphasis added).

109. See STEVEN GOODE & OLIN GUY WELLBORN, III, COURTROOM EVIDENCE HANDBOOK rule 405 authors’ cmt. (5) (2015-2016 student ed. 2015); see also United States v. Roberts, 887 F.2d 534, 536 (5th Cir. 1989) (finding that the district court erroneously excluded expert testimony on pertinent character traits).

110. Roberts, 887 F.2d at 536; see also United States v. Koessel, 706 F.2d 271, 275 (8th Cir. 1983) (affirming the exclusion of a witness’s opinion testimony, finding that the witness, who had only met the accused once, was not qualified to give an opinion regarding that person’s character).

111. FED. R. EVID. 405(a).
conduct in question, regardless of whether he testified in the form of opinion or to reputation.\textsuperscript{112}

These distinctions are quite significant in comparison to the Louisiana provisions whereby a witness may only give character evidence in the form of someone’s reputation in the community and may only be cross-examined by questions phrased in the form of “Have you heard?” as outlined above.

One final significant distinction between the two provisions is that there is a lower standard for determining about which prior offenses the character witness may be cross-examined under the federal Rule than the one established by the Louisiana Supreme Court in \textit{Johnson}. Under the federal Rule, the prosecution need only have a “good-faith factual basis” for believing the prior offenses occurred,\textsuperscript{113} whereas in Louisiana there must be “no question as to the fact of the subject matter of the rumor” that forms the basis of the questioned conduct.\textsuperscript{114}

5. Inadmissibility of Plea Discussions [Article 410]

Article 410 precludes the admission of statements offered against a person in a subsequent trial that were made in the course of plea discussions or negotiations related to a criminal charge, as well as certain actual pleas that may be entered as a result of a criminal charge.\textsuperscript{115} Like statements made during settlement negotiations, statements made during plea negotiations are excluded to encourage parties to come to agreements in criminal cases.

This article excludes pleas and plea negotiations (with the prosecuting attorney or their representative) that either did not result in a plea or resulted in a plea that was later withdrawn or set aside. Additionally, the exclusion encompasses statements made in court proceedings related to a plea that is later withdrawn or set aside. This rule is designed to encourage “unrestrained candor which produces effective plea discussions” between the prosecutor and the defense.

\textsuperscript{112} United States v. Scholl, 166 F.3d 964, 974 (9th Cir. 1999); see also \textit{Fed. R. Evid.} 405 advisory committee notes (characterizing the significance of the distinctions between question forms as “slight if any”).

\textsuperscript{113} United States v. Wells, 525 F.2d 974, 977 (5th Cir. 1976) (noting that prosecution must exercise good faith when inquiring about prior bad acts); see \textit{Goode & Wellborn}, supra note 109, rule 405 authors’ cmt. (8).


counsel\textsuperscript{116} “by giving the defendant protection from involuntary self-incrimination at two ends of the plea-bargaining spectrum: while he is negotiating over the disposition of his case and while he is offering or entering a plea that is rejected or later withdrawn.”\textsuperscript{117}

The article contains two exceptions in which such statements may be admitted:

1. In any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it; or

2. In a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.\textsuperscript{118}

\textbf{Federal Rules of Evidence Distinction.} This article differs from Rule 410 in one key respect. Rule 410(a)(4) only applies to statements made in the course of “plea discussions with an \textit{attorney} for the prosecuting authority.”\textsuperscript{119} It does not include statements made to “other representative[s] of the prosecuting authority,”\textsuperscript{120} as provided in the Louisiana article.\textsuperscript{121} Thus, the Louisiana provision gives greater protection because it also precludes statements that may have been made to other representatives of the prosecuting authority, including investigators, victim or witness advocates, or others.

6. \textbf{Liability Insurance [Article 411]}

Under article 411, the fact that a party is covered by liability insurance is admissible at trial.\textsuperscript{122} However, under Louisiana law, “the amount of coverage under the policy shall not be communicated to the jury unless the amount of coverage is a disputed issue which the jury will decide.”\textsuperscript{123}

\textbf{Federal Rules of Evidence Distinction.} Article 411 differs from Rule 411. Rule 411 precludes any evidence of the fact that a

\begin{itemize}
\item \textsuperscript{116} \textit{Fed. R. Crim. P. 11(e)(6)} advisory committee notes to 1979 amendment.
\item \textsuperscript{117} \textit{State v. Lewis}, 539 So.2d 1199, 1202 (La. 1989).
\item \textsuperscript{118} \textit{La. Code Evid. Ann.} art. 410(B).
\item \textsuperscript{119} \textit{Fed. R. Evid. 410(a)(4)} (emphasis added).
\item \textsuperscript{120} \textit{La. Code Evid. Ann.} art. 410(A)(4).
\item \textsuperscript{121} \textit{But see United States v. McCauley}, 715 F.3d 1119, 1125 (8th Cir. 2013) (recognizing that the rule has been interpreted to protect statements made to a law enforcement agent acting under the express authority to negotiate a plea on behalf of the prosecutor).
\item \textsuperscript{122} \textit{See La. Code Evid. Ann.} art. 411.
\item \textsuperscript{123} \textit{Id.}
party “was or was not insured,” including the amount of any coverage, from being admitted when deciding a party’s negligence. Rule 411 does, however, allow such evidence to be admitted to prove other relevant issues at trial, such as “proving a witness’s bias or prejudice or proving agency, ownership, or control.” Article 411, under Louisiana law, allows evidence that a party was insured, but does not allow the admission of the amount of coverage, except as provided above.

7. Rape Shield Statute [Article 412]

Article 412 is Louisiana’s rape shield statute. It provides that when the accused is charged with a crime involving sexually assaultive behavior, he may not offer evidence of the following types: (1) opinion evidence, (2) reputation evidence, or (3) specific instances of conduct regarding the past sexual behavior of the victim of the sexual assault. For purposes of article 412, all sexual behavior other than the sexual behavior at issue is generally excluded, including past sexual conduct between the victim and the accused, except as provided below. Further, the article only applies to criminal cases, while articles 404 and 405 govern such evidence in civil cases.

Louisiana’s rape shield statute contains two narrow exceptions by which the defendant may offer evidence of specific instances of the past sexual behavior of the victim. First, the accused may provide evidence of past sexual behavior with persons other than the accused that occurred within seventy two hours of the assault when determining “whether or not the accused was the source of semen or injury,” and second, the accused may provide “evidence of past sexual behavior with the accused” in determining whether the victim consented to “the sexually assaultive behavior.”

Evidence offered under the exceptions must strictly comply with the notice and hearing requirements of article 412(C)-(E), wherein the court will allow the evidence only if it determines that the evidence is relevant and when “the probative value of such evidence outweighs the danger of unfair prejudice.”

127. See id. art. 412(A)(2)(b) (Supp. 2016); id. art. 412(F) (2006 & Supp. 2016); see also id. art. 412 cmt. (e) (2006) (providing an “illustrative and not exhaustive” list of the types of conduct included).
129. Id. art. 412(A)(2) (Supp. 2016).
130. Id. art. 411 (2006).
Additionally, in the 2014 Regular Legislative Session, Louisiana amended its rape shield statute to include laws related to human trafficking and sexual trafficking.\textsuperscript{131} Article 412(B) provides that when the accused is charged with a crime involving “human trafficking” or the “trafficking of children for sexual purposes,” reputation or opinion evidence of the past sexual behavior of the victim is not admissible.\textsuperscript{132} The article excludes evidence regarding reputation, opinion, and specific past sexual behavior of the victim in such cases.\textsuperscript{133}

Article 412(B)(2) provides an exception, stating that the evidence may be admissible if it is offered by the prosecution in a criminal case to prove a pattern of trafficking activity by the defendant.\textsuperscript{134} In such instances, the evidence must be admitted in accordance with the same procedures for introducing evidence of past sexual conduct of a victim of a sexual assault under the rape shield statute found in article 412(C)-(E).\textsuperscript{135} Such evidence may be admissible at trial to the extent specified by the court in an order that sets forth the areas on which the victim may be examined or cross-examined.\textsuperscript{136}

\textit{Federal Rules of Evidence Distinction.} The federal rape shield statute is found in Rule 412.\textsuperscript{137} It similarly excludes evidence of prior sexual behavior of the victim of a sexual assault. However, the Rule contains three exceptions by which evidence of the victim’s prior sexual conduct may be admissible. Two of them are the same as in Louisiana: (1) prior sexual conduct with the accused on the issue of consent\textsuperscript{138} and (2) prior sexual conduct for questions about the source of semen or injury.\textsuperscript{139} The third exception under Rule 412 specifically provides for the admissibility of evidence of the victim’s past sexual behavior when its exclusion would violate the defendant’s constitutional rights.\textsuperscript{140}

While Louisiana’s rule may be interpreted to have that same construction, the federal Rule specifically provides that the accused’s constitutional right to present a defense and to have a fair trial may require the admissibility of such evidence. The Louisiana Supreme

\begin{itemize}
  \item \textsuperscript{131} See H.R. 1025, 2014 Leg., Reg. Sess. § 5 (La. 2014) (enacted).
  \item \textsuperscript{132} L.A. CODE EVID. ANN. art. 412(B)(1) (Supp. 2016).
  \item \textsuperscript{133} See id. art. 412(B).
  \item \textsuperscript{134} See id. art. 412(B)(2).
  \item \textsuperscript{135} See id. art. 412(E)(3) (2006 & Supp. 2016).
  \item \textsuperscript{136} Id.
  \item \textsuperscript{138} See FED. R. EVID. 412(b)(1)(B).
  \item \textsuperscript{139} See FED. R. EVID. 412(b)(1)(A).
  \item \textsuperscript{140} FED. R. EVID. 412(b)(1)(C).
\end{itemize}
Court has recognized that whenever an accused is restricted in his ability to offer evidence in his defense at trial, as provided in article 412, his constitutional rights to confront and cross-examine his accusers and his right to present a defense may be implicated. While the Louisiana article does not expressly contain a provision stating that the exclusion may not be applied if it would violate the accused’s constitutional rights, it is well recognized that all evidentiary rules in the Code are subject to the provisions of the United States Constitution.

Specifically, the official comments to article 102 state, “In criminal matters especially the Articles of this Code must be interpreted and applied in light of and within the confines mandated by the Louisiana and federal constitutions.” The comments state that under certain factual circumstances, the provisions of the Code must “bow to these notions of fundamental fairness.” Thus in some instances, a defendant will be permitted to introduce evidence of a sexual assault victim’s prior sexual conduct that might otherwise be excluded under this provision if it is necessary to protect his constitutional right to present a defense.

Further, Rule 412 specifically provides that the Rule also applies in civil cases while Louisiana’s statute only applies to criminal cases. Rule 412(b)(2) provides, “In a civil case, the court may admit evidence offered to prove a victim’s sexual behavior or sexual predisposition if its probative value substantially outweighs the danger to any victim and of unfair prejudice to any party.”

Finally, the federal rape shield statute does not contain a provision relating to sexual trafficking, as found in the 2014 amendment to Louisiana’s provision.

141. See State v. Vaughn, 448 So. 2d 1260, 1268 (La. 1983); see also LA. CODE EVID. ANN. art. 412 cmt. (b) (2006) (discussing the implications of the article for defendants’ constitutional rights).
142. See LA. CODE EVID. ANN. art. 102.
143. Id. art. 102 cmt. (b).
144. Id.
145. See FED. R. EVID. 412(b)(2).
146. LA. CODE EVID. ANN. art. 412 cmt. (h).
147. FED. R. EVID. 412(b)(2); see also PAUL F. ROTHSTEIN, FEDERAL RULES OF EVIDENCE 270 n.3 (3d ed. 2015) (“The burden is the reverse of Rule 403 which favors admittance. The Rule 412 balancing also expressly encompasses more negative factors than 403 probably does (notably, harm to a non-party, the victim) and requires that probative value substantially outweigh.”).
148. See LA. CODE EVID. ANN. art. 412(B) (Supp. 2016).
8. Prior Sex Offenses in Sex Offense Cases [Article 412.2]

Article 412.2 “applies in two situations: 1) when an accused is charged with a crime involving sexually assaultive behavior, or 2) when an accused is charged with acts that constitute a sex offense involving a victim who was under the age of seventeen at the time of the offense.” In the first instance, the article provides that other “crime[s], wrong[s], or act[s] involving sexually assaultive behavior” may be admissible. Similarly, when the accused is charged with a sex offense and the victim was under the age of seventeen, other sex offenses or acts that “indicate a lustful disposition toward children may be admissible.”

In either case, such evidence may be admitted and considered for its bearing on any relevant issue, subject to an article 403 balancing test. Thus, if the evidence passes the balancing test, the court may admit the evidence, but is not required to do so.

A wide range of other crimes, wrongs, or acts may be admissible under the article, including offenses or bad acts for which the accused may not have been arrested or charged, or even offenses for which he was acquitted, because the burden of proof is lower for admission under article 412.2 than it is for finding guilt at trial. Additionally, the other acts need not be a “sex” crime per se to be considered as evidence to prove a lustful disposition towards children.

Additionally, the other act can occur before or after the offense for which the accused is on trial, because the article contains no specific time limitation regarding the prior act. The amount of time that has passed since the prior act is a relevant factor that the court would consider when conducting its article 403 balancing test.

149. State v. Wright, 2011-0141, p. 11 (La. 12/6/11); 79 So. 3d 309, 316; see also FORCE & RAULT, supra note 36, art. 412.2 authors’ note (1) (recognizing the article’s application in both situations).

150. LA. CODE EVID. ANN. art. 412.2(A) (2006).

151. Id.

152. See id.

153. State v. Harris, 11-253, p. 19 (La. App. 5 Cir. 12/28/11); 83 So. 3d 269, 280; see State v. Cotton, 2000-0850 (La. 1/29/01); 778 So. 2d 569 (noting that the burden of proof for bad acts under article 404(B) is lower than the burden of proof required to convict a defendant).

154. For example, a conviction for trespassing on school property might be used to show a lustful disposition towards children.

155. See State v. Friday, 2010-2309, p. 18 (La. App. 1 Cir. 6/17/11); 73 So. 3d 913, 927 (recounting that the defendant’s possession of child pornography occurred after the charged offense).

156. See State v. Scoggins, 2010-0869, pp. 12-13 (La. App. 4 Cir. 6/17/11); 70 So. 3d 145, 153-54.
The prior offense must be proven by clear and convincing evidence and must be relevant to proving an issue or element in the case, subject to article 403. In order to offer evidence under this provision, specific notice requirements must be met; however, in State v. Williams, the Louisiana Supreme Court held that the procedural requirements of Prieur do not apply to article 412.2 cases. If requested, however, counsel is entitled to a limiting instruction to inform the jury of the appropriate usage of the prior offenses.

Federal Rules of Evidence Distinction. The federal counterparts to this article are found in Rules 413, 414, and 415. Rule 413 provides that when the defendant is accused of sexual assault, the court may admit evidence of another sexual assault to prove a relevant matter in the case. Rule 414 provides that when the accused is charged with child molestation, the court may admit evidence that the accused committed another act of child molestation to prove a relevant matter in the case. Louisiana contains provisions comparable to both of these rules in the same article, rather than dividing them into two separate articles.

Additionally, Louisiana’s article provides that the evidence of other crimes may be admissible subject to article 403, while the federal Rules do not provide that the evidence is admissible subject to a Rule 403 balancing test. In fact, Congress’s legislative judgment provides that such evidence “’normally’ should be admitted.” Thus, such evidence is more likely to be admitted in a federal court than in a Louisiana court.

Additionally, while Louisiana defines a “child” for purposes of article 412.2 as a person “under the age of seventeen at the time of the offense,” Rule 414 defines a child for purposes of the rule as a person “below the age of 14.”

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157. See LA. CODE EVID. ANN. art. 404(B).
158. See State v. Williams, 2002-1030, 2002-0898, p. 8 (La. 10/15/02); 830 So. 2d 984, 987.
159. See State v. Brown, 03-1747, p. 22 (La. App. 3 Cir. 5/12/04); 874 So. 2d 318, 332 (finding the trial court’s refusal to comply with defense counsel’s request of a limiting instruction reversible error).
160. See FED. R. EVID. 413(d) (defining “sexual assault” for the purposes of this Rule).
161. See FED. R. EVID. 414(d) (defining “child” and “child molestiation” for the purposes of this Rule).
162. FORCE & RAULT, supra note 36, art. 412.2 authors’ note (3), at 462 (quoting State v. Willis, 05-218, p. 29 (La. App. 3 Cir. 11/2/2005); 915 So. 2d 365, 387).
163. See id.
164. LA. CODE EVID. ANN. art. 412.2(A) (2006).
165. FED. R. EVID. 414(d)(1).
Finally, while Rules 413 and 414 specifically state that they apply only in criminal cases, Rule 415 provides for the admissibility of such evidence in civil cases and specifically provides that in civil cases, “[t]he evidence may be considered as provided in Rules 413 and 414.” Louisiana’s article only applies to criminal cases, and the Code has no comparable provision making the articles applicable in civil cases.

C. Chapter 5: Testimonial Privileges

The law governing privileges is contained in chapter 5 of the Louisiana Code of Evidence. A privilege is the legal right to preclude the disclosure of relevant, and in some cases, highly probative evidence from trial. Privileges are rooted in public policy interests that are furthered by the existence of the privilege, for example, by showing respect for the sanctity of marriage and promoting marital harmony or by protecting confidential communications within certain relationships in which open communication is essential to further the nature and purpose of the relationship. Privileges also exist to support and maintain certain relationships, to prevent a person from perjuring himself if he were compelled to disclose such information, and to further several other interests.

Privileges contained in chapter 5 of the Code include the spousal communications privilege, lawyer-client privilege, healthcare provider-patient privilege, clergymen-penitent privilege, accountant-client privilege, and others. Additionally, all of the privileges in chapter 5 of the Code contain exceptions. Exceptions include:

166. Fed. R. Evid. 415(a).
168. See State v. Taylor, 94-0696, pp. 3-5 (La. 9/6/94); 642 So. 2d 160, 163-64.
170. See U.S. Const. amend. V (providing for the privilege against self-incrimination).
172. See id. art. 506.
175. See id. art. 515.
176. See, e.g., id. art. 512 (protecting political votes); id. art. 513 (protecting trade secrets); id. art. 514 (protecting the identity of an informant).
177. See, e.g., id. art. 504(C) (providing for exceptions to the spousal confidential communications privilege, including crimes between spouses); id. art. 506(C) (noting exceptions to the lawyer-client privilege, including an exception for situations in which the communication is in furtherance of a future crime); id. art. 510(B)(2) (Supp. 2016) (noting exceptions to the health care provider-patient privilege).
situations in which the policy reasons sought to be furthered by the privilege do not apply. For example, the spousal testimonial privilege does not apply when the spouse or a child is a victim in a domestic abuse or child custody proceeding. In such a situation, the existence of a privilege that does not require the spouse to testify against the defendant-spouse does not further the goal of the privilege—furthering marital harmony.\footnote{178}{See State v. Taylor, 94-0696, p. 9 (La. 9/6/94); 642 So. 2d 160, 166 (holding that the spousal-testimonial privilege did not apply when the witness-spouse likely only refused to testify out of fear of the defendant-spouse).}

Pursuant to article 1101(A)(2), “except as otherwise provided by legislation, Chapter 5 of this Code with respect to testimonial privileges applies to all stages of all actions, cases, and proceedings where there is power to subpoena witnesses, including administrative, juvenile, legislative, military courts-martial, grand jury, arbitration, medical review panel, and judicial proceedings.”\footnote{179}{LA. CODE EVID. ANN. art. 1101(A)(2) (2006).} Chapter 5 has limited application to workers’ compensation cases, child custody cases, revocation of probation hearings, preliminary examinations in criminal cases, proceedings in mayor’s courts and justice of the peace courts, peace bond hearings, extradition hearings, and several other types of hearings and proceedings.\footnote{180}{See id. art. 1101(B).}

Thus the rules governing privileges have a much broader scope than the other rules of evidence and are generally applicable to all “types of hearings where a person may be required to give testimony in a government authorized trial, hearing, or other proceeding.”\footnote{181}{Id. art. 1101 cmt. (e).} If information is confidential, disclosure at any point would destroy that confidentiality. Thus, privileged information is protected in a broader range of proceedings.

\textit{Federal Rules of Evidence Distinction.} The Federal Rules do not contain a chapter on privileges. Rule 501 provides:

\begin{quote}
The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court. But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.\footnote{182}{FED. R. EVID. 501.}
\end{quote}

The rationale underlying the proviso is that federal law should not supersede that of the States in substantive areas such as privilege absent
a compelling reason. The Committee believes that in civil cases in the federal courts where an element of a claim or defense is not grounded upon a federal question, there is no federal interest strong enough to justify departure from State policy.\textsuperscript{183}

Thus, in federal criminal cases, privileges are governed by the common law. However, in civil cases in which the matter to be proved is related to a “claim or defense” to which state law supplies the rule of decision (e.g., in diversity cases), state privilege law applies.\textsuperscript{184} “When evidence covered by a privilege is relevant to both a federal and state claim or defense, the courts generally apply the federal law of privilege."\textsuperscript{185}

\textbf{D. Chapter 6: Witnesses}

1. Competency [Article 601]

All witnesses testifying at trial must be deemed competent. Article 601 sets forth the general rule for competency in Louisiana, providing that every person of “proper understanding” is competent to be a witness in a trial, except as otherwise provided by law.\textsuperscript{186} “Proper understanding” is the exclusive test for determining the competency of a witness under Louisiana evidence law\textsuperscript{187} and refers to the “witness’ general ability to appreciate truth and falsity and to understand the proceedings."\textsuperscript{188} The competency of a witness is not a matter of the witness’s age, his likelihood to lie, or any other issue bearing on his credibility.\textsuperscript{189}

The same standard applies when determining the competency of children. There is no longer a specific test to determine the competency of a witness under the age of twelve.\textsuperscript{190} Similarly, the fact that a person suffers from a mental disorder or defect does not automatically render that person incompetent to testify; if the person has the general ability to distinguish between the truth and a lie and understands his duty to tell the truth, the witness may be found

\begin{footnotes}
\textsuperscript{183} H.R. REP. NO. 93-650, at 9 (1973); FED. R. EVID. 501 notes of committee on the judiciary.
\textsuperscript{184} GOODE & WELLBORN, supra note 109, rule 501 authors’ cmt. (4), at 99.
\textsuperscript{185} Id.; see also Wilcox v. Arpaio, 753 F.3d 872, 876-77 (9th Cir. 2014) (finding that federal privilege law governed evidence relating to claims under both federal and state law).
\textsuperscript{186} LA. CODE EVID. ANN. art. 601.
\textsuperscript{187} Id. art. 601 cmt. (b).
\textsuperscript{188} Id. art. 601 cmt. (c).
\textsuperscript{189} See FORCE & RAULT, JR., supra note 36, art. 601 authors’ note (1).
\end{footnotes}
competent to testify at trial.\textsuperscript{191} Any issues regarding mental illnesses or disorders could be relevant to the witness’s capacity or credibility, but would not automatically render the witness incompetent.\textsuperscript{192}

\textbf{Federal Rules of Evidence Distinction.} The first part of Rule 601 provides, “Every person is competent to be a witness unless these rules provide otherwise.”\textsuperscript{193} Under this provision, “Every witness is presumed competent to testify, unless it can be shown that the witness does not have personal knowledge of the matters about which he is to testify, that he does not have the capacity to recall, or that he does not understand the duty to testify truthfully.”\textsuperscript{194} Under the Federal Rules, prior statutes that once rendered a person incompetent to testify, such as statutes disqualifying those convicted of crimes or those having an interest in the case, no longer apply. Today, as in Louisiana, such issues merely go to credibility and do not prevent a witness from testifying. The appropriate test of competence for young children “is whether [the child] has the requisite intelligence and mental capacity to understand, recall and narrate his impressions of an occurrence.”\textsuperscript{195} The court typically asks the child questions prior to his testimony to ensure that the child is competent to testify.

Despite the language of Rule 601, federal case law provides that a court may nonetheless decide that a witness is unable to testify due to insufficient capacity by applying a Rule 403 balancing test upon finding that the probative value of the person’s testimony would be outweighed by the countervailing considerations listed in that rule.\textsuperscript{196} Thus, in a federal court, the determination of competency can become an “inquiry about relevance,”\textsuperscript{197} although most often, such issues become credibility questions.\textsuperscript{198}

\textsuperscript{191} See State v. Morris, 429 So. 2d 111, 120 (La. 1983); see also State v. Burleson, 516 So. 2d 1159, 1162 (La. App. 4 Cir. 1987) (addressing the competency determination for an intellectually disabled adult).

\textsuperscript{192} 1 GEORGE E. DIX ET AL., MCCORMICK ON EVIDENCE § 62 (Kenneth S. Broun ed., 6th ed. 2006).

\textsuperscript{193} F ED. R. EVID. 601.

\textsuperscript{194} United States v. Lightly, 677 F.2d 1027, 1028 (4th Cir. 1982) (citation omitted).

\textsuperscript{195} United States v. Perez, 526 F.2d 859, 865 (5th Cir. 1976) (quoting United States v. Schoefield, 465 F.2d 560, 562 (D.C. Cir. 1972)).

\textsuperscript{196} See GOODE & WELLBORN, supra note 109, rule 601 authors’ cmt. (2); see also United States v. Ramirez, 871 F.2d 582, 584 (6th Cir. 1989) (recognizing that a judge’s authority to determine the admissibility of evidence may fall outside of Rule 601 and rather in Rule 403).

\textsuperscript{197} GOODE & WELLBORN, supra note 109, rule 601 authors’ cmt. (2), at 126.

\textsuperscript{198} See, e.g., United States v. Villalta, 662 F.2d 1205, 1207 (5th Cir. 1981) (allowing a witness’s testimony regarding conversations that he heard in Spanish, despite his
The second sentence of Rule 601 is the root of the primary difference from Louisiana law. It provides, “[I]n a civil case, state law governs the witness’s competency regarding a claim or defense for which state law supplies the rule of decision.” This provision means that in civil cases, “state law governs the competency of a witness where the proof is directed at a substantive issue governed by state law.” Thus, in a diversity case, for example, in which the federal court must follow substantive principles, the court would be required to follow the state law for determinations of competency.

2. Attacking and Supporting Credibility Generally [Articles 607 and 613]

An attack on a witness’s credibility is referred to as “impeachment.” Impeachment introduces evidence designed to question the truthfulness or accuracy of a witness’s testimony. Articles 607 and 613 govern several ways by which a witness may be impeached, including the admission of evidence that shows bias, interest, corruption, prior inconsistent statements, defects of capacity, and the witness’s relationship to the parties.

Article 607(A) provides, “The credibility of a witness may be attacked by any party, including the party calling him.” Article 607(b) continues, “The credibility of a witness may not be attacked until the witness has been sworn, and [his] credibility . . . may not be supported unless it has been attacked.”

While specific instances of conduct may not be inquired into for the purpose of attacking a witness’s character for truthfulness, specific instances may, however, be inquired into to show any issue “having a reasonable tendency to disprove the truthfulness or accuracy deficiencies in the language, because the deficiencies go to the weight of the evidence rather than to its admissibility).
of [the witness’s] testimony, even though such an inquiry may reveal bad acts, vices, or courses of conduct. For example, a witness might be asked if he was under the influence of drugs or alcohol at the time he observed the incident in question, solely to attack the witness’s ability to perceive or recollect events. A witness might be asked if he was fired from a job for stealing, solely to attack his motive for testifying against the prior employer.

Certain impeachment evidence may be proven only by examining the witness himself, an intrinsic attack on credibility, while other impeachment evidence may also be proven by evidence beyond the witness, if the witness denies the matter, an extrinsic attack on credibility. A witness’s credibility may be attacked intrinsically through examination of a variety of matters that may discredit his testimony, including his “relationship to the parties, interest in the lawsuit, or capacity to perceive or to recollect”; prior inconsistent statements; or on any other matter bearing on his credibility.

In addition to intrinsic evidence, extrinsic evidence may also be offered “to show a witness’ bias, interest, corruption, or defect of capacity . . . to attack the credibility of the witness.” Extrinsic evidence of prior inconsistent statements and “evidence contradicting the witness’ testimony, is admissible . . . to attack the credibility of a witness unless the court determines that the probative value of the evidence on the issue of credibility is substantially outweighed by the risks of undue consumption of time, confusion of the issues, or unfair prejudice.” Prior to offering such extrinsic evidence, “the proponent [must] first fairly direct[] the witness’ attention to the statement, act, or matter alleged, and the witness [must have been] given the opportunity to admit the fact and has failed distinctly to do so.”

Federal Rules of Evidence Distinction. Rule 607 provides that the witness’s credibility may be attacked by any party, including the one calling the witness. Rule 607 does not contain all of the specific provisions that the comparable Louisiana article does regarding the

207. Id. art. 607(C).
208. See id. art. 607(B).
209. See id. art. 607(C).
210. See id. art. 607(D).
211. Id. art. 607(B).
212. Id. art. 607(D)(1).
213. Id. art. 607(D)(2).
214. Id. art. 613.
215. See FED. R. EVID. 607.
time for attacking credibility and the specific ways in which credibility may be attacked intrinsically and extrinsically. However, most of the exceptions contained in Louisiana law have been recognized under the federal Rule. Namely, federal case law has recognized “five main forms of impeachment of the credibility of a witness, which include: (1) introducing prior inconsistent statements, (2) showing bias, (3) attacking the witness’ character for truthfulness, (4) attacking the perception or memory of the witness, and (5) contradicting the witness’ testimony.”  These are primarily the same forms of impeachment contained in Louisiana’s article.

Further, Rule 613 sets forth the foundational requirements for impeachment of a witness by extrinsic evidence for prior inconsistent statements. However, contrary to the Louisiana’s article 613, Rule 613 does not specifically address impeachment of a witness with extrinsic evidence as to any of the other commonly used forms of impeachment specifically listed in Louisiana’s article 613, such as “bias, interest, or corruption, prior inconsistent statements, conviction of crime, or defects of capacity.” Rule 613 only addresses the use of extrinsic evidence for impeachment for prior inconsistent statements. Like Louisiana’s rule, it provides that “[e]xtrinsic evidence of a witness’s prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement . . . , or if justice so requires.”

3. Character of Witness for Truthfulness/Credibility [Articles 404(A)(3) and 608]

Article 404(A)(3) addresses another instance in which character evidence may be admitted. It allows a witness to testify as to the character of another witness for truthfulness or untruthfulness. Such evidence is relevant because a witness’s credibility is always at issue.

The text of article 404(A)(3) specifically points to article 608 for the procedures for proving the character of a witness for truthfulness. Article 608 sets forth the general requirements: (1) the evidence must be in the form of the witness’s general reputation in the community for

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221. See id.
the pertinent character trait (here, *truthfulness or untruthfulness*), and a proper foundation must be established to show how the witness has become familiar with the witness’s reputation for truthfulness; (2) the character witness’s testimony cannot be in the form of his opinion regarding the principal witness’s character; and (3) in laying the foundation on direct examination for how the witness is familiar with the principal witness’s character for truthfulness, counsel may not inquire into specific instances of conduct.

Article 608(B) expressly precludes the use of specific instances of conduct for the purpose of attacking a witness’s character for truthfulness, except when proceeding under articles 609 and 609.1. Similarly, such evidence cannot be proven by extrinsic evidence, other than as it relates to convictions under articles 609 and 609.1.

It is important to remember that pursuant to article 607(B), “[t]he credibility of a witness may not be attacked until [after] the witness has been sworn . . . and . . . may not be supported unless it has been attacked.” Thus, while counsel could call a witness to testify that a principal witness has a reputation for being *untruthful* any time after a witness has been sworn, a witness may not be called to testify regarding a principal witness’s reputation for being *truthful*, offering evidence supporting his credibility, until after the witness’s credibility has been attacked.

Federal Rules of Evidence Distinction. Rule 608 also provides for impeachment of a witness by testimony of another witness regarding the principal witness’s character for truthfulness or untruthfulness. As in all instances under the Federal Rules of Evidence in which character evidence is admissible, the character trait may be proven “by testimony about the witness’s reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character.” As stated above, Louisiana does not allow opinion testimony to prove a witness’s character for truthfulness or untruthfulness.

222. See id. 608(A)(1).
223. See id. art. 608(A)(2).
224. See id.
225. See id. art. 608(A).
226. See discussion infra Part III.D.4.
227. See LA. CODE EVID. ANN. art. 608(B).
228. Id. art. 607(B).
229. See FED. R. EVID. 608.
230. FED. R. EVID. 608(a).
Rule 608 also requires a sufficient foundation to establish how the witness became familiar with the primary witness’s reputation for truthfulness or untruthfulness and how he is acquainted with the witness.\textsuperscript{231} The witness may be cross-examined on specific instances of conduct of the principal witness by asking, “Have you heard?” if the testimony concerns reputation or, “Did you know?” if the testimony concerns opinion. Counsel only needs a “good faith basis” for asking the questions, “Have you heard?” or “Did you know?”\textsuperscript{232}

4. Criminal Convictions (for Credibility) [Articles 609 and 609.1]

Articles 609 and 609.1 address the admissibility of a witness’s prior criminal convictions in assessing the witness’s credibility.\textsuperscript{233} Under these provisions, criminal convictions are not being offered to prove the character of a person or any issue or element directly related to the substantive law. Under articles 609 and 609.1, evidence of a criminal conviction may be offered only to address the witness’s credibility (i.e., his truthfulness).\textsuperscript{234} This provision applies to convictions only and does not apply to “an arrest, the issuance of an arrest warrant, an indictment, a prosecution, or an acquittal,”\textsuperscript{235} nor to a conviction that “has been the subject of a pardon [or an] annulment.”\textsuperscript{236}

i. Civil Cases [Article 609]

Article 609 provides:

For the purpose of attacking the credibility of a witness in civil cases . . . evidence of the name of the crime of which [the witness] was convicted and the date of conviction is admissible if the crime:

(1) Was punishable by death or imprisonment in excess of six months under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party; or

\textsuperscript{231} See United States v. Watson, 669 F.2d 1374, 1381-82 (11th Cir. 1982) (finding that the lower court was within the bounds of its discretion in excluding a witness’s reputation testimony because the witness only knew the person about whom she was testifying for a short time and at a time remote from the crime and the trial).

\textsuperscript{232} See United States v. Monteleone, 77 F.3d 1086, 1090-91 (8th Cir. 1996) (“[T]he Government must demonstrate a good faith factual basis for the incidents raised during cross-examination of the witness.”).

\textsuperscript{233} LA. CODE EVID. ANN. arts. 609, 609.1.

\textsuperscript{234} See id.

\textsuperscript{235} Id. art. 609.1(B).

\textsuperscript{236} Id. art. 609(C).
(2) Involved dishonesty or false statement, regardless of the punishment.\textsuperscript{237}

The first category of crimes admissible under this article are those punishable by death or by more than six months’ imprisonment.\textsuperscript{238} This category includes all felony convictions under Louisiana law,\textsuperscript{239} as well as a small group of misdemeanors, such as stalking\textsuperscript{240} and battery of a schoolteacher.\textsuperscript{241} Such convictions may only be admitted if the court finds that “the probative value of admitting this evidence outweighs its prejudicial effect.”\textsuperscript{242} Unlike the article 403 balancing test, which favors admissibility, this evidence is excluded unless the proponent of the prior criminal conviction can convince the judge that the probative value outweighs its prejudicial effect.

The second category of convictions admissible under article 609 to attack a witness’s credibility in a civil case are those crimes (including misdemeanors) involving dishonesty or false statement, regardless of the length of punishment.\textsuperscript{243} This category includes crimes such as fraud, perjury, or embezzlement. These crimes are admissible without the need for balancing the probative value against the prejudicial effect because they are deemed to have a direct bearing on a witness’s credibility. When a witness is cross-examined about his prior felony convictions and fails to admit those felony convictions, extrinsic evidence may be offered to prove that he has in fact been convicted of the felonies.\textsuperscript{244}

\textsuperscript{237} Id. art. 609(A) (emphasis added).
\textsuperscript{238} See id. art. 609(A)(1).
\textsuperscript{239} See LA. REV. STAT. § 14:2(A)(4) (2015) (defining a “felony” as “any crime for which an offender may be sentenced to death or imprisonment at hard labor”).
\textsuperscript{240} See id. § 14:40.2 (providing a range of penalties for stalking, which varies widely depending upon whether the offense satisfies the basic requirements for the offense, for which imprisonment will be “not less than thirty days nor more than one year,” or whether the offense is committed against someone under the age of eighteen, committed with a dangerous weapon, involves other aggravating circumstances, or if the defendant commits subsequent offenses, for which imprisonment may be “not less than ten years and not more than forty years”).
\textsuperscript{241} See id. § 14:34.3 (providing that if a battery is committed by a student, the conviction is punishable by a term of imprisonment of “not less than thirty days nor more than one year”; that if the offender is not a student, the offender may be “imprisoned with or without hard labor for not less than one year nor more than five years, or both”; and that if the battery results in injury requiring medical attention, the offender may be imprisoned “with or without hard labor for not less than one year nor more than five years, or both”).
\textsuperscript{242} LA. CODE EVID. ANN. art. 609(A)(1).
\textsuperscript{243} See id. art. 609(A)(2).
\textsuperscript{244} See id. art. 609.1(C)(1).
Article 609 applies only to convictions for crimes and does not include the “arrest, indictment, or prosecution of a witness" or a conviction that has been subject to a pardon or an annulment based upon a finding of innocence. Further, juvenile adjudications are not ordinarily inquired into under this article. Additionally, convictions are not admissible under this article if the conviction is more than ten years old. The fact that a conviction is being appealed does not preclude its use for impeachment purposes.

ii. Criminal Cases [Article 609.1]

Article 609.1 provides for the admissibility of a witness’s criminal convictions in a criminal case. In a criminal case, a witness may be cross-examined on any type of criminal conviction, whether felony or misdemeanor, regardless of whether the crime involves dishonesty or false statement. Additionally, in a criminal case, not only can the name and date of the conviction be admitted, but also the sentence imposed for such conviction. Further, there is no time limitation within which the conviction must have occurred. “Ordinarily, only the fact of a conviction, the name of the offense, the date thereof, and the sentence imposed is admissible." However, there are three instances in article 609.1 in which the details of the offense may become admissible to show the true nature of the offense:

1. When the witness has denied the conviction or denied recollection thereof;
2. When the witness has testified to exculpatory facts or circumstances surrounding the conviction; or
3. When the probative value thereof outweighs the danger of unfair prejudice, confusion of the issues, or misleading the jury.

245. Id. art. 609(F).
246. See id. art. 609(C).
247. See id. art. 609(D).
248. See id. art. 609(B).
249. Id. art. 609(E).
250. See id. art. 609.1.
251. See State v. Tolbert, 2003-0330, p. 9 (La. 6/27/03); 849 So. 2d 32, 38 (“[W]e conclude that municipal convictions subject to a penal sanction may be used for impeachment purposes in criminal cases pursuant to the provisions of and subject to the limitations provided in La. C.E. art. 609.1.”).
252. See LA. CODE EVID. ANN. art. 609.1.
253. Id. art. 609.1(C).
254. Id.
Article 609.1 does not permit inquiry “into matters for which there has only been an arrest, the issuance of an arrest warrant, an indictment, a prosecution, or an acquittal.”\textsuperscript{255} Additionally, it does not apply when a pardon or annulment has been granted,\textsuperscript{256} nor does it apply to juvenile adjudications of delinquency.\textsuperscript{257} As with civil cases, if the witness fails to admit to the prior criminal conviction in a criminal case, extrinsic evidence of the conviction may be offered to rebut the denial. However, pursuant to article 613, the proponent may only offer extrinsic evidence of the conviction after he has first fairly directed the witness’s attention to his prior conviction, has given the witness the opportunity to admit the fact, and the witness has failed distinctly to admit to it.\textsuperscript{258}

The Louisiana Supreme Court has held that a conviction for violating a municipal ordinance could be used for impeachment purposes under this article,\textsuperscript{259} overruling prior law that had held that it could not.\textsuperscript{260}

**Federal Rules of Evidence Distinction.** The Louisiana rules for the admissibility of prior convictions on the issue of credibility vary distinctly from the Federal Rules. First, under Rule 609, no distinction between civil and criminal cases exists regarding the types of prior convictions that may be offered against a witness. Regardless of whether it is a civil or criminal trial, there are only two categories of convictions that may be used to impeach a witness: (1) crimes punishable by death or imprisonment of more than one year\textsuperscript{261} (which are generally felony convictions) and (2) crimes involving dishonesty or false statement, regardless of punishment.\textsuperscript{262} Rule 609 does not provide that in a criminal case, any criminal conviction may be offered, regardless of whether it involves dishonesty or false statement, as set forth in Louisiana’s article 609.1.

Additionally, Rule 609 provides for a balancing test similar to a 403 balancing test for any crime that does not involve dishonesty or false statement (i.e., when the crime has no direct bearing on the

\textsuperscript{255} Id. art. 609.1(B).
\textsuperscript{256} See id. art. 609.1(E).
\textsuperscript{257} See id. art. 609.1(F).
\textsuperscript{258} See id. art. 613.
\textsuperscript{259} See State v. Tolbert, 2003-0330, p. 9 (La. 6/27/03); 849 So. 2d 32, 38.
\textsuperscript{260} See State v. Ramos, 390 So. 2d 1262, 1264 (La. 1980).
\textsuperscript{261} See FED. R. EVID. 609(a)(1).
\textsuperscript{262} See FED. R. EVID. 609(a)(2) (“[T]he evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness’s admitting—a dishonest act or false statement.”).
witness’s credibility). When such a crime is offered to discredit a witness who is not the defendant in the case, it is admissible subject to Rule 403,\(^{263}\) however, when the evidence is offered against a witness who is the defendant in a criminal case, it is admissible only if its probative value outweighs its prejudicial effect.\(^ {264}\)

Further, if more than ten years have passed since the conviction of the crime or release from confinement, the evidence is admissible only if the probative value outweighs the prejudicial effect, and notice must be given to the adverse party.\(^ {265}\) Louisiana only provides for a balancing similar to article 403 in civil cases and only for those convictions that do not involve dishonesty or false statement.\(^ {266}\)

This distinction shows the intent of the Federal Rules to allow for the impeachment of a witness with convictions only for serious crimes or for minor ones if they bear on the witness’s credibility. While Rule 601 is substantially similar to Louisiana’s article as it applies in civil cases, the Rule significantly differs from the Louisiana article as it applies in criminal cases, under which any criminal conviction may be used to impeach a witness, regardless of the seriousness of the crime or how long ago it occurred. This distinction may in large part be due to Louisiana’s interest in protecting a defendant’s right to present a defense in a criminal case by enabling a defendant to offer evidence on a broader range of convictions that might have a bearing on a witness’s credibility.

5. Cross- Examination of Witnesses [Article 611(B)]

Article 611 covers the examination of witnesses. Specifically, it outlines the judge’s role in interrogating witnesses,\(^ {267}\) the scope of cross-examinations,\(^ {268}\) the use of leading questions when examining witnesses,\(^ {269}\) the scope of re-direct and re-cross examination,\(^ {270}\) as well as

\(^{263}\) See FED. R. EVID. 609(a)(1)(A). This standard is interpreted similarly to the standard in Louisiana’s article 403, which permits admissibility unless the prejudicial effect of the evidence outweighs the probative value.

\(^{264}\) See FED. R. EVID. 609(a)(1)(B). This standard thus leans towards exclusion of the evidence.

\(^{265}\) See FED. R. EVID. 609(b)(1) (“[I]ts probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.”).

\(^{266}\) See LA. CODE EVID. ANN. art. 609(A)(1) (2006) (providing that such evidence is admissible if the court “determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party,” but implying that the court should lean towards exclusion of the evidence).

\(^{267}\) See id. art. 611(A).

\(^{268}\) See id. art. 611(B).

\(^{269}\) See id. art. 611(C).
as rebuttal evidence.\textsuperscript{271} The distinction in the Federal Rules specifically deals with the provision relating to the scope of cross-examination of witnesses found in article 611(B).

When a party calls a witness, he conducts a direct examination. When the calling party finishes his examination of a witness, he tenders the witness to the opposing party, who conducts a cross-examination. Cross-examination may be conducted using leading questions, with a minor exception. The court should prohibit counsel from using leading questions “when that party or a person identified with him is examined by his counsel, even when the party [was] called as a witness by another party and tendered for cross-examination” to his own counsel,\textsuperscript{272} unless an exception for using leading questions on direct examination exists.\textsuperscript{273}

In Louisiana, cross-examination is usually referred to as “wide open” cross\textsuperscript{274} because the law specifically states that a witness may be cross-examined on “any matter relevant to any issue in the case, including credibility.”\textsuperscript{275} Cross-examination is not limited to only those matters covered during direct examination by the opposing party.

While cross-examination is generally open to any relevant matter under Louisiana law, under article 611(B), “in a civil case, when a party or person identified with a party has been called as a witness by an adverse party to testify only as to particular aspects of the case, the court shall limit the scope of cross-examination to matters testified to on direct examination, unless the interests of justice otherwise require.”\textsuperscript{276} Thus, if the plaintiff called the owner of the defendant company only to testify as to the employer-employee relationship between him and the driver of the vehicle that struck the plaintiff (i.e., a specific issue), when the witness is tendered back to his own counsel for cross-examination, not only should his counsel be prohibited from questioning him in the form of leading questions, but his counsel should only be allowed to question the owner of the company about

\begin{itemize}
\item 270. See id. art. 611(D).
\item 271. See id. art. 611(E).
\item 272. Id. art. 611(C); see also Force & Raullt, supra note 36, art. 611 authors' note (3) (asserting that a party does not have a right to cross-examine himself).
\item 273. See LA. CODE EVID. ANN. art. 611(C) (“[L]eadin questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony and in examining an expert witness on his opinions and inferences . . . when a party calls a hostile witness, a witness who is unable or unwilling to respond to proper questioning, an adverse party, or a witness identified with an adverse party.”).
\item 274. Id. art. 611 cmnt. (d).
\item 275. Id. art. 611(B) (emphasis added).
\item 276. Id.
\end{itemize}
the specific issue(s) that he was called to testify about by the adverse party.

*Federal Rules of Evidence Distinction.* Louisiana’s article differs from Rule 611(b), which specifically limits the scope of cross-examination to “the subject matter of the direct examination and matters affecting the witness’s credibility.”\(^{277}\) The court has discretion to allow examination on any “additional matters as if on direct examination.”\(^{278}\) While the federal Rule generally limits the scope of cross-examination to matters brought out on direct examination and other matters within the court’s discretion, Louisiana has a wide-open cross-examination, permitting questions on any relevant matter as outlined above.\(^{279}\)

While a party in federal court may not be able to question a witness on any relevant matter as a matter of right, courts interpret the scope of issues brought out on direct examination broadly and liberally.\(^{280}\) Matters deemed to be beyond the scope of direct examination should be brought out on direct examination during that party’s case in chief.\(^{281}\)

Additionally, Rule 611 does not contain the provisions in Louisiana’s article 611 that provide that when a party calls an adverse party on direct examination, not only should his counsel be prohibited from questioning him in the form of leading questions, but his counsel should only be allowed to question him regarding the specific issue(s) about which he was called to testify by the adverse party. This limitation in the Louisiana article preserves the purpose of the use of leading questions by requiring a friendly witness to testify from his own knowledge, rather than through suggestion from the examining attorney.

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\(^{277}\) *Fed. R. Evid.* 611(b); see also ROTHSTEIN, *supra* note 147, at 521 (“It adopts the so-called ‘restrictive view,’ limiting cross-exam to matters raised on the direct exam, as opposed to the so-called ‘wide open’ view.”).

\(^{278}\) *Fed. R. Evid.* 611(b).

\(^{279}\) See *La. Code Evid.* Ann. art. 611 cmt. (d).

\(^{280}\) When determining if a particular line of questioning is within the scope of direct exam, “[i]t is difficult, time consuming, and unfair for the court to ascertain where a line of questioning is headed. Yet such ascertainment is necessary in order to administer the restrictive rule properly.” ROTHSTEIN, *supra* note 147, at 522.

\(^{281}\) See *id.* at 522-23 (noting that a party must wait until his own case to submit relevant issues and that the rule “promotes orderly proof and allows a party to control his own case”).
E. Chapter 7: Opinions

1. Lay Opinion Testimony [Article 701]

While certain opinions obviously require specialized knowledge, experience, or expertise, such as testimony regarding a person's cause of death, there are certain other opinions that any reasonable person can give, such as whether a person appeared to be happy or whether a substance smelled like bleach. These opinions are referred to as lay witness opinions. Pursuant to article 701, a witness, not qualified as an expert under article 702, may give testimony in the form of opinions or inferences if two requirements are met. The opinions or inferences must be “(1) [r]ationally based on the perception of the witness ... and (2) [h]elpful to a clear understanding of his testimony or the determination of a fact in issue.”

The limitation on the admissibility of lay witness opinions to only those that are “rationally based” on perceptions shows that these opinions can be no more than “reasonable inferences” that could be drawn by any reasonable person, provided that the opinions and inferences are based on the person's own perceptions. The witness must have personal, firsthand knowledge of the underlying facts upon which his opinion is based. Further, the witness's opinion must be based on facts perceived by him (i.e., what he personally saw, heard, touched, or smelled). In other words, if a witness will testify that gasoline was poured on his vehicle, he must have personally seen or smelled it.

Additionally, prior to giving such testimony, counsel must lay a sufficient foundation to establish the underlying facts upon which the opinion is based and the witness must state those facts prior to giving his testimony. Finally, the witness's testimony must help the finder

282. See LA. CODE EVID. ANN. art. 803 cmt. (e) to exception (6).
283. Id. art. 701.
284. Mitchell v. Roy, 2010-563, p. 5 (La. App. 3 Cir. 11/3/10); 51 So. 3d 153, 159 (“The general rule is that a lay witness is permitted to draw reasonable inferences from his or her personal observation.” (quoting State v. LeBlanc, 2005-0885, p. 7 (La. App. 1 Cir. 2/10/06); 928 So. 2d 599, 603)).
285. See State v. Keller, 09-403, p. 17 (La. App. 5 Cir. 12/29/09); 30 So. 3d 919, 931 (“A lay witness is permitted to draw reasonable inferences from his own personal observations, as long as the lay witness also states the observed facts.” (quoting State v. Imbraguglio, 08-64, p. 16 (La. App. 5 Cir. 5/27/08); 987 So. 2d 257, 266)); State v. Decay, 01-192, p. 27 (La. App. 5 Cir. 9/13/01); 798 So. 2d 1057, 1074 (“Where the subject of the testimony is such that any person of experience may make a natural inference from observed facts, a lay witness may testify as to such inferences, provided he also states the observed facts.”); see also LA. CODE EVID. ANN. art. 602 (requiring firsthand knowledge and evidence sufficient to prove that a witness has firsthand knowledge).
of fact either understand the witness’s testimony or determine a fact at issue.\textsuperscript{286} If the opinion testimony is not helpful, it should be excluded. Courts have found opinion testimony unhelpful if it is not based on personal observations, finding that such testimony merely constitutes speculation.\textsuperscript{287} Testimony might also be unhelpful if it embraces the ultimate issue to be determined by the trier of fact.\textsuperscript{288}

In some rare instances, courts have allowed witnesses not qualified as experts to give opinions requiring specialized knowledge or expertise if the witness might otherwise have the necessary qualifications to qualify as an expert.\textsuperscript{289} These witnesses have sometimes been referred to as “quasi-experts.”\textsuperscript{290} However, if a witness has not been qualified as an expert pursuant to the requirements set out in articles 702-706, then his testimony should be confined to the scope of a lay witness’s opinion—only those opinions and inferences that are rationally based on his personal perceptions.

\textit{Federal Rules of Evidence Distinction}. The Federal Rules have specifically addressed the issue of the so-called “quasi-expert” in Rule 701, requiring three elements to be present in order to permit lay witness opinion testimony: the testimony must be “(a) rationally based on the witness’s perception; (b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.”\textsuperscript{291} Rule 701(c) specifically excludes from the

\textsuperscript{286} See LA. CODE EVID. ANN. art. 701(2).
\textsuperscript{287} See Shaw v. Fid. & Cas. Ins., 582 So. 2d 919, 924 (La. App. 2 Cir. 1991).
\textsuperscript{288} 19 FRANK L. MARAIST, LOUISIANA CIVIL LAW TREATISE: EVIDENCE AND PROOF § 11.2 (2d ed. 2007) (“Although there is no absolute prohibition against lay opinion of ultimate fact, such an opinion rarely will be helpful to the jury and thus usually is not admissible under Article 701.” (footnote omitted)).
\textsuperscript{289} See, e.g., Eldridge v. Carrier, 2004-203, pp. 7-8 (La. App. 3 Cir. 11/17/04); 888 So. 2d 365, 370-71 (finding that the trial court did not abuse its discretion by permitting a law enforcement officer to testify as to location of cars at the time of impact, based upon skid marks, while he was not qualified as an expert witness); Cooper v. La. State Dep’t of Transp. & Dev., 2003-1847, pp. 3-4 (La. App. 1 Cir. 6/25/04); 885 So. 2d 1211, 1213-14 (finding that the trial court did not abuse its discretion by permitting a state trooper to give his opinion as to what caused the accident, even though he was not qualified as an expert in accident reconstruction); Whetstone v. Dixon, 616 So. 2d 764, 768-69 (La. App. 1 Cir. 1993) (finding no error in permitting a state trooper to give an opinion concerning the point of impact based on his perception of the accident scene and the physical evidence he observed, while he was not qualified as an expert).
\textsuperscript{290} E.g., 19 MARAIST, supra note 288, § 11.2 (referring to lay witnesses who give testimony that should otherwise be given by expert witnesses as “quasi-experts” and noting that “Louisiana appellate courts continue to recognize this ‘quasi expert’ testimony under Article 701”).
\textsuperscript{291} FED. R. EVID. 701 (emphasis added).
realm of lay witness opinion testimony any opinion that should ordinarily be elicited only from a witness who has been qualified as an expert in the particular field, even if the witness possesses the necessary expertise to give the opinion in question. Under the federal Rule, if the testimony is based on scientific, technical, or specialized knowledge, it does not meet the requirements for a lay witness opinion.

While Louisiana has not specifically enacted this provision, many courts construe article 701 to have this intent and will not allow a lay witness to testify to areas requiring specialized knowledge if the witness has not been qualified as an expert. While some courts have allowed such quasi-expert testimony, a better approach is to qualify the witness as an expert prior to having him testify in any area requiring specific expertise.

2. Scope of Expert Testimony [Article 704]

Once a witness is qualified as an expert pursuant to the requirements of article 702, he may give a broad range of testimony in the form of opinions (or otherwise) in his area of expertise. He may not, however, give expert opinions in areas outside of or beyond the scope of the area in which he has been qualified as an expert. In any area outside of his area of expertise, the expert witness’s testimony is limited to that of a lay witness.

Additionally, expert witnesses are limited when it comes to giving opinions on ultimate issues in a case. Article 704 specifically provides that expert testimony “is not to be excluded solely because it embraces an ultimate issue to be decided by the trier of fact,” provided that the testimony will be helpful to them. As an expert’s opinion approaches an ultimate issue in a case, it becomes less concrete and more conclusory. Conclusory testimony is generally less helpful. For example, it is more concrete and helpful for a witness to testify that a defendant was not capable of understanding the difference between right and wrong than for him to testify that the defendant was “insane,” which is more abstract and conclusory. The more concrete the

292. See FED. R. EVID. 701(c).
293. See cases cited supra note 289.
295. Id.
296. See id. art. 704 cmt. (c).
297. See LA. REV. STAT. § 14:14 (2015) (setting forth the legal standard for insanity in Louisiana as when the accused cannot discern between right and wrong).
testimony, the more helpful it will be to the jury, aiding the jurors in
drawing their own conclusions, rather than “invading the province of
the jury” and making the determination for them.

Whether the evidence embraces the ultimate issue to be decided
in the case “should be taken into account in determining whether [the
evidence] is, on balance, helpful or unduly prejudicial.” Thus, the
evidence may be excluded if its probative value in assisting the trier of
fact in deciding a fact in issue is outweighed by its prejudicial effect in
suggesting the result to be reached. Evidence has also been held to be
unhelpful when the fact finder could reasonably draw the same
inferences based on his own knowledge and experience without the aid
of an expert.

While expert witnesses are given wide latitude in the issues to
which they may testify, “in a criminal case, an expert witness shall not
express an opinion as to the guilt or innocence of the accused” or the
equivalent of such testimony. For example, expert testimony that the
defendant possessed the specific intent to kill in a first-degree murder
trial would be excluded. However, not all testimony as to mental
state of an accused is excluded. The Louisiana Code of Criminal
Procedure expresses that the appointment of a “sanity
commission” to inquire into the mental condition of the accused who
seeks to plead insanity or mental incompetency to proceed, and
testimony regarding those findings are admissible at trial. “Other

298. LA. CODE EVID. ANN. art. 702 cmt. (f); see also id. art. 704 (providing that
testimony is not to be excluded solely because it relates to an ultimate issue); State v.
Wheeler, 416 So. 2d 78, 78-81 (La. 1982) (finding that the district court erred in allowing
police officer to give testimony that was tantamount to his opinion of the defendant’s guilt).
299. See Theriot v. Lasseigne, 93-2661, p. 3 n.5 (La. 7/5/94); 640 So. 2d 1305, 1308
n.5 (“Expert testimony is not necessary when a factfinder can reasonably draw inferences
based on his own knowledge and experience.”). The Louisiana Supreme Court held that the
trial court could have reasonably found that alcohol consumption may have played a role in
the combined negligence of the parties, even though no party introduced expert testimony on
the effect of the consumption of alcohol on a person’s judgment. See id.
300. LA. CODE EVID. ANN. art. 704.
301. See, e.g., State v. Deal, 2000-0434, p. 8 (La. 11/28/01); 802 So. 2d 1254, 1262
(finding that the trial court erred by allowing two expert witnesses to testify in a first-degree
murder trial that the defendant had the specific intent to kill at the time the offense was
committed).
302. LA. CODE CRIM. PROC. ANN. art. 641 (2003); see id. art. 644 (Supp. 2016).
303. LA. CODE EVID. ANN. art. 704 cmt. (b); see also LA. CODE CRIM. PROC. ANN. art.
647 (2003) (providing for the appointment of counsel to represent a defendant who has been
ordered to undergo a mental examination).
expert evidence on the accused's mental condition is also admissible.\textsuperscript{304}

\textit{Federal Rules of Evidence Distinction.} Louisiana's article allowing testimony regarding the mental condition of an accused differs from the comparable provision in the Federal Rules. Rule 704 provides that an expert witness in a criminal case may not "state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense."\textsuperscript{305} Such testimony is deemed to specifically involve matters that are solely for the trier of fact to decide.\textsuperscript{306} Louisiana has not adopted this provision, and concerns exist as to whether the provision violates a defendant's constitutional right to present a defense.\textsuperscript{307}


An important distinction between an expert witness and a lay witness is that an expert may base his opinion on information acquired before or during a hearing, unlike a lay witness, who must have firsthand knowledge of the underlying facts upon which he bases his opinions or inferences.\textsuperscript{308} Usually, an expert will base his opinions on information provided to him by counsel and obtained through discovery. Additionally, article 703 provides that an expert may base his opinions on information made known to him at the hearing itself and may even base his opinion on inadmissible facts or data if they are the type of information reasonably relied upon by experts in the

\textsuperscript{304} \textit{La. Code Evid. Ann.} art. 704 cmt. (b) (citing \textit{State v. Claibon}, 395 So. 2d 770, 774 (La. 1981)).

\textsuperscript{305} \textit{Fed. R. Evid.} 704(b); \textit{see also} \textit{La. Code Evid. Ann.} art. 704 cmt. (b) (noting that Louisiana has not adopted the 1984 amendment to the federal Rule); United States v. DiDomenico, 985 F.2d 1159, 1163-65 (2d Cir. 1993) (finding that the district court properly excluded expert psychiatric testimony that the defendant had a "dependent personality disorder" because its purpose would have been to show the defendant's state of mind in a criminal case, which is prohibited by Rule 704(b)).

\textsuperscript{306} \textit{See Fed. R. Evid.} 704(b); \textit{see also} \textit{Goode & Wellborn, supra} note 109, rule 704 authors' cmt. (6) (noting that experts may testify to symptoms and qualities of accuseds' mental illnesses and whether those illness normally affect a person's ability to understand the nature of their actions, but experts cannot make particularized determinations about whether accuseds' mental illnesses affected their abilities to comprehend the wrongfulness of their actions (citing United States v. Samples, 456 F.3d 875, 884 (8th Cir. 2006))).


\textsuperscript{308} \textit{Id.} art. 703 cmt. (c).
An expert witness may even give opinions based on hypothetical scenarios.\textsuperscript{310} While article 703 governs the types of facts or data upon which an expert may base his opinion,\textsuperscript{311} article 705 governs the disclosure of such facts or data upon which he may rely, including the disclosure of any inadmissible facts or data.\textsuperscript{312} Pursuant to article 705, in a civil case, an expert may testify to his opinions or inferences without disclosing the facts upon which his opinion is based, unless the court requires otherwise. He may be required, however, to disclose the facts or data underlying his opinion on cross-examination.\textsuperscript{313} Thus, in a civil case, an expert would not be required to disclose the factual basis of his expert opinion testimony at all if the opposing party does not inquire into it on cross-examination.

The requirements are different in a criminal case. In a criminal case, an expert is required to state the facts upon which his opinion is based.\textsuperscript{314} However, this is not the case with any inadmissible facts or data upon which the witness may rely. Inadmissible evidence, such as inadmissible hearsay, cannot be disclosed by the proponent of the expert’s opinion. However, the opposing party may elicit the information on cross-examination if he chooses to do so.\textsuperscript{315}

Federal Rules of Evidence Distinction. The Federal Rules of Evidence differ with respect to the disclosure of underlying facts upon which an expert bases his opinions. Under Rule 705, no distinction is made between experts testifying in civil cases and criminal cases with respect to what underlying facts or data must be disclosed. In either instance, the expert may testify to his opinions or inferences without first testifying to the underlying facts, unless the court requires otherwise.\textsuperscript{316} “[T]he expert may be required to disclose those facts or data [underlying his opinions] on cross-examination.”\textsuperscript{317} This requirement is virtually identical to Louisiana’s provision that applies in civil cases, but differs from Louisiana’s provision that is applicable

\textsuperscript{309} See id. art. 703 cmt. (d).
\textsuperscript{310} See id.
\textsuperscript{311} See id.
\textsuperscript{312} See id. art. 703 cmt. (f); see also id. art. 705 (governing disclosure of underlying facts).
\textsuperscript{313} Id. art. 705(A).
\textsuperscript{314} Id. art. 705(B).
\textsuperscript{315} See id.
\textsuperscript{316} See FED. R. EVID. 705.
\textsuperscript{317} FED. R. EVID. 705 (emphasis added).
in criminal cases, where an expert witness is required to disclose the underlying facts or data upon which his opinion is based.

The standards also differ with respect to the disclosure of inadmissible data upon which an expert witness may rely. While both Louisiana’s article 703 and the federal Rule 703 allow an expert witness to base his opinions on inadmissible facts or data, Louisiana’s article 705(B) provides that such evidence may only be disclosed on cross-examination by the opponent. Rule 705, however, provides that such facts or data may be disclosed to the jury by the proponent “only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.” Thus, in some circumstances, such inadmissible facts or data may be disclosed to the jury under the Rule by the proponent of the evidence, while under Louisiana law, it may only be disclosed by the opponent on cross-examination.

F. Chapter 8: Hearsay

1. Prior Inconsistent Statements [Article 801(D)(1)(a)]

Article 801(D)(1)(a) exempts certain prior inconsistent statements from the hearsay rule. A prior inconsistent statement is a statement that a witness made prior to testifying in the present trial that is inconsistent with his testimony at trial. Article 801(D)(1)(a) provides that in a criminal trial, a declarant’s prior inconsistent statement may be used or offered for its substantive value (i.e., to prove the truth of the matter asserted), rather than merely for its impeachment value, as provided for in article 607. The legislature enacted this change in 2004, primarily to address circumstances that arise in the context of domestic violence, in which victims commonly recant and change their stories. This provision allows prosecutors to use the victim’s prior statements as substantive evidence to prove the

318. See LA. CODE EVID. ANN. art. 705(B).
319. FED. R. EVID. 703.
320. See ROTSTEIN, supra note 147, at 666 (“The balancing calculation needed to admit the basis is quite a bit more stringent than the Rule 403 calculus, and puts the shoe on the other foot. Here, the proponent bears the burden of showing that probabilistic value outweighs prejudice (the opposite of Rule 403) and that it substantially outweighs. In 403, the prejudice must substantially outweigh the probative value for the evidence to be excluded. In other words, under Rule 403 there is a kind of overcomeable presumption of admissibility; here there is an overcomeable presumption of inadmissibility.”).
321. State v. Rankin, 42-412, pp. 6-7 (La. App. 2 Cir. 9/19/07); 965 So. 2d 946, 950.
323. See Rankin, 42-412 at p. 7; 965 So. 2d at 950-51.
truth of the matter asserted if the requirements of the provision are met.

Should the proponent of the prior inconsistent statement seek to offer evidence of the prior statement for its substantive value under this provision, six requirements must be met: (1) the declarant must testify at trial, (2) the declarant must be subject to cross-examination about the prior statement,324 (3) it must be a criminal case, (4) the prior statement must be inconsistent with the current testimony, (5) the witness must first be given an opportunity to admit the truth of the prior statement, and (6) additional evidence must corroborate the prior statement.325

As with all four types of prior statements contained in article 801(D)(1), the declarant must testify at the current trial and be subject to cross-examination about the prior statement.326 If the witness is unavailable, this exemption does not apply. Further, the prior inconsistent statement need not have been made at a prior trial or hearing or under oath.327 The exemption includes statements given in a variety of circumstances, including a statement made to a police officer, to a friend, in a deposition, or otherwise, whether formal or informal. The requirement that a witness be given an opportunity to admit the fact is substantially similar to the foundational requirements contained in article 613 for admitting evidence of a prior inconsistent statement under article 607. Finally, the exemption requires that corroborating evidence exist to help ensure the reliability of the statement because the statement is being offered to prove the truth of the matter asserted within it.

**Federal Rules of Evidence Distinction.** Rule 801(d)(1)(A) similarly contains a rule that allows a prior inconsistent statement to be used to prove the truth of the matter asserted within the statement. However, there are distinctions from the Louisiana article. Under Rule 801(d)(1)(A), the prior statement must have been made by the declarant “under penalty of perjury at a trial, hearing, or other proceeding or in a deposition.”328 Under Louisiana law, it is irrelevant as to where and when the prior statement was made. Further, the

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324. LA. CODE EVID. ANN. art. 801(D)(1).
325. Id. art. 801(D)(1)(a).
326. See id. art. 801(D)(1) (referring to the statements found in article 801(D)(1)(a) (prior inconsistent statements), article 801(D)(1)(b) (prior consistent statements), article 801(D)(1)(c) (identifications), and article 801(D)(1)(d) (complaints of sexual assault), which are exempt from the hearsay rule).
327. See id.
328. FED. R. EVID. 801(d)(1)(A).
2. Prior Consistent Statements [Article 801(D)(1)(b)]

Article 801(D)(1)(b) also exempts certain prior consistent statements from the hearsay rule. A prior consistent statement is one that is consistent with the witness’s testimony at the present trial “and is offered to rebut an express or implied charge against [the witness] of recent fabrication or improper influence or motive.” In other words, if a witness is accused, either expressly or implicitly, of testifying to a particular matter only because of some improper influence or because of a motive to lie, evidence that the witness made a statement consistent with his current testimony prior to any motive to lie may be offered to rebut the accusation. A statement that conforms to the requirement of this article may be offered for both its rehabilitative value on the issue of the witness’s credibility as well as for its substantive value to prove the truth of the matter asserted within the statement.

There are five requirements for the admissibility of a prior consistent statement: (1) “[t]he declarant [must] testify[ at the trial or hearing],” (2) the declarant must be “subject to cross-examination concerning the [prior] statement,” (3) the statement must be consistent with the declarant’s current testimony, (4) the statement must be “offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive,” and (5) the statement must be made prior to the emergence of a motive or influence to lie.

The key component to the relevancy of the prior consistent statement is that it must have been made prior to the emergence of any motive the witness may have to lie at the trial; the statement must predate the motive. If the motive to lie already existed when the prior statement was made, then the exception does not apply. Further, a witness’s credibility can only be supported with a prior consistent statement after his credibility has been attacked by the

330. See FORCE & RAULT, supra note 36, art. 801 authors’ note (3).
331. L. A. CODE EVID. ANN. art. 801(D)(1).
332. Id. art. 801(D)(1)(b).
333. See State v. Milto, 99-0217, p. 8 (La. App. 1 Cir. 11/5/99); 751 So. 2d 271, 276-77.
334. Id.
335. See id.
opposing party by an express or implied charge that the witness is lying due to an improper influence or a motive to lie.\textsuperscript{336} Finally, the charge of recent fabrication or improper influence or motive by opposing counsel need not be expressly made, but could have been implied through a line of questioning, voir dire, or from the defense strategy or case theory.\textsuperscript{337}

\textit{Federal Rules of Evidence Distinction.} Rule 801(d)(1)(B) was amended in 2014. The amendment exempts a prior consistent statement from the hearsay rule if it is offered “to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or . . . to rehabilitate the declarant’s credibility as a witness when attacked on another ground.”\textsuperscript{338}

As originally adopted, Rule 801(d)(1)(B) only provided for substantive admissibility of statements offered to rebut charges of recent fabrication or improper influence or motive, as provided in Louisiana’s article. As amended, the Rule now extends substantive effect to prior consistent statements that rebut other attacks on a witness’s credibility, such as charges of faulty memory or that the witness’s testimony is inconsistent with his prior statement.\textsuperscript{339} The amendment does not alter the fact that the prior consistent statement may only be offered \textit{after} the witness’s credibility has been attacked and is only admissible subject to a Rule 403 balancing test. Further, “[t]he amendment does not make any consistent statement admissible that was not admissible previously—the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.”\textsuperscript{340}

\textsuperscript{336} LA. CODE EVID. ANN. art. 607(B) (“[T]he credibility of a witness may not be supported unless it has been attacked.”).

\textsuperscript{337} See State v. Domino, 97-0261, pp. 3-4 (La. App. 1 Cir. 2/20/98); 708 So. 2d 1143, 1145-46 (holding that the charge of recent fabrication or improper influence or motive may come by way of opposing counsel’s voir dire and opening statement, which suggested that the witness may have been biased); FORCE & RAULT, supra note 36, art. 801 authors’ note (3).

\textsuperscript{338} FED. R. EVID. 801(d)(1)(B) advisory committee’s notes (extending substantive effect to prior consistent statements that rebut attacks on a witness’s credibility), with FED. R. EVID. 801(d)(1)(B) (2012) (repealed 2014) (providing for substantive admissibility of statements offered to rebut only charges of recent fabrication and improper influence or motive).

\textsuperscript{339} Compare FED. R. EVID. 801(d)(1)(B) advisory committee’s notes (extending substantive effect to prior consistent statements that rebut attacks on a witness’s credibility), with FED. R. EVID. 801(d)(1)(B) (2012) (repealed 2014) (providing for substantive admissibility of statements offered to rebut only charges of recent fabrication and improper influence or motive).

\textsuperscript{340} FED. R. EVID. 801(d)(1)(B) advisory committee’s notes.
3. Admissions [Article 801(D)(2)-(3)]

Article 801(D)(2)-(3) exempts admissions from the hearsay rule and allows them to be offered for the truth of the matter asserted within them. Admissions are statements made by a party to the action that are being offered against that party by his opponent. Article 801(D)(2)-(3) lists the types of statements deemed to be a party’s own, either through his personal or representative capacity or by a statement attributable to him because he adopted or authorized it or by virtue of his relationship with the person making the statement. For the exemption to apply, the party’s opponent must offer his statement against him. Thus, there are two very important requirements that apply to all admissions: the statement must be offered against the party and must be a statement made by a party to the action or that is attributable to him.

The theory behind classifying a party’s own statements as nonhearsay is that a person should not be able to complain that he cannot cross-examine himself or that he is not worthy of belief because he was not under oath. These statements hold a party responsible for his own words.

This provision only applies when a party’s statement is offered against him and does not apply when a party attempts to offer his own statement into evidence at trial. There are six main types of statements that may be offered against a party as either his own statement or one attributable to him: (1) “[h]is own [personal] statement, in either his individual or a representative capacity”; (2) a statement that he adopted; (3) a statement authorized by him; (4) a statement of an agent or employee in the course or scope of their employment or agency; (5) statements of coconspirators “in furtherance of . . . the conspiracy”; or (6) privity admissions.

341. See LA. CODE EVID. ANN. art. 801(D)(2)-(3).
342. See id.
343. See id.
344. See id.
345. See id. art. 801 cmt. (b) to art. 801(D)(2).
346. See State v. Freeman, 521 So. 2d 783, 786 (La. App. 2 Cir. 1988); see also Force & Raught, supra note 36, art. 801 authors’ note (6) (noting that a party’s offering of his own statement falls within the hearsay ban).
347. LA. CODE EVID. ANN. art. 801(D)(2)(a).
348. Id. art. 801(D)(2)(b).
349. Id. art. 801(D)(2)(c).
350. Id. art. 801(D)(3)(a).
351. Id. art. 801(D)(3)(b).
352. Id. art. 801(D)(3)(c)-(f).
Article 801(D)(2)(a) allows a statement to be offered against a party if it is a personal statement made by him in his individual capacity or by his representative. The statement may be expressed orally or in writing or may be tacit, expressed by silence or action. Such statements will be subject to the balancing test of article 403.

Additionally, article 801(D)(2)(b) allows a statement to be offered against a party if he “adopts” it or “manifest[s a] belief in its truth.” A person may expressly adopt a statement or implicitly adopt it. A person could implicitly adopt a statement by either (1) relying upon the contents of a statement in a related conversation or writing or (2) by remaining silent in circumstances in which it would be natural to respond. The courts will consider all the surrounding facts and circumstances in determining whether a person in fact adopted a statement through silence. This provision does not apply to persons who chose to remain silent while in the custody of law enforcement due to the privilege against self-incrimination.

Article 801(D)(2)(c) allows a statement to be offered against a party if he authorized the speaker to make a statement on the subject. Such statements are “called ‘representative’ or ‘vicarious’ admissions.” Article 801(D)(3)(a) refers to statements being made by “speaking agents.” Here, the statement must concern a matter “within the scope” of the agency or employment and made “during the existence” of the relationship.

Article 801(D)(3)(b) allows a statement to be offered against a party if it is made by a coconspirator-declarant “while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of the conspiracy.” For the provision to apply, the proponent must first establish a prima facie case of conspiracy.

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353. Id. art. 801(D)(2)(a).
354. Id. art. 801 cmt. (c) to art. 801(D)(2).
355. Id. art. 801(D)(2)(b).
357. See id.; see also HARGES & JONES, supra note 53, art. 801 authors’ cmts. (providing that “statements” under article 801(A) include silence or inaction as a tacit admission).
358. See U.S. CONST. amend. V; see also Miranda v. Arizona, 384 U.S. 436, 444-45 (1966) (prohibiting the use of any evidence arising out of the questioning of the accused by law enforcement after he has invoked his “right to remain silent”).
359. LA. CODE EVID. ANN. art. 801(D)(2)(c).
360. Id. art. 801 cmt. (d) to art. 801(D)(2).
361. Id. art. 801 cmt. (b) to art. 801(D)(3).
362. Id. art. 801(D)(3)(a).
363. Id. art. 801(D)(3)(b).
between the coconspirator-declarant and the party against whom the statement is offered.\textsuperscript{364}

Finally, article 801(D)(3)(c)-(f) contains statements referred to as privity admissions, which are based upon the principle that “one who under substantive law stands in another’s shoes for the purposes of a lawsuit should generally be made to take the bad with the good.”\textsuperscript{365} Such statements are supported by concepts of fairness and completeness.\textsuperscript{366} This article applies to any relevant statement made by the opponent, even if it is exculpatory or neutral, including opinions and conclusions.\textsuperscript{367} There is no requirement of personal knowledge for this exemption to apply.\textsuperscript{368}

\textit{Federal Rules of Evidence Distinction.} Rule 801(d)(2) is similar to Louisiana’s article 801(D)(2). It also provides that various statements made by a party or attributed to him may be offered against him by the opposing party.\textsuperscript{369} The Rule includes statements that are made by a party in his individual or representative capacity,\textsuperscript{370} those that are adopted by him,\textsuperscript{371} those authorized by him,\textsuperscript{372} those made by an agent or employee within the scope of his employment or agency,\textsuperscript{373} and those made by a coconspirator in the course of a conspiracy.\textsuperscript{374} However, the Federal Rules do not contain the provisions found in article 801(D)(3)(c)-(f) that relate to privity admissions.\textsuperscript{375}

4. \textit{Then-Existing Mental Condition (State of Mind) [Article 803(3)]}

Article 803(3) contains an exception for statements that are the declarant’s “then existing state of mind, emotion, sensation, or physical condition.”\textsuperscript{376} While this exception refers to both \textit{mental} and \textit{physical} conditions, for purposes of drawing the distinction with the Federal Rules, we will only address mental conditions here. The “then existing mental condition” exception excludes statements from the hearsay

\textsuperscript{364} See State v. Lobato, 603 So. 2d 739, 746 (La. 1992); State v. Cox, 04-42, p. 4 (La. App. 3 Cir. 6/16/04); 876 So. 2d 932, 935; 19 MARAIST, supra note 288, § 10.3.
\textsuperscript{365} L.A. CODE EVID. ANN. art. 801 cmt. (a) to art. 801(D)(3).
\textsuperscript{366} Id. art. 801 cmt. (d) to art. 801(D)(3).
\textsuperscript{367} FORCE & RAULT, supra note 36, art. 801 authors’ note (6).
\textsuperscript{368} Id.
\textsuperscript{369} See FED. R. EVID. 801(d)(2).
\textsuperscript{370} See FED. R. EVID. 801(d)(2)(A).
\textsuperscript{371} See FED. R. EVID. 801(d)(2)(B).
\textsuperscript{372} See FED. R. EVID. 801(d)(2)(C).
\textsuperscript{373} See FED. R. EVID. 801(d)(2)(D).
\textsuperscript{374} See FED. R. EVID. 801(d)(2)(E).
\textsuperscript{375} L.A. CODE EVID. ANN. art. 801 cmt. (d) to art. 801(D)(3) (2006).
\textsuperscript{376} Id. art. 803(3) (2006 & Supp. 2016).
prohibition that are expressions of the declarant’s state of mind at the moment in which the statement is made. The rule is broad and includes a wide range of expressions of the declarant’s emotions, sensations, or other mental feelings, such as his intentions, plans, desires, likes, and dislikes. The exception does not include past mental states, such as, “I didn’t love you when I married you.” The statement must be the declarant’s “then existing” mental condition.\(^{377}\)

The exception is premised upon the fact that, as opposed to other types of evidence of a person’s state of mind, a person’s own statement regarding his feelings at a particular time is the best available evidence and the only direct evidence of the person’s state of mind. Further, because of the requirement that only statements concerning a person’s “then existing” mental state are included in the rule,\(^{378}\) the statements do not rely upon memory.

Although the exception does not generally include statements of “memory,” the declarant’s state of mind at some time in the past,\(^{379}\) there is an exception to this rule. A statement of memory or belief may be offered to prove the thing remembered or believed when the statement “relates to the execution, revocation, identification, or terms of declarant’s testament,” or will.\(^{380}\)

The declarant’s expression of his present mental condition may also be offered to prove the declarant’s future action,\(^{381}\) that is, that he acted in conformity with his intentions. Thus, if a person stated, “I’m going to California this weekend,” his statement may be offered to prove that he not only planned to go to California, but also that he actually went to California. While such statements may be offered to prove the declarant’s future action, the statements may not be offered to prove past conduct.\(^{382}\) The exception is said to be forward-looking.

The exception may not, however, be offered to prove the future action of a third party.\(^{383}\) Thus, if the declarant stated, “Frank and I are going to California this weekend,” the statement may be offered to prove that the declarant went to California, but it may not be offered to

\(^{377}\) Id. (emphasis added).

\(^{378}\) Id. (emphasis added).

\(^{379}\) Id.

\(^{380}\) Id.

\(^{381}\) Id.

\(^{382}\) See Force & Rault, supra note 36, art. 803(3) authors’ note (8); see also State v. Holland, 544 So. 2d 461, 467 (La. App. 2 Cir. 1989) (finding that the trial court did not err in ruling that testimony as to past conduct was inadmissible).

\(^{383}\) La. Code Evid. Ann. art. 803 cmt. (b) to exception (3) (2006); see also State v. Weedon, 342 So. 2d 642, 647 (La. 1977) (finding a witness’s testimony as to another’s intentions inadmissible).
prove that Frank went to California. To be admissible under this rule, the declarant’s state of mind must be at issue or relevant in the case; however, it need not be an ultimate issue in the case.\(^{384}\)

As stated above, this exception also refers to statements regarding the declarant’s then-existing “physical condition” and “sensations,”\(^{385}\) such as, “My back hurts.” Like mental conditions, the exception does not include statements of past physical conditions such as, “My back was hurting me last week.” Such statements rely on the declarant’s memory and are not deemed reliable.

**Federal Rules of Evidence Distinction.** Rule 803(3) is substantially similar to Louisiana’s article 803(3), with one major distinction. Unlike Louisiana’s article, which only allows a person’s expressions of his present mental condition to be offered to prove his own future action,\(^{386}\) under Rule 803(3), a declarant’s words may be offered to prove both his own future action as well as that of a third party.\(^{387}\) Thus, under the federal Rule, if the declarant stated, “Frank and I are going to California this weekend,” the statement may be offered to prove that both Frank and the declarant, in fact, went to California.

5. **Statements Made for Purposes of Medical Treatment and Diagnosis in Connection with Treatment [Article 803(4)]**

Article 803(4) provides that certain statements made to healthcare providers for the purpose of obtaining medical treatment and pretreatment diagnoses are excluded from the hearsay rule.\(^{388}\) These statements are deemed reliable because a person is unlikely to...

\(^{384}\) L.A. CODE EVID. ANN. art. 803 cmt. (c) to exception (3); see also State v. Doze, 384 So. 2d 351, 353 (La. 1980) (finding that the declarant’s state of mind was not at issue).


\(^{386}\) See Joseph A. Devall, Jr., Comment, Whether Federal Rule of Evidence 803(3) Should Be Amended To Exclude Statements Offered To Prove the Subsequent Conduct of a Nondeclarant: Guidance from Louisiana, 78 Tul. L. Rev. 911, 913 (2004) (“This article has limited the scope of the exception to allow only a declarant’s out-of-court statements to prove her own future conduct into evidence. Therefore, the Louisiana courts have long held that a declarant’s hearsay does not fall within the ambit of the state of mind exception when the statement is proffered to prove a third party’s future conduct.” (footnote omitted)).

\(^{387}\) See FED. R. EVID. 803(3); Mut. Life Ins. v. Hillmon, 145 U.S. 285, 295-300 (1892); see also United States v. Pheaster, 544 F.2d 353, 374-80 (9th Cir. 1976) (deciding that hearsay evidence could be offered to prove the future actions of a third person, despite the additional inferential steps). But see Kenneth S. Klein, The Enduring Quality of an Alluring Mistake: Why One Person’s Intentions Cannot—And Never Could—Be Evidence of Another Person’s Conduct, 37 Am. J. Trial Advoc. 339 (2013) (arguing that Mutual Life Insurance v. Hillmon was incorrectly decided).

\(^{388}\) See L.A. CODE EVID. ANN. art. 803(4).
lie to a healthcare provider when he knows that the healthcare provider is relying on the information he provides to treat him. The exception includes statements that describe a person’s medical history or past or present symptoms, pain, and sensations. The statements may relate to the cause or external source of the condition if the information is reasonably pertinent to the treatment or pretreatment diagnosis of the condition.

There are three basic requirements for the statement to fall within this hearsay exception: the statements must (1) describe a person’s medical history or past or present symptoms, pain, or sensations and/or regard the cause and circumstances of the injury (if reasonably pertinent to treatment or diagnosis); (2) be made to a healthcare provider; and (3) be made for the purposes of medical diagnosis and treatment in connection with that treatment. This exception ultimately envisions actual treatment by the healthcare provider. As a result, if the statements are being made to a healthcare provider for some other purpose, such as in anticipation of litigation, the exception will not apply. Such statements are not deemed to be reliable.

This exception also includes statements about the cause or source of the declarant’s injuries if that information is “reasonably pertinent to treatment or diagnosis in connection with treatment.” These statements include those “that are usually relied upon by physicians in their diagnosis and treatment.” For example, a person who arrives at the hospital with a broken leg might state that he fell down the stairs—a statement that might assist the doctor in treating him. However, if the person states, “My employee pushed me down the stairs after I fired him,” the court will likely find that who pushed the patient down the stairs and why he did so is not pertinent to the diagnosis and treatment and will likely exclude the statement. Additionally, this exception only applies to statements made to healthcare providers. A healthcare provider may include nurses, emergency medical technicians, lab

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389. *Id.* art. 803 cmt. (a) to exception (4) (2006).
391. *Id.*
392. See *id.*
393. *Id.* art. 803 cmt. (a) to exception (4) (2006).
394. *Id.*
396. *Id.* art. 803 cmt. (b) to exception (4) (2006).
397. See *id.* art. 803 cmt. (e) to exception (4).
technicians, and other healthcare providers working under the direction of a physician.\textsuperscript{398}

Finally, in addition to the patient’s own statements, a third party’s statements to the healthcare provider may be included under this exception, including that of a parent or spouse, provided that he has a relationship with the patient such that his statements are likely to be trustworthy.\textsuperscript{399} The declarant must, however, have personal knowledge of whatever information he relates to the healthcare provider for the purposes of treatment or diagnosis.\textsuperscript{400}

\textbf{Federal Rules of Evidence Distinction.} There is one key distinction between Louisiana’s article 803(4) and Rule 803(4). Rule 803(4) does not require that the statement be in connection with treatment; the statement may be made solely in connection with a diagnosis.\textsuperscript{401} Rule 803(4) requires that such statements be “made for—and [be] reasonably pertinent to—medical diagnosis or treatment.”\textsuperscript{402} Thus, a person’s statements about his injuries to a chiropractor who will prepare a report that will be used at trial will be admissible under Rule 803(4), even if the doctor does not actually treat the patient for the injuries he diagnoses.\textsuperscript{403} Those statements would not be admissible under Louisiana law, however, which requires that the statements be made in connection with actual treatment to be deemed trustworthy.\textsuperscript{404}

6. Recorded Recollections and Writings Used To Refresh Memory [Articles 803(5) and 612]

In some instances, a witness who once had firsthand knowledge of a matter may be unable to testify from memory about the matter when called to testify at trial. It may be because of the amount of time that has passed, the number of cases he has handled, or for any number

\textsuperscript{398} See id.

\textsuperscript{399} See 19 MARAIST, supra note 288, § 10.16 (referring to relationships “such as the patient’s spouse, parent or child”).

\textsuperscript{400} Compare FED. R. EVID. 803(4) (requiring that the statement only needs to be connected to a diagnosis), with LA. CODE EVID. ANN. art. 803 cmt. (a) to exception (4) (applying the exception only to statements made in connection with actual treatment by a medical provider).

\textsuperscript{401} See GOODE & WELLBORN, supra note 109, rule 803(4) authors’ cmt. (1), at 216 (describing the extension of the rule “to statements to a nontreating physician consulted solely for purposes of expert testimony”); see also O’Gee v. Dobbs Houses, Inc., 570 F.2d 1084, 1089 (2d Cir. 1978) (recognizing that the federal Rule allows a nontreating doctor to testify about a patient’s statements).

of other reasons. Article 612 provides that in such a case, a witness may use any writing, recording, or other object to attempt to refresh his memory of the matter. If the item refreshes the witness’s memory of the matter, he must then testify from his own memory, independent of the writing, recording, or object he used to refresh it.\textsuperscript{405} If, however, the witness asserts even after attempting to refresh his memory of the matter that he still cannot testify from his own independent recollection, the writing, recording, or object may be admitted into evidence under article 803(5) and be read or heard by the jury, provided that certain foundational requirements are met.\textsuperscript{406}

When a proponent offers an item into evidence, which has failed to refresh a witness’s memory, in lieu of testimony, it is being offered to prove the truth of the matter asserted, which would be hearsay. The recorded recollection exception excludes such a writing or recording from the hearsay rule. The exception specifically requires that prior to introducing an item into evidence under the exception, the proponent must first comply with the requirements of article 612 and attempt to refresh the witness’s independent recollection of the matter.\textsuperscript{407} Only when the witness has asserted even after attempting to refresh his memory that he still cannot testify from memory may the item be introduced into evidence under article 803(5) and be read or heard by the jury.

i. Writing Used To Refresh Memory [Article 612]

Article 612 sets out the requirements for refreshing a witness’s memory of a matter using a writing, recording, or other object. First, counsel must establish that the witness once had personal knowledge of the incident. Second, counsel must ask the witness if anything, such as a writing, recording, or other object, would refresh his memory of the incident. Third, counsel should approach the witness and hand him the writing, recording, or other object and ask the witness to review it \textit{silently} to himself.\textsuperscript{408} Fourth, after the witness has reviewed the writing, recording, or other object, counsel should ask the witness if his memory has been sufficiently refreshed such that he can testify from his own independent memory. Fifth, if the witness asserts that

\textsuperscript{405} See id. art. 612(A) (2006).
\textsuperscript{407} See id.; id. art. 612(A) (2006).
\textsuperscript{408} If the witness relies upon a recording to refresh his memory, the recording should be heard outside of the presence of the jury. See State v. Woods, 619 So. 2d 803, 806 (La. App. 1 Cir. 1993).
his memory has been refreshed, then counsel should take the writing, recording, or other object away from the witness, and the witness should then testify from his own independent recollection. If the witness asserts that his independent memory has not been refreshed and that he still cannot testify independently, counsel can seek to admit the document as a recorded recollection or move on to another topic.  

A witness may use “any” writing, recording, or object to refresh his memory. The item need not be a “formal document.” The range of items that may be used should be given the “broadest meaning” and may “include sound recordings, pictures,” depositions, unsworn statements, diaries, newspaper articles, police reports, calendars, notes, and letters, regardless of who prepared them. The witness’s testimony “is the evidence, not the writing itself.”

Additionally, when a witness refreshes his memory, he reads the writing silently to himself. The witness does not read it aloud, nor does the attorney read it aloud to the witness, as in the case of impeachment. Additionally, the writing is not admitted into evidence under this provision. If the witness is relying upon a recording to refresh his memory, he should review it outside the presence of the jury.

Whenever a witness uses an item to refresh his memory, an adverse party will have certain rights to the item. In a criminal trial, if a witness uses a writing, recording, or object to refresh his memory at trial, the adverse party has a right “to inspect it, to examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness,” subject to certain irrelevant

410. Id.
411. Id. art. 612 cmt. (c).
412. Id.
413. See, e.g., State v. Ester, 490 So. 2d 579, 584-85 (La. App. 2 Cir. 1986) (finding that the district court did not err by allowing a thirteen-year-old boy to refresh his memory by referring to a calendar in which he had placed checkmarks and other notations on days that his mother sexually assaulted him).
414. LA. CODE EVID. ANN. art. 612 cmt. (a).
415. State v. Runnels, 2012-167, p. 12 (La. App. 3 Cir. 11/7/12); 101 So. 3d 1046, 1055-56 (citing State v. Young, 552 So. 2d 669 (La. App. 2 Cir. 1989) (allowing a police officer to use a note prepared by another police officer to refresh his memory on the stand)).
417. See LA. CODE EVID. ANN. art. 612 cmt. (b).
418. Id. art. 612(B).
portions being excised pursuant to article 612(C). In a civil trial, the adverse party has the right to inspect any items used by the witness both before and during his testimony, to examine the witness thereon, and to introduce relevant portions into the record.

ii. Recorded Recollection [Article 803(5)]

If after attempting to refresh a witness’s independent memory of a matter, the witness asserts that he still cannot testify “fully and accurately” from his own independent memory, the attorney can seek to admit the item into evidence as a recorded recollection under article 803(5). Pursuant to the article, counsel must lay the foundation for admitting the item. First, counsel must establish that the witness once had personal knowledge of the matter. Second, counsel must establish that despite an attempt to refresh the witness’s memory, the witness still has insufficient recollection to enable him to testify “fully and accurately.” Third, counsel must establish that the record was made, adopted, or verified by the witness. Fourth, counsel must establish that the record was made, adopted, or verified when the matter was fresh in the witness’s memory. Fifth, counsel must establish that the record correctly reflects the witness’s knowledge of the matter.

Once the foundational requirements of article 803(5) are met, the item may not be excluded on hearsay grounds. If the document is admitted into evidence, it may then be read aloud in the presence of the jury, but it may not be taken into the jury room. This limitation is imposed to ensure that the jury does not give the item too much weight. The foundational requirements help ensure the reliability of the item.

Federal Rules of Evidence Distinction. The article on recorded recollection is substantially the same as the federal Rule with a few minor exceptions. Under Rule 803(5), once the proponent has unsuccessfully attempted to refresh a witness’s memory under Rule 612 and the foundation is laid under the Rule 803(5) hearsay exception, the item may be “read into evidence but may be received as

419. See State v. Taylor, 96-1043, pp. 11-14 (La. App. 3 Cir. 2/5/97); 688 So. 2d 1262, 1270-71 (analyzing the circumstances under which an adverse party would be entitled to a document used by a witness to refresh his memory).
420. LA. CODE EVID. ANN. art. 612(A).
422. FORCE & RAULT, supra note 36, art. 803(5) authors’ note (1).
423. LA. CODE EVID. ANN. art. 803(5).
424. See id. art. 803 cmt. (c) to exception (5) (2006).
an exhibit only if offered by an adverse party."

Thus, unlike Louisiana’s article 803(5), which allows the item to be admitted into evidence, but not taken into the jury room, under the federal Rule, the memorandum or record may not be admitted into evidence at all by the proponent, but may be read aloud.

The reasoning underlying the prohibition on admission of the item into evidence is the same as that underlying Louisiana’s prohibition on the jury’s taking the item into the deliberation room—to prevent the jury from giving it too much weight. Under the Federal Rules, while the proponent may not offer the record into evidence, the opposing party may offer the record into evidence if he chooses to do so.


[Article 803(6)-(7)]

Under the business records exception, certain records made and kept in the course of regularly conducted business activity may be excluded from the hearsay ban. The rule applies to both civil and criminal cases. Pursuant to article 803(6)-(7), all of the following requirements must be met to conform to the business records exception:

1. Be of a business (e.g., “[any] business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit”);
2. Be in the form of a “memorandum, report, record, or data compilation, in any form”;
3. Concern “acts, events, conditions, opinions, or diagnoses”, and
4. Satisfy foundational requirements through a competent witness.

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425. FED. R. EVID. 803(5); see also Research Sys. Corp. v. IPSOS Publicite, 276 F.3d 914, 923 (7th Cir. 2002) (upholding the exclusion of an exhibit when it was offered into evidence, rather than read).
426. See United States v. Judon, 567 F.2d 1289, 1294 (5th Cir. 1978) (explaining the purpose of the rule as “[preven[ing] the trier of fact from being overly impressed by the writing”).
427. See FED. R. EVID. 803(5).
429. Article 803(6) was made applicable to criminal cases by section 1 of Act 1300 of 1995. See FORCE & Rault, supra note 36, art. 803(6) authors’ note (1).
430. See LA. CODE EVID. ANN. art. 803(6); see also FORCE & Rault, supra note 36, app. D checklist 6 (providing the foundational requirements for offering business records into evidence).
431. Id.
432. Id.
433. Id.
i. the record must have been made at or near the time of the event it records,

ii. the record must have been made by (a) a person with personal knowledge or (b) based on information transmitted to him by a person with personal knowledge,

iii. the recorded information must have been furnished to the business by either “a person who was routinely acting for the business in reporting the information or in circumstances under which the statement would not be excluded by the hearsay rule,”

iv. the record was made and kept in the course of a regularly conducted business activity, and

v. it was the regular practice of that business to make and to keep the record; and

(5) “[T]he source of information or the method or circumstances of preparation [must not] indicate lack of trustworthiness.”

(6) Additionally, the exception does not extend to public records and reports that are specifically excluded from the public records exception by article 803(8)(b).

To admit a record into evidence under this exception, a competent witness must be present to testify that the foregoing foundational requirements are met. Further, the records must not indicate that they lack trustworthiness. Additionally, if a public record is excluded from admissibility under the public records exception in article 803(8)(b), then those records similarly may not be admitted into evidence under the business records exception. However, if a public record or report is not specifically excluded by article 803(8)(b), there may be circumstances in which the record may be introduced under article 803(6) if all the requirements for admissibility are met.

Further, article 803(7) provides that evidence may be offered showing that a matter is not included in a business record “to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which” would have been included in the business record had it occurred. Like the business records exception, the exception allowing evidence of the nonentry of a matter to be introduced as

434. Id.
435. Id.
436. See id. art. 803 cmt. (e) to exception (6) (2006).
437. See id. art. 803 cmt. (d) to exception (6).
439. See id. art. 803 cmt. (d) to exception (6) (2006).
evidence of nonexistence similarly does not apply if the sources of information or other circumstances indicate a lack of trustworthiness. 441

**Federal Rules of Evidence Distinction.** Unlike the Code, the Federal Rules do not specifically contain language providing that if the information furnished to the business is not provided by a person routinely acting for the business then it must be “in circumstances under which the statement would not be excluded by the hearsay rule.” 442 This phrase, contained in Louisiana’s article 803(6), indicates that information or statements in the record that are provided by third parties that are not acting on behalf of the business must fall into a hearsay exception or that information will be excluded as double hearsay. While Rule 803(6) does not include this language, courts have recognized that the rule has the same effect under the Federal Rules. 443 Thus, statements by third parties contained in business records are regarded as double hearsay under the Federal Rules and must fit into an exception to be admissible.

Further, following amendments to the Federal Rules that came into effect in 2014, the opponent of the record has the burden of proving that the record “indicates a lack of trustworthiness.” 444 Louisiana’s article also provides that to be admissible, the record must not indicate a lack of trustworthiness, but the article does not specify who bears the burden of proof regarding trustworthiness.

8. Public Records and Absence of Entry in Public Records [Article 803(8)-(10)]

Article 803(8) contains the public records exception, which provides that certain records, reports, or data compilations of state or federal public offices or agencies are not subject to the hearsay rule. 445 The basis for excluding public records from the hearsay rule is an “assumption that these records are trustworthy because public officials will perform their duties properly, that they have no motive and thus are not likely to falsify the records, and that open records statutes requiring disclosure of public records will foster accuracy.” 446 Additionally, “[T]here is a need for admission of such records because

441. *Id.*
442. See *id.* art. 803(6); *Fed. R. Evid.* 803(6).
443. See United States v. Bortnowsky, 879 F.2d 30, 34 (2d Cir. 1989); United States v. Snyder, 787 F.2d 1429, 1434 (10th Cir. 1986).
it is unlikely that public officials will remember details of all events or occurrences they encounter in their positions.”

The public records exception is a narrow exception and sets forth only three categories of records that may be admitted under this exception. There are four requirements for the public records exception: the proffered evidence (1) must be a record, report, or data compilation (2) of a state or federal public agency or public office; (3) must set forth “(i) [i]ts regularly conducted and regularly recorded activities[,] (ii) [m]atters observed pursuant to a duty imposed by law and as to which there was a duty to report[,] or (iii) [f] actual findings resulting from an investigation made pursuant to authority granted by law”; and (4) cannot be excluded under article 803(8)(b)(i)-(iv).448

The exception is further narrowed by four categories of public records that are excluded from the exception in article 803(8)(b)(i)-(iv). They include

(i) [i]nvestigative reports by police and other law enforcement personnel[;]
(ii) [i]nvestigative reports prepared by or for any government, public office, or public agency when offered by that or any other government, public office, or public agency in a case in which it is a party[;]
(iii) [f]actual findings offered by the prosecution in a criminal case[; and]
(iv) [f]actual findings resulting from investigation of a particular complaint, case, or incident, including an investigation into the facts and circumstances on which the present proceeding is based or an investigation into a similar occurrence or occurrences.449

A record excluded from admissibility under this exception cannot in the alternative be admitted as a business record. The business records exception states that “[p]ublic records and reports which are specifically excluded from the public records exception by Article 803(8)(b) shall not qualify as an exception to the hearsay rule under this Paragraph.”450 As a result, the four categories of public records excluded above cannot be admitted as public records or business records. Even when not specifically excluded by the list of exclusions,

447. Id.
448. L.A. CODE EVID. ANN. art. 803(8) (emphasis added).
449. Id. art. 803(8)(b).
a public record should be inadmissible under the exception if it is deemed untrustworthy.  

Like the business records exception, there is also an exception to the hearsay rule for the absence of an entry in public records. Pursuant to article 803(10), if a public office or agency regularly made and preserved the public record, evidence of (1) the absence of a public record or (2) the absence of entry in a public record is admissible to prove either the absence of the record or the nonexistence or nonoccurrence of the matter. Such absence or nonexistence may be proven by either “a certification in accordance with Article 902,” which would be self-authenticating, or (2) “testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.”

Federal Rules of Evidence Distinction. There are distinctions between the Louisiana and federal public records exceptions. The substantive differences provide for a “narrower public records exception under the Louisiana Code of Evidence [and thus] require caution in relying on federal cases decided under [the federal Rule].”

Specifically, Rule 803(8) states:

(8) Public Records. A record or statement of a public office if:

(A) it sets out:

(i) the office’s activities;
(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or
(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

Like the Louisiana article, Rule 803(8) only relates to three types of public records. However, the federal Rule does not require that the activities be “regularly conducted and regularly recorded” activities, as is required under the Louisiana article. However, like the Louisiana article, the federal Rule also includes records that set out certain

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451. Id. art. 803 cmt. (e) to exception (8) (2006); see, e.g., State v. Nicholas, 359 So. 2d 965 (La. 1978).
453. FORCE & RAULT, supra note 36, art. 803(8) authors’ note (2), at 701.
454. FED. R. EVID. 803(8).
455. LA. CODE EVID. ANN. art. 803(8)(a)(i).
“matters observed” that the agency official is obligated to report, as well as records of factual findings from an investigation. 456

While Rule 803(8) does not have a separate section specifically listing exclusions, the Rule does exclude from the exception matters observed by law enforcement in a criminal case in Rule 803(8)(A)(ii). The Rule also excludes factual findings from a legally authorized investigation from being offered by the government in a criminal case under Rule 803(8)(A)(iii). Under this subsection of the Rule, however, such records could be introduced by the accused.

While Louisiana’s rule is narrower than the federal Rule as it relates to exclusions, Rule 803(8) also shows respect for the Sixth Amendment confrontation and cross-examination rights of the accused by prohibiting the categories of records in subsections (ii) and (iii) of Rule 803(A) from being offered against the accused in criminal cases. 457

Additionally, Rule 803(8)(B) specifically provides that such records may not lack trustworthiness. While Louisiana’s article does not specifically state this requirement, courts have recognized that a public record should not be admitted if it lacks trustworthiness. 458

Finally, pursuant to amendments to the Federal Rules that came into effect in December 2014, Rule 803(8) clarifies that the party claiming untrustworthiness of the record bears the burden of proving it. 459

9. Statements in Ancient Documents [Article 803(16)]

Article 803(16) contains an exception for statements in “ancient documents.” It applies to “[s]tatements in a document in existence thirty years or more the authenticity of which is established, or statements in a recorded document as provided by other legislation.” 460

To be admissible under this provision, the document must be properly authenticated under article 901(B)(8) to prove its genuineness. 461

Federal Rules of Evidence Distinction. The Louisiana exception is different than Rule 803(16), which only requires that the document have been in existence for twenty years, rather than thirty years. 462

457. See GOODE & WELLBORN, supra note 109, rule 803(8)-(10) authors’ cmt. (8).
458. See LA. CODE EVID. ANN. art. 803 cmt. (e) to exception (8) (2006); e.g., State v. Nicholas, 359 So. 2d 965 (La. 1978).
459. See FED. R. EVID. 803(8).
461. Id. art. 803 cmt. (c) to exception (16) (2006).
462. See FED. R. EVID. 803(16).
10. Former Testimony [Article 804(B)(1)]

In some limited circumstances, a witness’s testimony at a prior proceeding may be excluded from the hearsay rule under the former testimony exception pursuant to article 804(B)(1). First, the exception requires that the witness be unavailable to testify at the current proceeding pursuant to article 804(A). Under this exception, the prior testimony sought to be used could have been given at the same or different proceedings, in either a civil or criminal trial. The admissibility requirements for the prior testimony depends upon whether the instant case is a criminal or civil case.

If the proponent seeks to offer testimony given by a witness in a prior proceeding in a criminal case, then the “party against whom the testimony is now offered . . . [must have] had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.” If the subsequent proceeding is a civil case, then either the party himself or another party with similar interest must have “had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.”

i. Criminal Cases

If a party (usually the prosecution) seeks to admit a witness’s statement that was given at a prior hearing (criminal trial, preliminary exam, civil case, etc.) in a criminal case, then the defendant himself must have had an opportunity and similar motive to develop the witness’s prior testimony through the applicable examination, either direct, cross, or redirect.

The requirement that the defendant must have had a “similar motive to develop” the testimony in the prior proceeding means that in the prior in that proceeding, the defendant would have been trying to bring out, test, or address similar types of issues, elements, or defenses. Because the accused had an opportunity at the prior hearing to bring out the same issues that he would have if the witness were present at the trial, he cannot claim that he was highly prejudiced by not being able to examine the witness at the present trial. Thus, his constitutional right to confront his accuser is satisfied.

464. Id.
465. See id.
466. Orrill v. Ram Rod Trucking, 557 So. 2d 384, 386 (La. App. 4 Cir. 1990).
In further protection of the defendant’s rights to confrontation and cross-examination in a criminal trial, the following requirements must have also been met at the prior hearing where the former testimony was given: (1) the accused must have had counsel, (2) the witness must have been under oath,467 (3) the witness must have been cross-examined or the defendant must have validly waived that right, (4) the witness must currently be unavailable, and (5) the state must have made a good faith effort to locate the witness.468

Further, article 804(B)(1) only requires that the examining party (the defendant himself in a criminal case) have had a prior opportunity to develop the prior testimony, not that the examination of the witness in fact took place in the prior proceeding.469 Thus, if the defendant validly waived the right to cross-examination, then this requirement is met.

ii. Civil Cases

If a party seeks to admit a witness’s statement that was given at a prior hearing in a civil case, any party with a similar interest must have “had an opportunity and similar motive to develop” the witness’s prior testimony through the applicable type of examination.470 There is no requirement that the party himself have had the prior opportunity and motive to examine the witness.

The article specifically excludes from admissibility under the exception “[t]estimony given in another proceeding by an expert witness in the form of opinions or inferences.”471 Unlike other witnesses who may be the only persons who can testify to the substance of their testimony, other experts usually can testify on a given point.472 Depositions do not fall into this exception.473

Federal Rules of Evidence Distinction. There are a few narrow distinctions between the federal Rule and article 804(B)(1). First, Rule 804(b)(1) does not exclude expert testimony from the exception as

467. LA. CODE EVID. ANN. art. 804 cmt. (b) to exception (B)(1) (2006).
468. State v. Francois, 05-1385, pp. 11-12 (La. App. 3 Cir. 4/5/06); 926 So. 2d 744, 782; State v. Ball, 2000-2277, p. 26 (La. 1/25/02); 824 So. 2d 1089, 1112.
469. State v. Jones, 94-2244, p. 1 (La. 8/31/94); 642 So. 2d 151, 151 (per curiam); see State v. Randall, 2002-0248, pp. 7-8 (La. App. 4 Cir. 10/16/02); 830 So. 2d 1062, 1067.
471. Id.
472. See id.; see also id. art. 804 cmt. (h) to exception (B)(1) (2006) (explaining the rationale behind why experts are treated differently).
473. Id. art. 804 cmt. (d) to exception (B)(1) (2006).
Louisiana article 804(B)(1) does. Additionally, while any party with a similar interest must have had a prior opportunity and motive to develop the former testimony at the prior hearing under the Louisiana provision, Rule 804(b)(1) provides for only a “predecessor in interest” to have developed the prior testimony in a civil trial. When drafting the Louisiana provision, this deviation from the federal language was intended to widen the exception to the hearsay rule.

Rule 804(b)(1) also provides for the admission of testimony given in “a lawful deposition.” This language is not contained in Louisiana’s article 804(B)(1), which makes it clear that article 804(B)(1) does not permit the admission of depositions. The admissibility of depositions in Louisiana continues to be governed by article 1450 of the Louisiana Code of Civil Procedure.

11. Dying Declaration [Article 804(B)(2)]

Article 804(B)(2) excludes from the hearsay rule statements “made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.” This exception is commonly referred to as the “dying declaration” exception and expands prior Louisiana law in significant ways. Under prior law, the exception applied only in criminal homicide prosecutions in which the declarant actually died and his death was the subject of the criminal prosecution in which the statement was proffered. Under the current article 804(B)(2), the exception applies in civil trials as well as any type of criminal trial. Further, the declarant need not have actually died at the time the statement was made, though he must be otherwise unavailable at the time of the trial for the exception to apply.

Under the current law, the exception may apply in any type of civil or criminal trial if (1) the declarant is unavailable, (2) the

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474. See FED. R. EVID. 804(b)(1); see also LA. CODE EVID. ANN. art. 804 cmt. (h) to exception (B)(1) (noting the difference between the federal and state rules).
475. FED. R. EVID. 804(b)(1)(B); see also GOODE & WELLBORN, supra note 109, rule 804(b)(1) author’s cmt. (4), at 233 (“Courts applying Rule 804(b)(1) in civil cases have generally interpreted the phrase ‘predecessor in interest’ not in the narrow, common-law sense of privity, but broadly to encompass any party with a similar interest and motive.”).
476. See LA. CODE EVID. ANN. art. 804 cmt. (c) to exception (B)(1).
477. FED. R. EVID. 804(b)(1).
478. See LA. CODE EVID. ANN. art. 804 cmt. (d) to exception (B)(1).
480. Id. art. 804 cmts. (b)-(c) to exception (B)(2) (2006).
482. See id.
declarant believed his death was imminent when he made the statement, and (3) the statement concerns “the cause or circumstances of what he believed to be his impending death.”

Whether the declarant believed his death to be imminent when he made the statement is a subjective determination for the trial judge to make. In making the determination, the judge may consider all facts and circumstances surrounding the making of the statement, including the declarant’s own words, the nature of his wounds, testimony of others present, the time between the wound and his death, the opinion of a physician, and any other factors that suggest that the declarant had “abandoned all hope or expectation of recovery.”

The second requirement of the exception concerns the content of the statement. The exception only includes statements “concerning the cause or circumstances of what [the declarant] believed to be his impending death.” Generally, if a person is dying, information regarding “the person, motive, or mechanism which made up the ‘cause or circumstances’ of the impending death” generally satisfies the “content requirement” of the rule. The declarant’s statement must concern facts about which he has firsthand knowledge—things he either saw or heard. While he may give an opinion, mere expressions of conjecture or suspicion will be excluded.

*Federal Rules of Evidence Distinction.* Rule 804(b)(2) is slightly different than the Louisiana article. Like Louisiana’s article, Rule 804(b)(2) also provides that the statement must be made while the declarant believes his death is imminent and must be concerning the cause or circumstances of what he believed to be his impending death. However, under the federal Rule, such statements are admissible only “[i]n a prosecution for homicide or in a civil case.” In Louisiana, if the requirements for the rule are met, such statements may be offered in any type of criminal or civil trial.

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483. *Id.* art. 804 cmts. (a)-(b) to exception (B)(2) (2006).
484. See *id.* art. 104.
485. State v. Winn, 97-2509, pp. 7-8 (La. App. 4 Cir. 1/14/98); 705 So. 2d 1271, 1274-75.
489. Garza v. Delta Tau Delta Fraternity Nat’l, 2005-1508, 2005-1527, p. 12 (La. 7/10/06); 948 So. 2d 84, 93 (quoting Timothy J. McNamara, Comment, *Dying Declarations in Louisiana Law*, 22 LA. L. REV. 651, 651 (1962)).
490. See LA. CODE EVID. ANN. art. 804 cmt. (b) to introductory cl. of para. B (2006).
491. See FED. R. EVID. 804(b)(2).
492. FED. R. EVID. 804(b)(2).
G. Provisions that Have No Federal Counterpart

One final distinction between the Code and the Federal Rules of Evidence is that the Code contains several provisions that are not included in the Federal Rules of Evidence. These provisions are briefly discussed below.

1. Victim’s Attire in Sexual Assault Cases [Article 412.1]

   Article 412.1 excludes evidence of the manner and style of the victim’s attire in certain sexual assault cases from being admitted to prove the victim encouraged or consented to the offense. Such evidence may, however, be used for other purposes, such as to show the presence or absence of an element of the offense.

2. Statements Made in Human Trafficking [Article 412.3]

   In 2014, the Louisiana legislature enacted article 412.3. It provides that if a victim of human trafficking or trafficking of children for sexual purposes is also a defendant in any case arising from unlawful acts committed as part of the same trafficking activity, any inculpatory statement made by the victim about unlawful acts committed by the victim as part of the same trafficking activity as a result of questioning by any person then known by the victim to be a law enforcement officer is inadmissible against the victim at a trial of the victim, if all of the following conditions exist:

   (1) The victim cooperates with the investigation and prosecution, including the giving of a use-immunity statement as directed by the prosecuting attorney.

   (2) The victim testifies truthfully at any hearing or trial related to the trafficking activity or agrees, either in writing or on the record, to testify truthfully at any hearing or trial related to the trafficking activity in any prosecution of any other person charged with an offense arising from the same trafficking activity, regardless of whether the testimony is unnecessary.

493. Applicable offenses include aggravated rape, first-degree rape, forcible or second-degree rape, simple or third-degree rape, sexual battery, or second-degree sexual battery. See H.R. 139, 2015 Leg., Reg. Sess. (La. 2015) (enacted) (adding first-degree, second-degree, and third-degree rape as applicable offenses to which this provision applies).


496. See LA. CODE EVID. ANN. art. 412.3(1).

497. See id. art. 412.3(2).
(3) The victim agrees in writing to receive services or participate in a program that provides services to victims of human trafficking or trafficking of children for sexual purposes, if such services are available.\footnote{498}

This provision does not apply to statements offered against the victim pursuant to article 801 of the Code or in any prosecution of the victim for perjury.\footnote{499}

3. Settlement or Tender [Article 413]

The Federal Rules of Evidence also do not contain a provision comparable to Louisiana's article 413, which precludes evidence of any amount \textit{actually paid} in settlement or by tender unless the failure to make a settlement or tender is an issue in the case.\footnote{500} The goal of this provision is to prevent plaintiffs from being prejudiced by the trier of fact's limiting of recovery based on any amounts previously received. Such evidence might not be excluded if the evidence is deemed relevant for other purposes, such as to show bias, prejudice, or for some other purpose as provided in article 408.\footnote{501}

4. Workers’ Compensation Payments [Article 414]

The Code also contains a provision that excludes, in a civil case, evidence of the fact and amount of any past or future workers’ compensation payments the plaintiff may have received in connection with the injury that is also the subject of the current lawsuit.\footnote{502} The purpose of the provision is to prevent the jury from minimizing any award amount to which the plaintiff may be entitled through its consideration of any workers’ compensation payments.\footnote{503} Such information may be presented if the fact finder is the judge alone.\footnote{504}

\footnote{498. See id. art. 412.3(3).}
\footnote{499. See id.; see also id. art. 801(D) (2006) (relating to statements that are not hearsay).}
\footnote{500. See id. art. 413 (2006).}
\footnote{501. HARGES & JONES, supra note 53, art. 413 authors’ cmts.; see FORCE & RAULT, supra note 36, art. 413 authors’ note (1); Alexander v. Tate, 09-844, pp. 11-13 (La. App. 3 Cir. 2/3/10); 30 So. 3d 1122, 1129-31 (concluding that it is likely that the provision implicitly contains such an exception when the evidence is offered for a relevant purpose).}
\footnote{502. See LA. CODE EVID. ANN. art. 414.}
\footnote{503. See FORCE & RAULT, supra note 36, art. 414 authors’ note (1).}
\footnote{504. See LA. CODE EVID. ANN. art. 414; see also FORCE & RAULT, supra note 36, art. 414 authors’ note (2), at 466 (explaining that there is greater risk that a jury would “use the evidence improperly” than a judge would).}
The evidence might also be admissible if it is otherwise relevant in the case.

5. Act of Contacting a Lawyer [Article 415]

The Federal Rules also do not contain a provision comparable to Louisiana’s article 415, which excludes evidence from being offered against a party or entity in a criminal case to show that the accused contacted an attorney, unless such act falls within an established exception for crime or fraud. The rule is designed to limit questions that would imply that a witness contacted an attorney because of consciousness of guilt.

6. Initial Complaint of Sexually Assaultive Behavior [Article 801(D)(1)(d)]

Unlike the Federal Rules, which do not contain any provisions excluding complaints of sexually assaultive behavior from the hearsay rule, the Code contains two such provisions. Article 801(D)(1)(d) exempts an initial complaint of sexually assaultive behavior from the hearsay rule if the statement is consistent with the declarant’s testimony at trial and if the declarant is subject to cross-examination regarding the statement. An “initial complaint” is defined as a complaint made to the first “friendly adult,” such as a parent, teacher, pastor, or similar adult.

7. Things Said and Done [Article 801(D)(4)]

The Federal Rules of Evidence also do not contain a provision comparable to article 801(D)(4), which exempts statements from the hearsay rule if, when used in a criminal case, the statements are (1) made by participants of the crime (2) before, during, and after the crime and form a continuous transaction with it and (3) are instructive, impulsive, and spontaneous to the criminal act or immediate

505. See LA. CODE EVID. ANN. art. 415.

506. The sexually assaultive behavior included in the exemption is broadly defined to include initial complaints of rape, aggravated rape, simple rape, sexual battery, aggravated sexual battery, carnal knowledge of a juvenile, molestation, crime against nature, and others. See id. art. 801 cmt. (d) to art. 801(D)(1).

507. See id. art. 801(D)(1); e.g., State v. Johnson, 97-1519, p. 9 (La. App. 4 Cir. 1/27/99); 726 So. 2d 1126, 1131; LA. CODE EVID. ANN. art. 801(D)(1)(d).

508. State v. Ste. Marie, 97-0168, p. 12 (La. App. 3 Cir. 4/18/01); 801 So. 2d 424, 433.
concomitants of it.509 “[I]t is believed that spontaneous and impulsive words which are spoken during the criminal transaction, or as part of it, are reliable statements” because it is unlikely that the participants would have had an opportunity to reflect and fabricate their statements.510

8. Foreign Records of Regularly Conducted Activity [Article 803.1]

Article 803.1 became law in 2008511 and excludes records from businesses domiciled in a state outside of Louisiana from the hearsay rule in criminal trials.512 This article applies to the same types of business entities and records included in the business records exception found in article 803(6).513 Additionally, the foundational requirements for establishing reliability are substantially the same as those under the business records exception, except that rather than having a competent witness personally testify to the foundational requirements establishing the reliability, a competent witness certifies514 that the foundational requirements are met.515 A party intending to offer certification must provide written notice of that intention to the opposing party not less than ten days prior to trial.516 A party opposing the admissibility of the evidence may file a motion challenging admission of the evidence; failure to file that motion constitutes a waiver of objection, but the court may grant relief from the waiver for good cause.517

509. See Goldsmith v. Green, 45-532, 45-533, pp. 3-4 (La. App. 2 Cir. 9/1/10); 47 So. 3d 637, 640-41 (“[R]es gestae has only been used by courts in criminal matters as a means of introducing evidence for convictions of defendants, not for determining the applicability of provisions in insurance policies.”); see also Force & Raulet, supra note 36, art. 801 authors’ note (8) (noting that if used at all in civil cases, it should be given an extremely narrow interpretation).

510. State v. Robinson, 634 So. 2d 1274 (La. App. 3 Cir. 1994).


512. LA. CODE EVID. ANN. art. 803.1(A).

513. See id. art. 803.1(B)(3).

514. See id. art. 803.1(B)(2) (requiring a “foreign certification,” which is defined as “a written declaration made and signed in a jurisdiction outside the territorial limits of the state of Louisiana by the custodian of a business record of regularly conducted activity or another qualified person that, if falsely made, would subject the maker to criminal penalty under the laws of the state of Louisiana”).

515. See id. art. 803.1(A)(1).

516. Id. art. 803.1(A)(2).

517. Id.
9. Testimony as to Age [Article 803(24)]

Article 803(24) contains an exception to the hearsay prohibition for a person’s testimony as to his own age.\(^{518}\)

10. Complaint of Sexually Assaultive Behavior [Article 804(B)(5)]

Under article 804(B)(5), statements of complaint regarding sexually assaultive behavior are excepted from the hearsay rule and are excluded if the following three requirements are met: (1) the declarant is unavailable to testify, (2) the statement is either an initial complaint of sexually assaultive behavior or a trustworthy complaint of sexually assaultive behavior, and (3) the declarant is a person under the age of twelve.\(^{519}\) Unlike the similar provision found in article 801(D)(1)(d), this exception applies not to only initial complaints of sexually assaultive behavior, but also to subsequent complaints if they are found to be trustworthy.\(^{520}\) Further, as in all cases of article 804 exceptions, the declarant must be unavailable as defined in article 808(A).

IV. CONCLUSION

While it is clear that the Code largely tracks the Federal Rules of Evidence, distinct differences exist between the two. Additionally, as noted above, the Code contains several provisions that are not included in the Federal Rules and several provisions that contain more detailed specifications governing admissibility. These distinctions show a recognition for the greater protection provided to the citizens of the state as provided by the Louisiana Constitution of 1974.


\(^{519}\) See id. art. 804(B)(5).

\(^{520}\) State v. Free, 26-267, pp. 10-12 (La. App. 2 Cir. 9/21/94); 643 So. 2d 767, 776 (holding that the district court did not abuse its discretion by overruling a hearsay objection to the admission of evidence of subsequent complaints).