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AN OVERVIEW OF THE NEW LOUISIANA CODE OF EVIDENCE—ITS IMPERFECTIONS AND UNCERTAINTIES

Gerard A. Rault, Jr.*

After many decades of controversial efforts and aborted attempts to codify Louisiana's evidence law, the state finally has a comprehensive Code.¹ The Louisiana Code of Evidence,² generally applicable in both civil and criminal cases, became effective on January 1, 1989.³

The road toward codification has been long and rocky. That road may be said to have begun in 1805, when Louisiana enacted the Crimes Act,⁴ officially introducing common law evidentiary rules in specified criminal prosecutions.⁵ Within six years appellate courts were considering common law evidentiary principles in civil cases,⁶ and in 1819 the Louisiana Supreme Court held that Spanish evidentiary rules had been abrogated by common consent and that common law evidence would thereafter apply.⁷ Three years later, in 1822, the first attempt to codify

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1. The history of attempted codification of Louisiana evidence law, as well as that of national codification efforts, is outlined in Pugh, *Federal Rules of Evidence: Foreword*, 36 La. L. Rev. 59 (1975) [hereinafter Pugh, *Federal Rules*], reprinted in G. Pugh, *Louisiana Evidence Law 2* (Supp. 1978); Sanders, *A Code of Evidence for Louisiana—An Idea Whose Time Has Come?*, 13 S.U.L. Rev. 201 (1987).

2. 1988 La. Acts No. 515.

3. Under article 1101(A), the provisions of the Code are generally "applicable to the determination of questions of fact in all contradictory judicial proceedings and in proceedings to confirm a default." Under section 12 of Act 515, the Code took effect on January 1, 1989, and applies to proceedings brought or initiated on or after that date. The Code also applies on that date to actions and proceedings then pending except to the extent that application of the rules would not be feasible or would work injustice, in which event former evidentiary principles apply.

4. 1804 La. Acts ch. 50, p. 416. Between Louisiana's accession into the United States in 1803 and the creation of laws abrogating the *status quo ante*, Spanish law obtained. See Comment, *Were the Louisiana Rules of Civil Evidence Affected by the Adoption of the Louisiana Code of Criminal Procedure?*, 14 La. L. Rev. 568 (1954). It is not clear that Spanish evidentiary principles were any more than theoretically extant or applicable. *Id.*

5. See 1804 La. Acts ch. 50, § 33, p. 440; Comment, *supra* note 4.

6. *Durnford v. Clark*, 1 Mart. (o.s.) 202 (La. 1811), cited in Comment, *supra* note 4, at 569 n.8.

7. *Planters Bank v. George*, 6 Mart. (o.s.) 670 (La. 1819).

Louisiana's common law of evidence was initiated when the Louisiana legislature appointed Edward Livingston to prepare a penal code for the state.⁸ Although part of an effort to systemize only the criminal law, the code of evidence that Livingston produced applied to both criminal and civil cases. In part because the entire penal code proved controversial,⁹ the legislature never adopted Livingston's code of evidence. Each subsequent attempt at codification, including the most recent and successful one, has likewise been steeped in controversy.

During the more than century and a half since the rejection of Livingston's evidence code, Louisiana courts have continued to follow the general common law of evidence in both civil and criminal cases. In a variety of particulars, common law rules were set out in statutes, sometimes with legislative modifications. Many of the common law rules came into our law in the Acts of 1928, now found in Title 15 of the Revised Statutes, but others were placed in the Civil Code, the Code of Civil Procedure, the Code of Criminal Procedure, other codes, and diverse titles of the Revised Statutes. In large measure, however, answers to evidentiary questions, to the extent that there were answers, could be found only in judicial decisions.

By the middle of this century Louisiana evidence law had become notoriously murky and uncertain. This was particularly true in civil matters, where trial courts tended to apply both general common law principles and, by loose analogy, the criminal evidentiary rules in Title 15. Almost invariably these courts let the objection "go to the weight" rather than to the issue of admissibility. Due to the "harmless error" rule, appellate courts rarely had occasion to analyze evidentiary issues closely or to pronounce the law with care.

This confusion in the law led to a second attempt at codification in 1956. In that year the legislature commissioned the Louisiana State Law Institute to prepare a code of evidence.¹⁰ Again the effort proved controversial.¹¹ After some ten years of effort the Institute abandoned the project, in part because the contending forces simply could not agree

8. Act of March 21, 1822. See Pugh, *Federal Rules*, supra note 1; Sanders, supra note 1. This movement toward codification was motivated in part by the writings of Jeremy Bentham, and particularly his *Theory of Judicial Evidence*, published in French in 1818. In his report to the Louisiana Legislature Livingston acknowledged the leadership of his English counterpart. See Pugh, *Federal Rules*, supra note 1, at 60 n.6.

9. Moore, *The Livingston Code*, 19 *J. Crim. L. & Criminology* 344, 354 (1928), cited in Pugh, *Federal Rules*, supra note 1, at 60-61 n.8.

10. 1956 La. Acts No. 87.

11. Dean Antonio Papale of the Loyola Law School served as Reporter for the Law Institute project. He reviews issues and recounts some of the problems in Papale, *Editorial: Reflections on the Proposed Louisiana Code of Evidence*, 12 *Loy. L. Rev.* 51 (1965).

and in part because it appeared that a federal code of evidence might soon be forthcoming.¹²

The project leading to the new Code began in 1979, when the Louisiana Legislature again directed¹³ the preparation of a code of evidence.¹⁴ The three Law Institute Reporters analyzed the relevant issues and meticulously examined the existing Louisiana law. The Reporters then compared federal law, the law of all other states, model rules and, on occasion, the laws of other countries. An Advisory Committee composed of outstanding practitioners, judges, and law professors reviewed the Reporters' work product. After much scholarly and practical debate, the Advisory Committee made a number of additions, deletions, and modifications. The resulting draft then went to the Council of the Law Institute, where it was again thoroughly reviewed and debated.¹⁵

The resulting Proposed Louisiana Code of Evidence was published and submitted to the legislature in 1986.¹⁶ But, predictably, the Proposed Code proved controversial. What the plaintiffs' bar liked, the defense bar disliked. What prosecutors abhorred, criminal defense lawyers applauded. This was, of course, exactly what happened with the Livingston code of the 1820s and the Law Institute code of the 1950s. The Proposed Code did not come out of committee in the 1986 legislature. In the 1987 session, another stalemate blocked the adoption of the Code.

A similar fate may have awaited the Proposed Code in the 1988 legislative session, but, on the evening before it was to be considered by Senate Committee, the opposing factions held a last-minute compromise session.¹⁷ The various interested groups confected a compromise and, after the addition of numerous amendments, the Louisiana Code of Evidence was enacted. Like most products of compromise, however, some aspects of the new Code are awkward or imperfect.

This article offers a chapter by chapter overview of the new Code with particular focus on those articles that effect substantial changes in

12. Sponsler, *Evidence: Louisiana Style*, 21 *Loy. L. Rev.* 273, 274 (1975). It would seem that controversy and failure to reach a consensus were the primary reasons for the project's failure, for there was no shortage of models. See, e.g., *Model Code of Evidence* (1942); *Uniform Rules of Evidence* (1953).

13. La. H.R. Con. Res. 250, Reg. Sess. (1979).

14. The 1979 resolution commissioned the Louisiana Judicial College with the task, but the Louisiana State Law Institute actually undertook the project. Professor George Pugh of the Paul M. Hebert Law Center was named Co-Reporter and Coordinator of Reporters, and Professor Robert Force of the Tulane Law School and I were named Co-Reporters. Mr. Kerry Triche of the Law Institute served as Director of Research for the project.

15. The process is explained in greater detail in Pugh, Force, Rault and Triche, *The Louisiana Code of Evidence—A Retrospective and Prospective View*, 49 *La. L. Rev.* 565 (1988).

16. La. H.R. 1155, Reg. Sess. (1986).

17. See Pugh, Force, Rault and Triche, *supra* note 15.

former Louisiana law or that seem to raise uncertainties for practitioners and judges.¹⁸

Chapter One—General Provisions

The first chapter of the Code deals primarily with procedural matters. Article 101 sets out the scope of the Code, stating the general rule that the Code governs all proceedings in Louisiana courts. The article refers the reader to article 1101, which offers more detailed rules on the applicability of the Code. The general thrust of article 1101 is that, subject to several exceptions, the Code applies to "the determination of questions of fact in all contradictory judicial proceedings."¹⁹

The purpose of the Code and the rule of construction is placed in article 102, which is phrased in general terms and offers the broad aims of the Code. Although it is an abridgement of the federal source provision, the change effected no significant divergence from the corresponding Federal Rule in policy or results.

Article 103 codifies principles regarding rulings on evidence that are already familiar to the Louisiana practitioner. For example, the requirement that an erroneous ruling effect "a substantial right of a party" before a reversal is proper in effect codifies the "harmless error" rule of Louisiana law. Likewise, the requirement of a timely and specific objection or motion to admonish the jury to disregard is not new to our courts;²⁰ nor are provisions allowing the judge to make a *per curiam* explanation,²¹ or to require that discussions or arguments on objections generally be held out of the hearing of the jury.²²

Prosecutors had several objections to the article as originally offered by the Law Institute, and the version adopted reflects several amendments to that original proposal. At the behest of the Louisiana District Attorney's Association (LDAA) the phrase "motion to admonish the jury" was substituted for the phrase "motion to strike." The concern was that the original language created a new and unprecedented motion for Louisiana, and that its effect was uncertain. It is believed, however, that the terms are interchangeable, and that the debate on this issue was one of semantics. When the court grants a motion to strike, the court reporter does not actually tear up or erase that portion of the

18. See generally Triche, Overview of the New Louisiana Code of Evidence: Part 1, 36 La. B.J. 76 (Aug. 1988). No slavish attempt has been made at uniformity or thoroughness of treatment, and not all of the articles nor even the trouble-spots of the new Code are here addressed.

19. La. Code Evid. art. 1101(A). See *infra* text accompanying note 220.

20. La. Code Evid. art. 103(A)(1).

21. *Id.* art. 103(B).

22. *Id.* art. 103(C).

record. Rather, the jury is instructed constructively to strike the testimony from their minds. The motion to strike is the same as a motion to admonish the jury to disregard.²³ In any event, the substitution of the latter phrase for the original language caused no serious harm.

The LDAA also objected to the provision of the Proposed Code that required a specific ground of the objection "if the specific ground was not apparent from the context";²⁴ in effect, this provision would have allowed appeal on objections for which no ground was stated so long as the ground for the objection was obvious. By Senate Committee amendment this phrase was deleted. The LDAA was correct in its argument that the proposal would change Louisiana law,²⁵ but its elimination seems unfortunate. Under former law, as under this article, no error may be appealed successfully unless the objecting party articulated the proper specific ground for the objection at trial. It will not matter, for example, that the judge ruled so quickly as to cut off the objecting party, or that the ground for objection was not stated because it was so patently obvious from the context or the question asked. This constitutes a trap for the unwary and inexperienced, which the law of evidence ought not encourage.

Prosecutors did not stand alone in their criticism of the Proposed Code. Criminal defense lawyers complained that the new Code did not include a provision parallel to Federal Rule 103(d)²⁶ embracing a "plain error" provision. The Law Institute omitted the Federal provision from the Proposed Code because, whatever its merits, it was an appellate procedural statute rather than a purely evidentiary one and thus arguably exceeded the Law Institute's mandate from the legislature. In any event, Louisiana will continue to follow the rule that absent objection and briefing on appeal, the appellate courts will assess only errors "discoverable by a mere inspection of the pleadings and proceedings" in criminal matters.²⁷

Article 104 deals with preliminary questions and aroused relatively little controversy. The criminal defense bar did raise the point that article 104(A), addressing questions of admissibility generally, and 104(B), dealing with relevancy conditioned on fact, could be used to eviscerate *State*

23. See Proposed La. Code Evid. art. 103 comment (d).

24. Proposed La. Code Evid. art. 103(A)(1).

25. See *id.* art. 103 comment (e).

26. Fed. R. Evid. 103(d).

27. La. Code Crim. P. art. 920.

v. Davis.²⁸ This realization and a review of the federal case law²⁹ led to the last-minute creation of article 1103. While inartfully phrased, that article seems to have accomplished its purpose of retaining the judge-made protections of the *Davis* case, and thus avoiding the possible application of article 104(B) to "K.I.S." evidence.

Article 105, on limited admissibility, differs from the Law Institute proposal and modifies prior Louisiana law. It mandates that the court, upon request, shall restrict evidence to its proper scope and so instruct the jury. Although the article does not address the point, it seems clear that the court retains the authority to take these sorts of protective measures even absent request.³⁰

The first chapter of the Proposed Code contained one additional provision, article 106. The proposed provision mandated that when a party introduced all or part of a photograph, writing, or recording, "an adverse party may require him at that time to introduce any other part or any other photograph, writing, or recording which ought in fairness to be considered contemporaneously with it."³¹ The Institute agreed to delete the article at the insistence of the LDAA, which feared that this specification of the familiar "rule of completeness" might go too far in affording the adversary control over a party's presentation of evidence. It is believed, however, that notwithstanding the deletion of the proposed article, a similar effect can be reached under other provisions.³²

Chapter Two—Judicial Notice

The Code's second chapter collects, streamlines, and clarifies Louisiana's law of judicial notice. Judicial notice of facts is dealt with in article 201, and judicial notice of laws is treated in article 202.

Article 201 applies only to "adjudicative" facts. A fact is adjudicative when it is directly involved in the solution of the particular dispute before the tribunal and is of the sort normally determined by the trier

28. 449 So. 2d 466 (La. 1984). *Davis* held that the accused's commission of "other crimes" must be established by clear and convincing evidence in order to make them admissible to prove knowledge, intent, or system. See La. Code Evid. art. 404(B)(1); La. R.S. 15:445-46, repealed by 1988 La. Acts No. 515. The "knowledge, intent, system" formulation is commonly denoted "K.I.S."

29. See *Huddleston v. United States*, 108 S. Ct. 1496 (1988) and *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978), cert. denied, 440 U.S. 920, 99 S. Ct. 1244 (1979), holding that Federal Rule of Evidence 104(b), rather than a "clear and convincing" standard, governs the court's determination whether the defendant committed "K.I.S." crimes to be admitted under Federal Rule of Evidence 404(b).

30. See La. Code Evid. art. 611(A); *State v. Tucker*, 354 So. 2d 521 (La. 1978).

31. Proposed La. Code Evid. art. 106.

32. See, e.g., La. Code Evid. arts. 403, 611(A).

of fact.³³ The article generally follows the corresponding federal provision and defines a fact subject to judicial notice as “one not subject to reasonable dispute”³⁴ either because it is “generally known within the territorial jurisdiction of the trial court”³⁵ or because it is “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”³⁶

As originally submitted by the Institute, paragraph (G) of article 201 provided that in all civil cases and in criminal cases when the accused requested it, the court should instruct the jury to accept as conclusive the fact judicially noticed; but if the accused did not request the instruction, the court should instruct the jury that it may, but need not, accept the fact.³⁷ Although this seemed to the Institute to afford the accused greater protection against jury abuse,³⁸ the provision was amended at the demand of the LDAA. Under the article as amended, the criminal case jury always retains discretion to disregard judicially noticed facts.³⁹

The greatest utility of article 202, on judicial notice of legal matters, is that it brings together and clarifies diverse general provisions previously scattered throughout the Revised Statutes.⁴⁰ The article slightly alters prior law in two ways. First, it requires a court to take judicial notice of ordinances enacted by parishes and municipalities within its territorial jurisdiction when the proponent has filed certified copies of the ordinance with the clerk of court.⁴¹ Second, it permits judicial notice of the official rulings and regulations of administrative boards and agencies.⁴² Although

33. Compare, “legislative” facts, which are the sort used by courts “to determine law, to declare policy, or to exercise discretion.” J. Weinstein and M. Berger, *Weinstein’s Evidence*, ¶ 201[02], at 201-21 (1988). See also La. Code Evid. art. 201 comment (b).

34. La. Code Evid. art. 201(B).

35. *Id.* art. 201(B)(1).

36. *Id.* art. 201(B)(2). At first blush this provision seems to create, in effect, an exception to the hearsay exclusion not necessarily recognized by article 803 or 804. The better approach, however, is to recognize that the court determines the factual preconditions of article 201 under article 104(A), and is thus not bound by the usual rules excluding hearsay. The sources on which the court relies will not formally be admitted into evidence, although a record of them should be made to facilitate judicial review on appeal.

37. Proposed La. Code Evid. art. 201(G).

38. See *id.* art. 201 comment (f).

39. La. Code Evid. art. 201(G).

40. See, e.g., La. R.S. 15:422, repealed by 1988 La. Acts No. 515, § 8; La. R.S. 13:3712, amended by 1988 La. Acts No. 575, § 6. Judicial notice provisions addressing highly specialized topics will remain where previously found. See, e.g., La. R.S. 3:3225 (1987) (state chemist’s reports); La. R.S. 17:2084 (1982) (Xavier University); La. R.S. 32:1473 (Supp. 1988) (certified traffic conviction record); La. R.S. 44:367 (1982) (certified copy from re-established archive). See La. Code Evid. art. 202 comment (f).

41. La. Code Evid. art. 202(A). See also *id.* art. 202 comment (b).

42. *Id.* art. 202(B)(1)(d). See also *id.* art. 202 comment (b).

the provision requiring notice to all parties is included as a subparagraph of paragraph (B),⁴³ it would seem to have been intended to apply to all instances of judicial notice under this article.⁴⁴

Chapter Three—Presumptions and Burdens of Proof

Chapter three was intentionally omitted from the first stage of the Institute's codification effort. One reason for this was that while the Institute had been directed generally to follow the federal mode, the corresponding chapters of the Federal Rules of Evidence do not go into any depth. Moreover, the controversial and divisive topics of those chapters would have further slowed the codification effort. Hence, the Institute deferred codification of these areas until the second stage of the evidence project, which is now underway. Until the current work of the Institute is completed and enacted, existing statutes and case law will continue to govern issues of presumptions and burdens of proof.⁴⁵

Chapter Four—Relevancy and Its Limits

Chapter Four is probably the most important chapter in the Code. In particular, articles 401 through 403 form the theoretical cornerstone of the Code and are the foundation upon which other provisions depend.

Article 401 defines relevancy in a purely logical—and, if it stood alone, an impractical—manner:

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.⁴⁶

The term “*any tendency*” should be stressed, for under this definition evidence may be marginally relevant as an abstract matter even though it is of so little probative weight that no one would consider it meaningfully helpful. Thus, in an intersectional collision action for damages allegedly caused by defendant's speeding, evidence that defendant was seen slightly speeding some ten years earlier would be “relevant” under this definition. Likewise, evidence that the accused in a rape trial had subscribed to Playboy magazine several years before the crime would be “relevant,” for this article deals only with what has been called

43. *Id.* art. 202(B)(2).

44. Certainly, for example, the opponent should be afforded an opportunity to confirm the accuracy of the purported text of a Guam statute or of a parish ordinance noticed under article 202(A). See also *id.* art. 611(A).

45. See, e.g., on presumptions, La. Civ. Code arts. 1849-52; La. R.S. 15:432-33 (1981); on burdens of proof, La. Code Civ. P. art. 2903, La. Code Crim. P. art. 804.

46. La. Code Evid. art. 401.

logical relevancy. This "logical relevancy"⁴⁷ definition contained in article 401 operates in tandem with article 403 "legal relevancy"⁴⁸ to give a practical relevancy rule.

Article 402 states the most important general rule of admissibility in the Code, the rule of presumptive admissibility of relevant evidence. Under this rule, all relevant evidence (as defined in article 401) is admissible except as otherwise provided.⁴⁹ Many of the remaining articles of the Code create the exceptions to article 402.

Article 403 contains the first exception to the rule of presumptive admissibility. This article articulates a balancing test already familiar to most Louisiana practitioners:⁵⁰

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time.⁵¹

As used in this balancing test, "unfair prejudice" does not refer to mere damage, however great, to the opponent's case, but rather to the creation of a tendency or temptation for the jury to decide the case on some illicit ground such as prejudice, emotion, hostility, or sympathy.⁵² This article differs from the proposed article and the federal source provision only by the deletion of the language "or needless presentation of cumulative evidence" from the end of the sentence. The LDAA, concerned that this phrase gave trial courts too much discretion to limit the state's case, insisted on the deletion. It would seem, however, that the deletion brought about no substantial change. For similar results can be reached, if warranted, by reliance on the avoidance of "undue delay, or waste of time."⁵³ The Law Institute proposal had substituted the word "shall" for the federal "may" in the term "may be excluded" in the belief that if the probative value was "substantially outweighed" by one or more of the offsetting risks the evidence must be excluded.⁵⁴

47. See C. McCormick, *McCormick on Evidence* § 185 (E. Cleary 3d ed. 1984).

48. Article 403 deals with what has been called "legal relevancy" by requiring, for admissibility, a balance of the weight of the relevancy (probative value) against various off-setting risks. Article 403 would make the evidence in the two hypothetical situations discussed above in text inadmissible. See also La. Code Evid. art. 404.

49. La. Code Evid. art. 402. When doubt arises about the admissibility of any evidence, this general rule provides a useful starting point for analysis.

50. See, e.g., *State v. Ludwig*, 423 So. 2d 1073 (La. 1982); *State v. Moore*, 278 So. 2d 781 (La. 1972).

51. La. Code Evid. art. 403.

52. See C. McCormick, *supra* note 47, § 185, at 545, *Sanders*, *supra* note 1, at 205. On the possibility of unfair surprise constituting "unfair prejudice," see *State v. Ludwig*, 423 So. 2d 1073, 1079 (La. 1983); Proposed La. Code Evid. art. 403 comment (g).

53. See also La. Code Evid. art. 611(A).

54. See Proposed La. Code Evid. art. 403 comment (d).

The return to the federal phrase was effected by Senate Committee amendment. It is to be hoped that, as has been the case in the federal system, the use of "may" will not prove significant.

The importance of this article should not be underestimated. First, it operates as the initial sieve through which evidence found relevant under article 401 must pass to be admissible. Second, article 403 serves as a restraint on the abuse or misuse of other provisions in the Code. For example, although article 404(A)(1) generally permits the criminally accused to offer testimony on his good community reputation in order to show a character trait pertinent to the crime charged, article 403 could be employed to prevent him from calling twenty different witnesses for that purpose.⁵⁵ The article 403 rule has this same residual effect in the operation of many other articles.

Many articles, of course, reflect by word or tenor that the legislature itself has made the primary balance.⁵⁶ Articles 404 through 412 address frequently recurring issues upon which the legislature has specified admissibility or inadmissibility of stated evidence for certain purposes. Where these articles apply, no primary or general "403-balance" by the courts is appropriate. It is important to recognize, however, that although most of these articles make certain evidence inadmissible for the purpose specified, it may be admissible for a distinct purpose. Sometimes the same evidence has dual relevance in that it raises two distinct lines of inferences.⁵⁷

Article 404 and 405 deal with character evidence, that is, evidence about what kind of person someone is.⁵⁸ Article 404 renders character evidence generally inadmissible, but certain parties can introduce character evidence for certain purposes.⁵⁹ For example, the criminally accused

55. See also La. Code Evid. art. 611(A).

56. See, e.g., La. Code Evid. arts. 404, 412, 608(B), 609, and 609.1. Even in the application of these articles, of course, article 403 might be employed to prevent many witnesses from testifying to the same thing or similar abuses.

57. Where the accused is charged with a burglary, for example, evidence that he committed an earlier uncharged burglary is specific act character evidence and is inadmissible. La. Code Evid. art. 404(A). If, however, a spare key to the apartment was stolen in the prior burglary and used in the more recent one, evidence that the accused committed the earlier burglary has a line of relevancy separate and apart from the prohibited character evidence inference, and may be admissible. *Id.* art. 404(B). In such instances of dual relevancy the trial court must perform a balancing assessment akin to that articulated in article 403. Now the issue is whether, comparing the probative value of each line of relevancy, the jury realistically may be expected to follow a cautionary instruction under article 105 to consider only the permissible line of relevancy while ignoring the prohibited use.

58. See C. McCormick, *supra* note 47, § 195, at 574.

59. La. Code Evid. art. 404(A) (lists exceptions to the general rule of the inadmissibility of circumstantial character evidence).

may offer reputation testimony, after proper foundation,⁶⁰ on a pertinent trait.⁶¹ Should the accused exercise this option, the prosecution may respond in kind.⁶² The prosecution may itself offer character evidence in certain narrow circumstances. In homicide cases the prosecution is allowed to introduce evidence regarding the victim's reputation for peacefulness in order to rebut the accused's evidence that the victim was the first aggressor.⁶³ Article 404(B) embodies the "knowledge-intent-system" concept.⁶⁴ The article reflects the recognition that "other crime" evidence may have independent relevance apart from the prohibited character use and may be admissible for the independent purpose.⁶⁵

There is an important but unarticulated distinction between the direct use of character evidence and its circumstantial use. Character evidence may occasionally be used *directly* (such as where character or a trait of character is itself a relevant issue in the case).⁶⁶ When it is used directly, it is admissible so long as it is relevant and does not run afoul of any other prohibition. More often, though, the evidence is used *circumstantially* to raise the inference that on a particular occasion the person acted in conformity with his character or a trait of his character.⁶⁷ It is the circumstantial use of character evidence that article 404 addresses.

While article 404 determines when character evidence is admissible, article 405 controls the type of character evidence that may be used. The structure of article 405 shows that the type of character evidence permitted depends on whether the character evidence is used directly or circumstantially. Article 405(A) generally provides that when article 404 permits the circumstantial use of character evidence, only evidence of reputation is permissible. But when character evidence is used directly, article 405(B) authorizes evidence of both reputation and specific acts.⁶⁸

60. Id. art. 405(C).

61. Id. art. 404(A)(1).

62. Id.

63. Id. art. 404(A)(2)(b). The defendant's evidence need not be character evidence. This changes former Louisiana law by following the corresponding federal provision.

64. See former La. R.S. 15:445-46, repealed by 1988 La. Acts No. 515, § 8; State v. Kahey, 436 So. 2d 475 (La. 1983); State v. Humphrey, 412 So. 2d 507, 520 (La. 1982) (on rehearing).

65. There are three possible means of proving character: general reputation, individual opinion, and specific instances of conduct.

66. This use is alluded to in article 405(B). When plaintiff sues for defamation alleging that defendant called him a thief and defendant admits the statement but defends on the ground that his statement was true, whether plaintiff is a thief is directly at issue in the lawsuit. See C. McCormick, *supra* note 47, § 187.

67. This use is governed by article 404(A).

68. La. Code Evid. art. 405(B). This is quite rare. See *supra* note 66; La. Code Evid. art. 405 comment (e).

As enacted, article 404 differs substantially from the original Law Institute proposals,⁶⁹ and sometimes in a troubling manner. First, article 404(A)(2) and (B)(2) add to the original proposal a "battered woman"⁷⁰ proviso, which eases the burden of any qualifying accused who can show a "history of assaultive behavior"⁷¹ vis-a-vis the victim. Unlike other accuseds, the defendant who can qualify under this provision and who alleges self-defense need not first offer evidence of "a hostile demonstration or overt act"⁷² before introducing evidence of the victim's dangerous character and prior specific acts of violence.⁷³ It might have been reasonable to delete entirely the "hostile demonstration or overt act" requirement,⁷⁴ but it is not clear why it is reasonable to exempt only one class of accuseds.⁷⁵ The added proviso further stipulates that "an expert's opinion as to the effects of the prior assaultive acts on the accused's state of mind is admissible."⁷⁶ The unqualified language

69. See Proposed La. Code Evid. arts. 404-05. There are several differences, only a few of which are here discussed. Others, such as the inartful redundancy ("pertinent trait . . . qualities pertinent") of article 404(A)(1) should not give rise to problems of interpretation or application.

70. Although I here employ the popular term, in fact the addition is applicable to any accused who lived in a "familial or intimate relationship" with the victim. The examples of "husband-wife, parent-child, or concubinage" are illustrative. See La. Code Evid. art. 404(A)(2) and (B)(2).

71. This term is nowhere defined. Technically, one prior act of "assaultive behavior" might constitute a "history." A fuller definition of the term must await judicial implementation. This preliminary fact is to be determined by the court without the usual evidentiary restrictions. La. Code Evid. art. 104(A). It would seem possible, under article 104(C), for the accused to testify on this issue out of the hearing of the jury.

72. La. Code Evid. art. 404(A)(2) and (B). See La. R.S. 15:482, repealed by 1988 La. Acts No. 515, § 8.

73. La. Code Evid. art. 404(A)(2) and (B). The admissibility of specific acts of violence for the purpose of proving a violent character is a change from both former Louisiana laws and the corresponding federal provision. See Fed. R. Evid. 405(a).

74. That option was seriously considered in the drafting of the Law Institute's proposed Code. It ultimately was decided that elimination of the requirement was not only politically infeasible but that the clause served a salutary purpose of preventing an accused from besmirching the reputation of the victim without offering any evidence whatever of an actual attack by him.

75. In homicide cases, for the accused to prevail on a self-defense theory there must be evidence suggesting that the defendant reasonably believed himself to be in "imminent danger" of death or great bodily harm. La. R.S. 14:20 (1986). Typically, that evidence will also constitute the evidence of the "hostile demonstration or overt act." The argument in favor of special treatment is based on what has come to be called the "battered wife syndrome," a reference to the special mental state of those who acted to defend themselves when they knew well from repeated experiences that a beating was in the offing but, in retrospect, can not easily show that the beating was "imminent" without resort to evidence of the victim's prior assaultive patterns. See generally, W. LaFave and A. Scott, *Criminal Law* § 5.7(d) (2d ed. 1986).

76. La. Code Evid. art. 404(A)(2) and (B). See also, Comment, *Battered Women*

suggesting admissibility is unfortunate, for in some instances the state of mind testified to by the expert will not be relevant under the bounds of substantive law. Perhaps this final proviso should be read as authorizing otherwise relevant expert testimony.⁷⁷

A second addition to the Law Institute's proposed Code is the final clause of the "K.I.S." provisions contained in article 404(B)(1). This rule permits evidence of other crimes or wrongs "when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding." This is an articulation of the familiar if uncertain Latin phrase *res gestae*. The redactors had hoped to keep this obfuscating anachronism⁷⁸ out of the Code altogether,⁷⁹ even in English explication. However, it seems to do relatively little harm here.⁸⁰

Besides the two additions to article 404, there is one significant deletion. Article 404 as proposed by the Law Institute contained a paragraph (C), which codified the procedural safeguards of *State v. Prieur*,⁸¹ *State v. Davis*,⁸² and *State v. Moore*.⁸³ These cases provide that when the state intends under the "K.I.S." rule to offer evidence of the accused's other uncharged crimes, it must give advance notice

and Self-Defense: Admissibility of Expert Testimony on the Battered Woman Syndrome in Virginia, 10 Geo. Mason L. Rev. 171 (1987).

77. As these provisions are lodged in the Chapter on relevancy, there seems no intent to loosen the independent requirements as to first hand knowledge, article 602, expert testimony, articles 702-06, hearsay, articles 801-06, and the like.

78. Professor George Pugh of the Paul M. Hebert Law Center faculty, who led the Law Institute's codification project, is fond of saying to students and anyone else who will listen that *res gestae* is Latin for "let it in." In fact, of course, it means "thing done," but his version is not only funnier but is in fact a better guide to how the term traditionally has been applied by Louisiana courts.

79. It seems clear that the Latin term has served as a substitute for analysis. The concept is both a specification of relevancy principles—that all portions of the act or transaction being litigated which are necessary or helpful to a full appreciation of the event are admissible—and a fuzzy label for several hearsay exceptions. The Reporters had hoped that articles 401 through 403 and 803(1), (2), and (3) would have made even indirect references to the "*res gestae*" unnecessary, as in the federal system, and thus permitted this overworked ghost to take its well deserved rest.

80. But see La. Code Evid. art. 801(D)(4), discussed at *infra* text accompanying notes 186-87. In the article 404(B)(1) formulation the key word is "integral." It must be interpreted in light of article 403. In a prosecution for armed robbery, for example, evidence that the accused slapped the victim is an "integral" part of the act for, although it constitutes a separate crime, it shows the force or intimidation necessary for robbery. Evidence that at the time of the incident the accused had pornographic photos of young children in his wallet is not "integral" and is inadmissible. See generally, C. McCormick, *supra* note 47, § 190.

81. 277 So. 2d 126 (La. 1973) (on rehearing).

82. 449 So. 2d 466 (La. 1984).

83. 278 So. 2d 781 (La. 1973).

to the defense, and must satisfy the court prior to trial both that the evidence is not a subterfuge for illustrating bad propensity and that clear and convincing evidence will show that the accused committed the other crimes.⁸⁴

The LDAA successfully argued that these judicially created safeguards should not be made part of the new Code. Upon their deletion, however, a problem existed. Evidence of other crimes becomes relevant only if the accused committed those crimes; hence the court would decide this preliminary question of conditional relevance under the rule of article 104(B). Under that rule, the evidence of other crimes would be admissible if there was "evidence sufficient to support a finding" that the accused committed them. Although this rule could be read to dilute the "clear and convincing" standard, there was no intent to affect that standard nor any of the other judicially created protections. At the last minute, therefore, the contending forces concocted the hastily drawn article 1103. Although its reference to article 104(A) rather than 104(B) seems erroneous,⁸⁵ the title of the article makes its intent crystal clear: these important jurisprudential protections of the criminally accused, while not codified, are preserved.

Like article 404, article 405 suffered amendments backed by the LDAA. The proposed article of the Law Institute permitted opinion evidence on character whenever reputation evidence of character could be introduced.⁸⁶ As amended, article 405(A) permits only reputation evidence. The amended article does follow the Louisiana tradition, but the Institute based its view on the corresponding federal provision⁸⁷ and on the national trend. In most instances, it seems, witnesses actually testify to their own opinions of another's character but simply put them in the reputation form required by law. Thus the original proposal may have been a more straightforward recognition of the realities of character testimony.

Article 406 stresses the importance of distinguishing between habit, which is generally admissible as circumstantial evidence, and character, which is generally inadmissible as circumstantial evidence. Habits are always much more specific than character traits, and tend to be invariable and semiautomatic.⁸⁸ The marked difference in treatment of character and habit is based on common experience: although people not infrequently act contrary to their character traits, they very rarely act contrary to their habits.

84. Proposed La. Code Evid. art. 404(C).

85. The difficulty in distinguishing between paragraphs 104(A) and 104(B) is emphasized in article 104 comment (b).

86. Proposed La. Code Evid. art. 405(A).

87. Fed. R. Evid. 405(a).

88. See C. McCormick, *supra* note 47, § 195.

Article 407, concerning evidence of subsequent remedial acts, codifies prior Louisiana law and follows the federal provision. It does not specifically address the application of the rule to strict and product liability cases.⁸⁹ At the suggestion of the Louisiana Trial Lawyers Association during compromise negotiations the words "if controverted" were deleted from the second sentence of this article.⁹⁰ As originally proposed, evidence of subsequent measures might be admissible not to prove negligence but to prove another relevant point, but only if that point is truly contested under the facts of the case. If the article as enacted were read literally, therefore, evidence of subsequent acts will be admissible to prove any relevant point other than negligence or culpable conduct, regardless whether the point to be proved is abundantly clear from the facts and is not contested by or even is stipulated to by the opponent. This encourages a sham, since it is predictable that the jury will misuse the evidence as proof of negligence, notwithstanding a cautionary instruction under article 105 to the contrary. This untoward result should be avoided by sound application of article 403.⁹¹

Together, articles 408 and 410 generally bar evidence of compromises in civil cases and plea discussions in criminal cases. An amendment to the Institute proposal created article 408(B), which seems to make evidence of attempted compromises admissible in criminal cases. This creates a conflict with article 410, which clearly makes plea discussions inadmissible in criminal cases. The intent must have been that the more specific provisions of article 410 prime the hastily drawn amendment to article 408. The same result can be reached by use of the phrase in article 408(B), "[t]his Article does not require the exclusion . . .,"⁹² and recognition that article 410 does require the exclusion of most of the evidence referred to in article 408(A). In addition to those provisions of 408(B), the last clause of that article authorizes the admissibility, except as article 403 or other provisions of the Code may prohibit, of evidence of the accused's attempt to make direct or indirect restitution to the victim. Again, this is at theoretical odds with the exclusion of such evidence in civil cases.⁹³

89. See La. Code Evid. art. 407 comment (b); *Toups v. Sears Roebuck & Co.*, 507 So. 2d 809 (La. 1987), noted at Note, Admission into Evidence of Postaccident Warnings in Product Liability Suits: *Toups v. Sears, Roebuck & Co.*, 34 Loy. L. Rev. 448 (1988).

90. Proposed La. Code Evid. art. 407. See also Fed. R. Evid. 407.

91. Louisiana Code of Evidence article 403 serves a secondary function in preventing abuse of other provisions in the Code. See *supra* text accompanying notes 51-56. When evidence is offered putatively to prove a point that is not contested or is otherwise clear, its probative value is substantially diminished. When it is predictable that jurors will use it more for its prohibited purpose than for the independent line of relevancy for which it is nominally offered its "unfair prejudice" increases.

92. La. Code Evid. art. 408(B) (emphasis added).

93. *Id.* art. 408(A).

Payment of medical and similar expenses is dealt with in article 409.⁹⁴ By its terms it applies only in civil cases; moreover, article 408(B) makes clear that this evidence is admissible in a criminal case. It is sometimes important to distinguish payments or offers to compromise, covered under article 408, from payments or offers to pay medical and like expenses, covered under article 409. The former expressly excludes statements or conduct surrounding the payment or offer while the latter does not.⁹⁵ For example, in a negotiation context the statement "I ran the red light, so I'll pay you \$1,000 to settle the case" is inadmissible in its entirety. But with the statement "I ran the red light, so I'll pay your medical expenses" only the latter part of the statement is inadmissible. The admission concerning the running of the red light is admissible.

One portion of article 409 may be misleading, for it suggests that evidence regarding payment of medical expenses is not admissible "to reduce" liability. The intent is that evidence of the payment should not go to the jury for the purpose of currying its favor by raising the inference that the payor is charitable or a humanitarian. Clearly the prior payment may be employed as an offset of damages once assessed.

On the admissibility of evidence of liability insurance coverage, article 411, another product of last-minute compromise, governs. The article does not say whether the evidence is admissible to prove negligence or wrongful conduct,⁹⁶ but it seems clear that under article 403 such evidence would be inadmissible for that purpose. The article specifies that when the existence of insurance coverage is admissible⁹⁷ the amount of coverage is generally inadmissible, unless disputed.

The new "rape-shield" statute is found in article 412. Analytically, of course, it belongs in article 404 since it deals with the victim's character for promiscuity, but it is lodged here simply in deference to the federal numbering system. The article expands the protection⁹⁸ to

94. The article is both an expansion and a restriction of the federal source provision. It goes further than Federal Rule of Evidence 409 in that it applies by its terms to property damage cases as well as personal injury suits. Unlike the federal provision, however, it is applicable only in civil cases.

95. The rationale for the difference is that full and unfettered exchange is necessary for compromise negotiations, but not for an offer to pay medical expenses. See Proposed La. Code Evid. art. 408 comment (d), art. 409 comment (c).

96. Cf. Fed. R. Evid. 411; Proposed La. Code Evid. art. 411.

97. Insurance might be admissible to show material facts other than negligence or wrongful conduct, such as agency, ownership, applicability of the direct action statute, or to attack the credibility of a witness. See Fed. R. Evid. 411; Proposed La. Code Evid. art. 411.

98. The article generally makes the victim's reputation for and prior specific acts of consensual intercourse inadmissible. Like the federal source provision, its purpose is "to protect rape victims from degrading and embarrassing disclosure of intimate details about

victims offered under the former statute⁹⁹ in several ways. It applies to all cases based on "sexually assaultive behavior," and mandates a pretrial motion and closed hearing when the defense intends to offer evidence of the victim's sexual acts prior or subsequent to the act now on trial.¹⁰⁰ The article permits not only evidence of prior sex acts with the accused on the issue of consent,¹⁰¹ but also evidence of acts with others offered to establish the source of semen or injury.¹⁰² Although the LDAA prevailed in deleting a clause permitting the introduction of any evidence having a "substantial and direct bearing on a clearly pertinent disputed factual issue,"¹⁰³ it seems clear that any such defense evidence is constitutionally required to be admitted.¹⁰⁴

The unfortunate and unnecessary thrust of article 413, which addresses evidence of settlement or tender, was concocted by the Louisiana Trial Lawyers Association during the last minute bargaining session. Its general rule—that amounts paid in settlement or by tender shall not be disclosed—is generally innocuous but unnecessary in light of articles 408 and 403. This article, unlike others in this series, does not specify the purpose for which the evidence is inadmissible. Nor does the article contain a second sentence, like others in the series, making clear that the evidence may be admissible for other purposes.¹⁰⁵ It appears, rather, to be a blanket prohibition without exceptions. It is believed that this was not the intent, but rather the result of oversight due to hurried drafting. If, hypothetically, a potential plaintiff in a multiple-plaintiff action for damages settles his claim with the defendant for an unusually high amount and then testifies favorably to defendant, could not the plaintiff elicit the amount of the settlement on cross-examination in

their private lives," 124 Cong. Rec. 34912 (1978), cited in M. Graham, *Handbook of Federal Evidence*, § 412.1, at 293 n.1 (2d ed. 1986).

99. La. R.S. 15:498, repealed by 1988 La. Acts No. 515, § 8.

100. La. Code Evid. art. 412(C), (D) and (E).

101. *Id.* art. 412(B)(2).

102. *Id.* art. 412(B)(1). These terms seem broad enough to include pregnancy or disease as well. The former statute seemed to disallow all such evidence, but *State v. Langendorfer*, 389 So. 2d 1271 (La. 1980), held it admissible to prove the source of semen nonetheless.

103. Proposed La. Code Evid. art. 412(B)(3).

104. See *State v. Vaughn*, 448 So. 2d 1280 (La. 1984); *State v. Langendorfer*, 389 So. 2d 1271 (La. 1980); Fed. R. Evid. 412(b)(1). The deleted phrase was an attempt to breathe life into the corresponding federal references to evidence "constitutionally required to be admitted." Fed. R. Evid. 412(b)(1). Deletion of the phrase does not, of course, change the tenor of the constitution, but it does make it more difficult for the novice or inexperienced criminal practitioner to spot the issue.

105. Through similar apparent oversight Federal Rule of Evidence 409 contains no second sentence similar to others in the series. See Proposed La. Code Evid. art. 409 comment (e). Federal courts, however, have permitted evidence of payment of medical expenses when offered for a purpose other than to prove liability. See M. Graham, *supra* note 98, § 409.1, at 267 n.4.

order to show the witness's bias? Under any rational system of law the answer is clearly yes, but this article seems to prohibit the evidence. Articles 401 and 402 can play a secondary role in limiting this article to its intended, but unarticulated, scope.

Chapter Five—Privileges

Until the Law Institute completes the second stage of its codification effort and the legislature acts on it, existing statutes and case law on privileges will continue to govern.¹⁰⁶

Chapter Six—Witnesses

Since the first five articles of this series are relatively uncontroversial and do not effect substantial changes in prior Louisiana law, extended commentary is unnecessary. Article 601 retains Louisiana's traditional definition of the competent witness as a "person of proper understanding."¹⁰⁷ Article 602 contains the familiar first-hand knowledge requirement. Article 603 on oaths and 604 on interpreters seem direct and unambiguous. So does article 605, which disqualifies the trial judge from being a witness in the case, although it may slightly modify former law.¹⁰⁸

Article 606 generally prohibits anyone from testifying in a case in which that person serves as juror. The article also regulates the admissibility of a juror's testimony or affidavit in an inquiry into the validity of the verdict or indictment. The general rule is that no juror may testify on the tenor of deliberation leading to the verdict or indictment. The exception permits juror testimony or affidavit "on the question whether any outside influence was improperly brought to bear"¹⁰⁹ or, in criminal cases, "whether extraneous prejudicial information was improperly brought to the jury's attention."¹¹⁰

106. See *supra* text accompanying note 45. For existing privileges, see, e.g., La. R.S. 13:3734-34.1 (Supp. 1988); La. R.S. 15:475-78 (1981 & Supp. 1988). See generally Forth, Triche, *The Current State of Evidentiary Privileges In Louisiana*, 49 La. L. Rev. 731 (1989).

107. See La. R.S. 15:461 (1981), repealed by 1988 La. Acts No. 515, § 8; La. R.S. 13:3665 (1968). Compare Fed. R. Evid. 601. The determination of competency is an issue governed by article 104(A).

108. La. R.S. 15:274, repealed by 1988 La. Acts No. 515, § 8, seemed to permit the judge to be a witness. But *State v. Eubanks*, 94 So. 2d 262 (La. 1957), seemed to hold otherwise.

109. La. Code Evid. art. 605(B).

110. *Id.* La. R.S. 15:470, repealed by 1988 La. Acts No. 515, § 8, and La. R.S. 15:471 (1981), amended by 1988 La. Acts No. 515, § 6, prohibited any and all attempts to "impeach" a jury verdict with a juror's testimony. That blanket prohibition had been modified by the courts. See, e.g., *State v. Sinegal*, 393 So. 2d 684 (La. 1981); *State v. Wisham*, 384 So. 2d 385 (La. 1980).

Most of the remaining articles of Chapter Six govern attacks on the credibility of witnesses.¹¹¹ On its face article 607(A) appears to effect one of the most major departures from former law. It provides any party may attack the credibility of a witness, including the party calling him. The attacking party no longer must show "hostility,"¹¹² "surprise,"¹¹³ or in civil cases, "adverse party" status.¹¹⁴ On closer examination, however, the practical significance of the change is not great, for it is rare that a party would have any reason to attack his own witness unless there were hostility, surprise, or adverse party status.¹¹⁵

The provision of article 607(A) allowing a party to impeach his own witness may be open to an abuse that would permit a party to circumvent the hearsay rule. A witness's unsworn prior inconsistent statements are generally inadmissible hearsay.¹¹⁶ In order to get these out-of-court statements before the jury, however, a party might call a witness for no other purpose than to "attack his credibility" with the prior statement, which could not be introduced directly. Although a limiting instruction would surely follow,¹¹⁷ the party introducing the hearsay would know that jurors could not follow a cautionary instruction to ignore the assertive use of the out-of-court statement. This should not be permitted and can be curbed only by judicially-imposed restraints.¹¹⁸

Article 607(B) states the familiar rule that a witness's credibility may not be attacked until he has testified and may not be rehabilitated until attacked. The second sentence of the article, however, allows questioning regarding the "relationship [of the witness] to the parties, interest in the lawsuit, or capacity to perceive or recollect." This provision represents a significant change from former law.¹¹⁹ In effect, this permits limited "rehabilitation" prior to attack when the imminence and tenor of the attack is predictable. When, for example, a witness wearing thick glasses is called to testify to the details of what he saw, questioning on direct about his good eyesight while wearing glasses should be permitted under this provision. Similarly, a witness who is related to the calling party may be questioned on direct to establish his lack of bias.

111. Of course, articles 401 through 403 still apply in their secondary role, as is generally the case throughout the Code.

112. See La. R.S. 15:487, repealed by 1988 La. Acts No. 515, § 8.

113. See *id.* §§ 487-88, repealed by 1988 La. Acts No. 575, § 8.

114. See La. Code Civ. P. art. 1634 (1970).

115. One notable change is that former law in instances of hostility or surprise limited impeachment to prior inconsistent statements, whereas no such limitation is found in the new Code. See La. Code Evid. art. 607(C) and (D).

116. *Id.* art. 801(C). Cf. *id.* art. 801(D)(1)(a).

117. *Id.* art. 105.

118. See, e.g., *Whitehurst v. Wright*, 592 F.2d 834 (5th Cir. 1979); La. Code Evid. art. 607 comment (a). Articles 403 and 611(A) may be cited in support of the limitation.

119. See, e.g., *State v. Passman*, 345 So. 2d 874 (La. 1977).

Paragraphs (C) and (D) of article 607 provide a general framework for analyzing the admissibility of evidence introduced to attack credibility. Article 607(C) deals with intrinsic attack, that is, attack by examination. The provision is broad and permissive, generally permitting questioning that is relevant to truthfulness or accuracy of testimony.¹²⁰

Article 607(D) regulates the admissibility of extrinsic evidence, that is, any evidence other than that elicited from the witness while on the stand. Subparagraph (D)(1) addresses extrinsic attacks to show bias, interest, corruption, or a defect of capacity.¹²¹ But perhaps misleadingly, the provision states without qualification that the evidence "is admissible."¹²² This seems overbroad unless carefully construed. Because the provision is found in the chapter on witnesses, it should be read as a legitimation of this method of extrinsic impeachment. This is not to say that such evidence always escapes the hearsay ban or other exclusionary rules. Further, it would seem that this provision, like most others in the Code, must be applied in light of the secondary applicability of the balancing provisions of article 403. If, for example, a white witness testified on direct examination contrary to the interests of a black party to the lawsuit, evidence that the white witness was once seen at a cocktail party chatting briefly with a person whose cousin had attended a K.K.K. rally would certainly be inadmissible. And even more clearly inadmissible would be the testimony of twenty different witnesses to the same cocktail party chat.

Subparagraph (D)(2) of article 607 presents a subtle puzzle. It appears clear enough on its face: the court should admit extrinsic evidence that contradicts the witness's testimony or shows the witness's prior inconsistent statement¹²³ unless the court finds that the risks of undue consumption of time, confusion of the issues, or unfair prejudice substantially outweigh the probative value of the evidence on the witness's credibility. But if article 403 applies to subparagraph (D)(1),¹²⁴ then (D)(1) does not appear to differ meaningfully from (D)(2). The secondary applicability of article 403 engrafts onto (D)(1) the same balancing test as that expressly found in (D)(2). It makes no sense to divide paragraph (D) into two parts if (D)(1) and (D)(2) state essentially the same test. The

120. The article allows introduction of this evidence "[e]xcept as otherwise provided by legislation." This makes reference, *inter alia*, to article 403's balancing test. See also, e.g., La. Code Evid. arts. 608(B), 609, 609.1, and 610.

121. Louisiana Code of Evidence article 613 imposes a foundational requirement of intrinsic questioning and failure to admit the fact prior to offering extrinsic evidence of bias, interest, corruption, or defect of capacity.

122. La. Code Evid. art. 607(D)(1).

123. Louisiana Code of Evidence article 613 establishes the foundation of intrinsic questioning and failure to admit prior to extrinsic evidence of a prior inconsistent statement.

124. See *supra* text following note 122.

answer lies in the hurried redrafting of the Institute's original proposal.

Subparagraph (D)(2) constitutes the "collateral evidence" rule.¹²⁵ As proposed by the Institute, the evidence specified in article 607(D)(2) was "not admissible"¹²⁶ unless the court found that its probative value on credibility "substantially outweigh[ed]"¹²⁷ the listed risks. The LDAA took the view that this phraseology was too negative, and that the provision should be phrased in somewhat more receptive terms. As altered, however, the text of (D)(2) seems largely duplicative of that of (D)(1) as supplemented by article 403.¹²⁸ It is believed, however, that courts can reach equitable results by careful application of the balancing test of subparagraph (D)(2).¹²⁹ Even as enacted the clause was intended to exclude all or most of the extrinsic evidence that would have been classed as "collateral" under former law.

Article 608 deals with attacks on a witness's credibility through the use of character evidence. The article makes one important change in Louisiana law: only evidence of the witness's reputation for truthfulness or untruthfulness may be presented, not evidence of general moral character. Except for that divergence, the article essentially codifies prior law.¹³⁰ Paragraph (B), in accordance with pre-Code law, prohibits extrinsic inquiry into the witness's prior acts for the purpose of proving his truthful or untruthful character¹³¹ but does not prohibit such inquiry for a distinct purpose, such as illustrating bias, interest or corruption,¹³²

125. See La. Code Evid. art. 607(D)(2); see also *id.* comments (k) through (o); La. R.S. 15:494, repealed by 1988 La. Acts No. 515, § 8.

126. Proposed La. Code Evid. art. 607(D)(2) (emphasis added); see also *id.* comments (a) and (b).

127. Proposed La. Code Evid. art. 607(D)(2).

128. See *supra* text following note 122.

129. All extrinsic evidence offered solely to attack a witness's credibility is of somewhat questionable probative value in that it is time consuming and does not relate directly to any material issue in the case. When the extent of its diminishment of credibility is substantial, particularly vis-a-vis an important witness, courts have properly tended to permit it. When the effect on credibility is relatively weaker, however, the extrinsic evidence has been excluded as "collateral." See generally, C. McCormick, *supra* note 47, §§ 36 (prior inconsistent statements) and 47 (contradictions). The Federal Rules of Evidence contain no provision akin to article 607(D), but federal courts have been effective in addressing the "collateral evidence" issue by use of Federal Rule of Evidence 403, essentially the same test as Louisiana Code of Evidence article 607(D)(2). Because article 607(D)(1) is phrased in even more receptive terms, Louisiana courts should be slightly more receptive to that evidence than to the evidence referred to in (D)(2).

130. Compare La. R.S. 15:490, repealed by 1988 La. Acts No. 515, § 8, which virtually invited the jury to misuse the evidence when the accused was the witness.

131. By prohibiting even cross-examination as to the witness's particular "acts, vices or courses of conduct," article 608(B) is more restrictive than its federal counterpart but retains the traditional Louisiana rule embodied in La. R.S. 15:491, repealed by 1988 La. Acts No. 515, § 8.

132. See La. Code Evid. arts. 607(C) and (D)(1).

or defects of capacity.¹³³ Paragraph (C) permits on cross-examination of the character witness the "have you heard" questions which are intended to test the basis of his knowledge of the first witness's reputation. These sorts of questions were authorized by *Michelson v. United States*¹³⁴ and have long been permitted under Louisiana law.¹³⁵

Attacks on a witness's credibility by evidence of his prior convictions of crime is regulated in civil cases by article 609 and in criminal cases by article 609.1. This is one of the relatively few topics in the Code upon which the contending forces could not agree on a unitary rule. The civil rule is a modification of the federal source provision.¹³⁶ The criminal case provision generally codifies prior law, which allowed evidence of the fact of a witness's prior criminal convictions,¹³⁷ but also specifies three instances when the actual details of the crimes are admissible.¹³⁸

The original Institute proposal for article 609 was quite similar to the federal model and to the rule finally adopted for civil cases. Proposed article 609 would have applied in both civil and criminal cases. In the

133. See *id.*

134. 335 U.S. 469, 69 S. Ct. 213 (1948). The *Michelson* rule is also codified in the last sentence of article 405(A).

135. See the procedural safeguards established in *State v. Johnson*, 389 So. 2d 372 (La. 1980) (there must be no question that the act took place, a reasonable likelihood that word of the act would have passed through the community, neither the act nor the rumor may be too remote in time, and the act must be related to truthfulness). These are not modified by the new Code.

136. Fed. R. Evid. 609. Among the changes, article 609 specifies that no details of the crime are admissible, simplifies the ten-year limit provision found in Federal Rule of Evidence 609(B), and adds paragraph (F) to clarify that arrests, indictments, and prosecutions are not admissible under this article. In rare instances arrests, indictments, or prosecutions may be admissible for another purpose, however, such as showing bias, interest, or corruption. See La. Code Evid. arts. 607(D), 613; *State v. Brady*, 381 So. 2d 819 (La. 1980).

137. See La. R.S. 15:495, repealed by 1988 La. Acts No. 515, § 8. This article is an amendment to the Law Institute proposal, which was closer to the Federal Rule.

138. La. Code Evid. art. 609.1(C). Subparagraph (C)(1), permitting details when the witness denies or does not recall the conviction, seems unfortunate. It acts as an inappropriate penalty on the witness who is confused, deceptive, or ill-prepared. Subparagraph (C)(2), permitting details when the witness has testified to exculpatory facts concerning the conviction, is equitable but does not reflect clearly the probable legislative intent that only the adversary is permitted to show the true (heinous) nature of the offense to counter the witness's exculpatory version. As written the provision seems to permit the party calling the witness to use extrinsic evidence to bolster the witness's exculpatory version of the crime underlying his conviction. This was not, it is believed, the drafters' intent. Note, however, that the preface of paragraph (C) provides that such evidence "may" become admissible. See also *id.* art. 403. Subparagraph (C)(3), permitting details if highly probative, seems sound but warrants the reminder that the "probative value" here addressed relates only to the witness's credibility. An example of the subsection would be when the theft for which the witness was convicted was effected by particularly untruthful practices.

latter class of cases, the proposed provision offered a substantial change from former law, under which *any* criminal conviction could be used to attack the credibility of a witness.¹³⁹ Quite predictably, this aspect of the proposal met the wrath of criminal prosecutors. The prosecutors possessed the political power to defeat the entire Code and thus were able to force modification of this proposal.

The defeat of this reform and the functional retention of former law on this issue may represent the greatest failing of the codification project. Criminal practitioners are well aware that when the accused testifies and the jury learns of his prior convictions, the jury cannot and does not follow a cautionary instruction to consider the convictions only on the issue of the witness's credibility. In fact, the jurors use evidence of prior convictions for their prohibited character evidence purpose.¹⁴⁰ The predictability of the jury's misuse of the evidence of prior convictions increases in direct proportion to the similarity of the prior crimes with the crime charged. It is lamentable that this abuse will continue under the new Code.¹⁴¹

Article 610 prohibits use of the religious beliefs of a witness to attack or support his credibility, except for those rare occasions when a witness's religious affiliation is relevant for another purpose, such as to show bias or interest. It seems inappropriate to specify that religion is inadmissible when offered "for the *sole* purpose" of attacking credibility.¹⁴² The word "sole" is not only an addition to the Law Institute proposal but also a departure from the federal rules, which contain no such limiting word. The inclusion of the word "sole" might suggest that when religion is offered for a permissible purpose, the prohibition contained in article 610 does not apply, and hence the evidence becomes admissible for the prohibited credibility purpose as well. Despite this implication, evidence of religious convictions should not be admissible to show credibility under any circumstances, and when introduced for

139. See La. R.S. 15:495, repealed by 1988 La. Acts No. 515, § 8; Proposed La. Code Evid. art. 609.

140. See La. Code Evid. art. 404(A). Thus the accused with a prior record faces the dilemma whether to stay off the stand and have the jury draw negative inferences from his silence or to take the stand and face the increased likelihood of conviction due to the jury's misuse of his prior convictions. See C. McCormick, *supra* note 47, § 43, at 99.

141. Louisiana is believed to be the only American jurisdiction permitting the use of any criminal conviction to attack credibility. See G. Lilly, *An Introduction to the Law of Evidence*, § 8.3, at 344 n.11 (2d ed. 1987); C. McCormick, *supra* note 47, § 43, at 93 n.5. Given the experience of Proposed Louisiana Code of Evidence article 609, legislative reform on this issue does not seem predictable. It is not impossible that the judiciary could curb this abuse on constitutional grounds. See, e.g., *State v. Santiago*, 53 Haw. 254, 492 P.2d 657 (1971).

142. La. Code Evid. art. 610 (emphasis added).

a permissible purpose, the court should issue a cautionary instruction under article 105.

Article 611 contains important procedural rules applicable to witnesses and to the questioning process. Paragraph (A) recognizes broad judicial discretion in all matters concerning witnesses and proof. Paragraph (B) uses the term "cross-examination" as meaning simply the second questioning, that is, the questioning after the calling party has completed his questioning.¹⁴³ Under the Code, the term "cross-examination" does not suggest a necessary right to question beyond the scope of the direct or to lead the witness. Thus when the civil plaintiff calls the defendant to the stand, subsequent questioning by defense counsel, while technically "cross-examination," is generally limited to the scope of the direct examination since defense counsel may call his client for questioning as to other matters during his own case. Otherwise, with functionally adverse witnesses, the "wide-open" rule of cross-examination is retained.

Article 611(C) limits the leading of one's own witness to four instances: (i) when the witness is an adverse party, or is "identified with"¹⁴⁴ an adverse party; (ii) when the witness is hostile;¹⁴⁵ (iii) when the witness cannot otherwise testify;¹⁴⁶ or, (iv) when the witness is an expert.¹⁴⁷ Leading questions are generally prohibited when counsel is "cross examining" his own client or a friendly witness.¹⁴⁸ Paragraph (D) codifies

143. See *id.* art. 611 comment (c).

144. This term generally encompasses, but is broader than, the term "representative" as defined in Louisiana Code of Civil Procedure article 1634 (1970). It would include, for example, plaintiff's questioning of the insured in a direct action against only the insurance company, or, usually, his questioning of one spouse in an action against only the other. And the term is broader than the "hostility" exception in La. R.S. 15:277, repealed by 1988 La. Acts No. 515, § 8. See La. Code Evid. art. 611 comment (f).

145. The phraseology of article 611(c) suggests that there are five exceptions, for the article contains the phrase "a witness who is unable or unwilling to respond to proper questioning." The language, a change from the article as proposed by the Law Institute, seems to have no additional effect at all. To the extent the witness is "unwilling" he seems subject to leading questions as a "hostile" witness. See La. R.S. 15:277, repealed by La. Acts No. 515, § 8; *State v. Monk*, 315 So. 2d 727 (La. 1975). To the extent he is "unable," he is subject to leading questions under the "except as may be necessary to develop his testimony" clause. See *infra* note 146. Nothing in this article limits the court's power to instruct the witness to answer or to hold him in contempt.

146. Louisiana courts have long permitted, in effect, leading a witness "as may be necessary to develop his testimony." La. Code Evid. art. 611(C). This was intended to cover such instances as the child witness, the very aged witness, the witness who does not speak English well, or the refreshing of a witness's recollection. See Proposed La. Code Evid. art. 611 comment (b).

147. Leading an expert is permitted only when the expert testifies as to his opinions. La. Code Evid. art. 611(C).

148. Here Paragraph (C) again employs the term a witness "identified with" the questioner's client. See *supra* note 144.

familiar limits on the scope of redirect examination and the possibility of recross.¹⁴⁹ Paragraph (E), governing rebuttal, was highly controversial. The proposed article authorized a right to surrebuttal "if necessary or appropriate to prevent unfairness."¹⁵⁰ Although the proposed reference to a possible surrebuttal was deleted, there seems no question that in unusual cases such a right should be recognized.¹⁵¹

The witness's use of a writing to refresh his recollection is regulated by article 612(A) in civil matters and by 612(B) in criminal cases. These provisions generally follow pre-existing law.

Article 613 creates the familiar foundation requirement which prohibits the use of extrinsic evidence to show bias, interest or corruption, prior criminal convictions, or prior inconsistent statements unless the witness has been asked about the fact but has failed to admit it.¹⁵²

Article 614 sets out the rules governing the calling and questioning of witnesses by the trial judge. The provision is inartfully drawn in that the "exception" of paragraph (D) virtually eliminates the original proposal, which left the judge relatively free to call and question witnesses.¹⁵³ Under paragraph (D), the judge may not question a witness or call a witness in a jury case unless authorized by all parties. This largely prevents the occasional clarifying question that helps prevent jury confusion and speeds up the trial. The LDAA opposed the original proposal, concerned that some judges might "take over" the presentation of the case.

Sequestration of witnesses is regulated by article 615, which generally preserves and clarifies former law by specifying those persons who may not be excluded from the courtroom. The LDAA proposal allowed the trial judge to exclude the victim of a crime from a sequestration order, but this provision stirred controversy. At the demand of the criminal defense bar, moderating factors to this exemption were included. Should the prosecutor wish to have the victim remain in the courtroom, the victim must testify before the exemption from sequestration is granted and cannot be recalled either in the case-in-chief or in rebuttal. Moreover, the victim may not sit at counsel table, and the court shall otherwise act to maintain decorum and assure a fair trial.¹⁵⁴

149. See La. R.S. 15:281, repealed by 1988 La. Acts No. 515, § 8.

150. Proposed La. Code Evid. art. 611(E).

151. See *State v. Turner*, 337 So. 2d 455 (La. 1976); *State v. Scott*, 320 So. 2d 538 (La. 1975); Proposed La. Code Evid. art. 611(E) & comment (d). In some cases the right seems constitutionally mandated. See La. Const. art. I, § 16.

152. An "interests of justice" exception permits waiver of the foundation in unusual cases, such as when the existence of a prior inconsistent statement was discovered only after the witness had been excused and is no longer available. See La. Code Evid. art. 613 comment (c).

153. Proposed La. Code Evid. art. 614.

154. La. Code Evid. art. 615(A)(4).

Chapter Seven—Opinions and Experts

Although Chapter Seven effects some improvements in prior law, its primary benefit lies in clarification and codification of the law in this important area. It is a short Chapter, consisting of only six articles.

Article 701 permits lay opinion in a manner that seems at first blush to be markedly more receptive to such evidence than was former law,¹⁵⁵ but which, upon further analysis, does not effect major change. The former statute seemed to prohibit absolutely testimony by a lay witness on any "impression or opinion."¹⁵⁶ The difficulty arose in distinguishing between opinion and fact, and often testimony that seemed more the former than the latter was permitted.¹⁵⁷ The appellate cases on this point make clear that Louisiana courts have often permitted opinions, but usually only when the opinion is based directly on the perceptions of the witness, rather than on hearsay or speculation, and when the opinion is one about which a lay witness can usually offer a reliable opinion that is not likely to confuse or mislead the fact-finder.¹⁵⁸ The new provision requires no more and no less. The demand that the opinion be "based on the *perception* of the witness"¹⁵⁹ excludes opinions based primarily on conclusion or speculation. Likewise, the requirement that the opinion be "helpful"¹⁶⁰ to the trier-of-fact, although vague, permits the court to keep from the jury opinions of the sort generally unreliable.

Expert testimony and the bases of expert opinions are regulated by article 702 and 703 respectively. They do not make any substantial changes from former law.¹⁶¹

The thrust of article 704 is that an otherwise admissible opinion "is not to be excluded solely because it embraces an ultimate issue."¹⁶²

155. See La. R.S. 15:463, repealed by 1988 La. Acts No. 575, § 8, which provided that the lay witness "can testify only as to facts within his knowledge, and neither as to any recital of facts heard by him, nor as to any impression or opinion that he may have."

156. *Id.*

157. See, e.g., *State v. Sayles*, 395 So. 2d 695 (La. 1981) (powder on shirt was sheetrock dust); *State v. Garner*, 229 So. 2d 179 (La. 1969) (substance was blood); *State v. Robins*, 499 So. 2d 94 (La. App. 1st Cir. 1986) (voice on tape was female). See also Proposed La. Code Evid. art. 701 comment (c).

158. See, e.g., *State v. Kahey*, 436 So. 2d 475 (La. 1983) (despite "opinion" prohibition, witness may testify to reasonable inferences based on his personal observation); *State v. Alexander*, 430 So. 2d 621 (La. 1983) (witness may testify to inferences several steps removed from raw-sense perceptions if more helpful to jury than mere recitation of factual perceptions); Coon, *Lay Opinions in Criminal Cases: A Flexible Prohibition*, 33 La. B.J. 12 (1985).

159. La. Code Evid. art. 701(1) (emphasis added).

160. *Id.* art. 701(2). See also *id.* art. 403.

161. See La. R.S. 15:464, 466, repealed by 1988 La. Acts No. 515, § 8. See generally the comments to Louisiana Code of Evidence articles 702 and 703.

162. La. Code Evid. art. 704.

During the early negotiations on the Code, many considered this a major change in Louisiana law, but it is not. Generally, of course, a witness may not testify on the ultimate issue, but only because of the rule restricting opinion evidence.¹⁶³ In criminal cases, for example, where the accused alleges insanity at the time of the offense, members of a sanity commission can offer their expert opinions whether the accused was sane or not.¹⁶⁴ Generally, of course, the law continues to prefer the more concrete and specific to the more conclusory and inferential, and this is particularly true where the issue is the ultimate one in the lawsuit.¹⁶⁵

In Louisiana it has been the rule that an expert must state the factual bases for his opinion,¹⁶⁶ even when they are not otherwise admissible.¹⁶⁷ One way to get otherwise inadmissible evidence before a Louisiana jury—a way that few, perhaps have realized—is to hire an expert and have him use otherwise inadmissible evidence as the basis for his relevant opinion. Article 705 guards against this abuse by modifying prior law. In civil cases an expert may offer opinions without first stating the underlying facts,¹⁶⁸ though the cross-examiner may elicit the factual bases of the expert's opinion. In criminal cases the expert must state bases that are otherwise admissible, but any basis for his opinion that is otherwise inadmissible may be elicited only at the option of the cross-examiner.¹⁶⁹

Article 706 closes the Chapter by regulating court appointment of experts. Paragraph (D), added by amendment to the original proposal,¹⁷⁰ limits the article to civil cases.

Chapter Eight—Hearsay and Exceptions

Although codification simplifies and clarifies this confusing area, it remains one of the most difficult topics in the law of evidence. This

163. Id. art. 701.

164. See La. Code Crim. P. arts. 643-49; *State v. Claibon*, 395 So. 2d 770 (La. 1981). The second sentence of article 704 does not prohibit this, of course. The point is that in some cases opinion on sanity is simply the other side of the coin from opinion on guilt or innocence.

165. See generally *State v. Wheeler*, 416 So. 2d 78 (La. 1982), discussed in Pugh and McClelland, *Developments in the Law, 1982-1983: Evidence*, 44 La. L. Rev. 335, 344 (1983).

166. La. R.S. 15:465, repealed by 1988 La. Acts No. 515, § 8; *State v. Clay*, 408 So. 2d 1295 (La. 1982); *Dixie Pipeline Co. v. Barry*, 227 So. 2d 1 (La. App. 3d Cir. 1969), writ refused, 255 La. 145, 229 So. 2d 731 (1970).

167. See, e.g., *State v. Watley*, 301 So. 2d 332 (La. 1974) (past criminal history); *State v. Hilburn*, 512 So. 2d 497 (La. App. 1st Cir. 1987) (hearsay).

168. The court, *sua sponte* or pursuant to the request of the opposing party, may order the expert to state the underlying facts prior to giving his opinion. La. Code Evid. art. 705. See also id. arts. 403, 611(A).

169. Id. art. 704(B).

170. Proposed La. Code Evid. art. 706.

chapter generally follows the federal model by explaining what is and is not hearsay (article 801), generally prohibiting hearsay (article 802), listing exceptions regarding which the declarant's availability to testify is immaterial (article 803), listing the exceptions regarding which unavailability of the declarant is a prerequisite (article 804). The chapter also clarifies the law pertaining to multiple hearsay (article 805) and that pertaining to attacking the credibility of the out-of-court declarant (article 806).

Article 801 defines hearsay. Paragraphs (A), (B), and (C) are familiar and consistent with former law. Paragraph (A)(2) makes clear that out-of-court conduct not intended to be a message ("non-assertive conduct") cannot be a "statement," and thus cannot constitute hearsay under the definition of paragraph (C).¹⁷¹

Article 801(D) defines nonhearsay. Much of this paragraph is complex and intriguing, and many of its subsections make changes in Louisiana law. Subparagraph (1) addresses the out-of-court statements of a witness. The initial portion of the subparagraph requires that the declarant testify and that the declarant be subject to cross-examination regarding the prior statement; unless these prerequisites exist, the court need not consider the remainder of the subparagraph. But assuming these requirements are met, the lettered subparts of subparagraph (1) offer four exclusions from the hearsay ban.

Under the first, contained in subparagraph (1)(a), the witness's out-of-court statement is not hearsay if it is inconsistent with the current testimony, was given under oath, and came at a prior proceeding at which the "accused" had the opportunity to cross-examine the declarant. This provision makes a change in prior Louisiana law;¹⁷² it differs substantially from the Institute's proposal.

By the use of the term "accused,"¹⁷³ the subparagraph seems to limit its application to criminal cases only.¹⁷⁴ Hence, in civil cases the general rule is the same as under former law: a witness's prior incon-

171. Although non-assertive conduct could constitute hearsay under the traditional common law rule, the modern trend is to classify it as non-hearsay. See Fed. R. Evid. 801; La. Code Evid. art. 801 comment (c).

172. Under former law a witness's prior inconsistent statements were admissible solely to attack credibility and not for their assertive value. See La. R.S. 15:493, repealed by 1988 La. Acts No. 515, § 8; *State v. Allien*, 366 So. 2d 1308 (La. 1978). The proposed Code embraced this approach. Proposed La. Code Evid. art. 801(D)(1) and *id.* comment (a).

173. Throughout the Code of Evidence, use of the word "accused" indicates that a rule is limited to criminal matters. See La. Code Evid. art. 101 comment (b).

174. It may be that in a rare instance the subparagraph may properly be invoked in a civil case. When a party to the current civil case was the accused in an earlier criminal trial, the statement of a state witness at the preliminary hearing or in the accused's earlier trial seems arguably admissible under this provision.

sistent statements will always be hearsay if offered assertively and therefore are admissible only to attack credibility. But in criminal matters, where the article does apply, it is narrow and ambiguous. It seems to apply only to the earlier statements of *prosecution* witnesses, for it requires that the earlier statements have been subject to "cross-examination" by the "accused."¹⁷⁵ It may well be, however, that the drafters of the provision, more familiar with former usage than with the terminology of the proposed Code, used the term "cross-examination" in the broad sense as including the cross-questioning of witness who "surprises" or proves "hostile" to the calling party.¹⁷⁶ On this basis, it may be reasonable to apply the subsection to a hostile defense witness who testified at the earlier proceeding. Further, when a co-defendant at the earlier proceeding had called a witness whose testimony was adverse to the accused, the accused's right to cross-question the witness at the earlier proceeding seems to trigger the applicability of this subparagraph.

The other three parts of the subparagraph, (b), (c), and (d) of paragraph 801(D)(1), will be more familiar to the practitioner than the unique and curious tenor of subparagraph (a). In general thrust these parts do not diverge significantly from the proposed Code, and generally follow former law on consistent statements,¹⁷⁷ out-of-court identifications,¹⁷⁸ and initial complaints of sexual assault.¹⁷⁹

Subparagraph 801(D)(2) codifies the law on admissions by a party, defining them as nonhearsay.¹⁸⁰ This subparagraph effects no major change in prior law. By contrast, the provisions of subparagraph 801(D)(3), the relational and privity admissions, either change Louisiana law or make explicit the obscure rules that were rarely reflected in reported decisions. The rationale for excluding these sorts of admissions from the hearsay definition differs from other hearsay exclusions. The exclusion does not rest on the inherent reliability of the statements, as most hearsay exclusions and exceptions do; nor does it follow from corollaries of adversary system principles, as with the admissions exclu-

175. La. Code Evid. art. 801(D)(1)(d).

176. See La. R.S. 15:487-88, repealed by 1988 La. Acts No. 515, § 8.

177. See *id.* §§ 496-97, repealed by 1988 La. Acts No. 515, § 8; *State v. Marcal*, 388 So. 2d 656 (La. 1980); La. Code Evid. art. 801(D)(1)(b) comment (b).

178. This provision broadens former law and seems troublingly subject to abuse. It substantially alters the Law Institute proposal. See *State v. Jacobs*, 344 So. 2d 659 (La. 1976) (inadmissible hearsay); Proposed La. Code Evid. art. 801(D)(1)(c) and comment (c).

179. Under former law such declarations seem to have been classed as exceptions to the hearsay exclusion. See, e.g., *State v. Pace*, 301 So. 2d 323 (La. 1974).

180. The admissions of subparagraph (2)(a) are "personal." Those of subparagraph (2)(b) are "adoptive." Those of subparagraph (2)(c) are "authorized." Under former law these have generally been viewed as exceptions to the hearsay rule. See La. Code Evid. art. 801(D)(2) comments (a)-(d).

sions of subparagraph (D)(2).¹⁸¹ Rather, considerations of fairness, completeness and the like underlie these exclusions.¹⁸²

There are two relational admission exclusions. The provisions concerning admissions of agents or employees are contained in subparagraph (3)(a), which expands former concepts of agency.¹⁸³ The traditional "co-conspirator" rule is found in (3)(b), but is expanded to make its applicability to civil cases clear.¹⁸⁴

The privity admissions apply solely in civil cases. Examples of these instances of nonhearsay include, for subparagraph (3)(c), the statement of the insured offered against the beneficiary; for (3)(d), the statement of an assignor or predecessor in title offered against the assignee or the purchaser; for (3)(e), the declaration of the deceased offered against the plaintiff in a survivorship action or action for wrongful death; and for (3)(f), the statement of an injured or tortious child offered against a party responsible for the child's injury, or, in an action to recover for damage caused by the child, offered against the person responsible for the child's torts.¹⁸⁵

The unfortunate provisions of article 801(D)(4), added to the Institute's proposal during the compromise discussions, perpetuate the amorphous *res gestae* concept, tracking the exact language of former law.¹⁸⁶ This provision seems to embrace nonhearsay operative facts and the declarations otherwise made exceptions to the hearsay exclusion by article 803(1), (2), and (3).¹⁸⁷ To the extent it includes more, it will work injustice. However uncertain the precise ambit of subparagraph (D)(4), whatever falls within it is nonhearsay.

181. Id. comment (b).

182. See id. art. 801(D)(3) comment (a). The rationale as to article 801(D)(3)(a) and (b) is that "one who undertakes to create an agency relationship should generally be made to reap the deleterious as well as the beneficial effects of what the agent sows." Id. As to subparagraphs (3)(c) through (3)(f), the underlying rationale is that "one who under substantive law stands in another's shoes for the purposes of the lawsuit should generally be made to take the bad with the good." Id.

183. See id. comment (b).

184. See id. comment (c).

185. See id.

186. La. R.S. 15:447-48, repealed by 1988 La. Acts No. 515, § 8. The form of the *res gestae* provision found in article 404(B) seems preferable to this formulation. Both, of course, are unnecessary and can only lead to continuing confusion. The concept is "arcane." Sanders, *supra* note 1, at 215. The major flaw in employing this formulation is that, as has long been the case, the practitioner must review numerous cases in an attempt to determine whether the definition applies to the statement at hand, and usually comes away from that task more confused than when the research was begun.

187. The phrases "the instructive . . . words and acts of the participants" and "immediate concomitants of it" seem present sense impressions under article 803(1) or statements of then existing conditions under article 803(3). The phrase "under the immediate pressure of the occurrence" suggests the excited utterance exception of article 803(2). Non-

Article 802 should have a dual effect. Not only does it set out the general rule excluding hearsay, but also, by limiting exceptions to those in the Code in other legislation,¹⁸⁸ the article ends the judicial creation of new hearsay exceptions. Henceforth, only the legislature, not the courts, may create new general exceptions to hearsay.¹⁸⁹

The twenty-four hearsay exceptions of article 803 are generally familiar to Louisiana practitioners.¹⁹⁰ The article creates no heretofore unknown exceptions and effects no substantial change. What changes are made were seen as clarifications or improvements of former law.¹⁹¹ The benefit of this article and article 804 is that they clarify the law by offering a precise codification of the contours and requirements of each exception.

Article 803 exemptions apply whether the declarant is unavailable or not. This is the major distinction between this article and article 804. Unlike its federal counterpart, article 803 contains no "catch all" exception.¹⁹² Among the more frequently occurring article 803 exceptions are the present sense impression,¹⁹³ excited utterance,¹⁹⁴ then existing mental, emotional or physical condition,¹⁹⁵ past recollection recorded,¹⁹⁶ civil business records,¹⁹⁷ and public records.¹⁹⁸

hearsay operative facts such as the robber's words, "This is a stick-up," are not offered for their assertive value. The fact that he said it, along with the gun in his hand, made it a stick-up. The problem, of course, is that when the rationale and boundaries of a concept do not clearly appear from the text of the law, practitioners tend to misunderstand it and courts are apt to misinterpret it. See Moylan, *Res Gestae, Or Why is That Event Speaking and What is it Doing in This Courtroom?*, 63 A.B.A. J. 968 (1977).

188. Many specialized hearsay exceptions of limited applicability are found in other codes and in the Revised Statutes. A policy decision was made that the more generally applicable exceptions in the Code should not be hidden by inclusion of the narrower and less frequently applied exceptions now found elsewhere. See, e.g., La. Code Civ. P. art. 1702(D) (proof in confirmation of a default); La. Code Crim. P. art. 105 (coroner's report); La. R.S. 10:1-205 (1983) (usage of trade). See also La. Code Evid. art. 802 comment (c).

189. But see La. Code Evid. art. 804(B)(6).

190. See *infra* notes 193-98 and accompanying text.

191. See generally La. Code Evid. art. 803 comment.

192. See Fed. R. Evid. 803(24). The decision not to include a "catch all" exception under article 803 means that henceforth in Louisiana all hearsay exceptions are codified or statutory, except in rare civil cases when the declarant is unavailable and the statement is highly trustworthy. See La. Code Evid. art. 804(B)(6).

193. La. Code Evid. art. 803(1).

194. *Id.* art. 803(2).

195. *Id.* art. 803(3). The first three exceptions of article 803 have traditionally been classed under the generic shibboleth "*res gestae*." See *supra* notes 186 and 187 and accompanying text.

196. La. Code Evid. art. 803(5).

197. *Id.* art. 803(6). The criminal case business records exception is found at article 804(B)(5).

198. *Id.* art. 803(8).

The six hearsay exceptions of article 804 all require the prerequisite showing that the declarant is unavailable to testify.¹⁹⁹ Paragraph (A) defines unavailability broadly and, for the first time in Louisiana, offers a uniform definition. The exceptions frequently occurring are former testimony,²⁰⁰ the dying declaration,²⁰¹ the statement against interest,²⁰² and business records offered in a criminal case.²⁰³ Subparagraph (B)(6) embodies a "catch all" exception that is rather narrow. It permits a court to admit hearsay in a civil case when the declarant is unavailable,²⁰⁴ the statement is trustworthy considering all relevant circumstances, the proponent has made all reasonable attempts to obtain nonhearsay evidence to prove the fact sought to be established, and the proponent has given advance written notice to the opponent.²⁰⁵ This provision anticipates the unusual case wherein the hearsay is very reliable under the facts surrounding its creation but no traditionally recognized exception applies.

Article 805 codifies the general common law and Louisiana rule that hearsay within hearsay is excluded unless a hearsay exception can be found for each link.²⁰⁶ Article 806 addresses attacking the credibility and rehabilitation of the hearsay declarant.²⁰⁷

Chapter Nine—Authentication

The five articles on authentication change little from prior Louisiana law, but have the advantage of clarifying it and bringing the general rules together in one place.

199. This preliminary fact is to be determined by the court without the ordinary evidentiary restrictions. See *id.* art. 104(A).

200. *Id.* art. 804(B)(1), which broadens somewhat the scope of the former exception.

201. *Id.* art. 804(B)(2), which broadens its predecessor by applicability to civil cases and all criminal cases.

202. *Id.* art. 804(B)(3).

203. *Id.* art. 804(B)(5).

204. See *id.* art. 804(A).

205. *Id.* art. 804(B)(6). This ad hoc exception has been recognized occasionally in Louisiana. See, e.g., *Burley v. Louisiana Power and Light Co.*, 319 So. 2d 334 (La. 1975); *Salley Grocer Co. v. Hartford Accident and Indem. Co.*, 223 So. 2d 5 (La. App. 2d Cir. 1969).

206. See, e.g., *State v. Monroe*, 345 So. 2d 1185 (La. 1977). Analytically, a link which appears to be hearsay under the traditional approach may in fact be defined as non-hearsay by article 801(D). Article 805's use of the word "hearsay" means as defined by article 801.

207. The article also permits attack or support of the declarant's credibility in instances of non-hearsay as defined in article 801(D)(2)(c) (authorized agency admission) or (D)(3) (relational and privity admissions). In these instances the declarant is not in court, unlike the situations embraced by article 801(D)(1) and (D)(2)(a) and (b). See also La. Code Evid. art. 806 comment (d).

Article 901 addresses the foundational requirement that real or documentary evidence be authenticated by the proponent prior to admission into evidence. This threshold requirement is satisfied by evidence upon which a rational juror could conclude that the item is what the proponent holds it out to be.²⁰⁸ The article offers an illustrative list of methods for authentication. The most frequently occurring method of these is the testimony of a witness that the item is what the proponent suggests.²⁰⁹ Although the article does not address the requirement of a chain of custody, in cases where the item is subject to material alteration or tampering such a showing remains a prerequisite to admissibility.²¹⁰

Article 902 makes a variety of listed documents self-authenticating, including most public documents²¹¹ and authentic acts.²¹² Articles 904 and 905 make a certified true copy of an original public document or other public record self-authenticating.

Chapter Ten—Contents of Writings

The eight articles of Chapter Ten should lead to the unlamented demise of the term “best evidence.”²¹³ Article 1001 offers definitions of terms used in the Chapter. Of particular importance is the definition of “original,” which includes anything intended by the parties to constitute an original, such as is the case with “multiple originals.” A “duplicate” is defined to include carbon copies and photocopies. Article 1002 then states the general rule that the original is required to prove the contents of a writing, recording, or photograph. But the requirement applies only when the proponent seeks “to prove the content” of the item. Often a fact may be proved without use of an available writing, recording, or photograph.²¹⁴ But when the fact cannot be proved otherwise,²¹⁵ or when the proponent chooses to prove the fact by use of

208. *Id.* art. 901(A). See also *id.* comment (c).

209. *Id.* art. 901(B)(1).

210. See *id.* art. 901(A) comment (d); *id.* arts. 403, 104(B).

211. *Id.* art. 902(1), (2) and (3).

212. *Id.* art. 902(8).

213. See La. R.S. 15:436, repealed by 1988 La. Acts No. 515, § 8. This area of the law has been described as “confusing and confused.” C. McCormick, *supra* note 47, § 233, at 565. The term “best evidence rule” is misleadingly broad, and not particularly descriptive of the law’s requirements. See La. Code Evid., Ch. 10, Introductory Note to Original Writings Articles.

214. The fact of receipt of money, for example, can ordinarily be proved by testimony, even though a written receipt may exist. Likewise, the description of a certain scene may be established by testimony although a photograph of the scene exists. Sound trial tactics may militate in favor of using the writing or photograph, but the law of evidence does not require it.

215. See, e.g., La. Civ. Code art. 1839 (transfer of title of immovable).

the writing, recording, or photograph, this article requires the original.²¹⁶ The seeming stringency of this rule is relaxed by the major qualification contained in article 1003, an exception that devours much of the previous article's rule. A duplicate, under that article, is generally admissible to the same extent as the original.²¹⁷

Article 1004 lists five familiar exceptions allowing other evidence in lieu of the original. By use of the term "other evidence," the article tacitly does away with the former requirements of degrees of secondary evidence.²¹⁸ Comparison of article 1004(4) with article 1003(1) suggests a convenient rule of thumb: when a writing, recording, or photograph is closely related to a controlling issue in the case, the original is required and a duplicate does not suffice; but if it is not closely related to a controlling issue, neither the original nor a duplicate is required and other evidence is sufficient.

Article 1005 through 1008 offer rules of specialized applicability.²¹⁹

Chapter Eleven—Miscellaneous Rules

Article 1001 states the general rule that the Code's provisions are "applicable to the determination of questions of fact in all contradictory judicial proceedings and in proceedings to confirm a default."²²⁰ In listed proceedings, such as workers' compensation hearings and child custody matters, the Code is of limited applicability. The principles underlying the provision serve in these proceedings as general guides to the admissibility of evidence, but with specific exclusionary rules applicable only to the extent that they "tend to promote the purposes of the proceedings."²²¹

216. Article 1002 applies only when the proponent seeks "[t]o prove the content of" the writing, etc., and not when it is used for other purposes, such as to compare handwriting or typeface. See *id.* art. 1002 comment (b).

217. The exceptions are: when authenticity of the original is in doubt; when it would be unfair not to use the original; and when the original is a testament to be probated, is a contract on which the claim or defense is based, or is otherwise closely related to a controlling issue. See La. Code Evid. art. 1003 comments.

218. See, e.g., *Harrison v. Occhipinti*, 251 So. 2d 188 (La. App. 4th Cir. 1971).

219. Article 1005 creates an exception to the requirement of the original for public records. Article 1006 permits the introduction of summaries of voluminous materials. Article 1007 permits the proving of contents by the admissions of the adverse party. And article 1008, in detailing the functions of judge and jury as to evidence of contents, represents a specialized application of the rules of article 104(A) and (B). See generally La. Code Evid. arts. 1005-08 comments.

220. La. Code Evid. art. 1101(A). This phraseology is technically imperfect in that it does not seem to embrace article 202 on judicial notice of legal matters. In proceedings to confirm a default there will be no opposing counsel to interpose objections, so enforcement of the evidentiary rules is left to the presiding judge.

221. *Id.* art. 1101(B). Those familiar with practice in the enumerated proceedings and hearings will recognize that this language, while somewhat vague and uncertain on its face, simply codifies rather than changes the former practice.

Paragraph 1101(D) covers the discretionary applicability of the Code. It permits any court, even in proceedings in which the Code is of limited applicability under paragraph (B) or is generally inapplicable under paragraph (C), to look to the provisions governing judicial notice, authentication, or contents of writings as an aid to admitting evidence or determining a fact. The intent was not to bind judges in those proceedings to the requirements of Chapters Two, Nine, and Ten, but rather to permit them to employ the provisions of those chapters to the extent they may prove helpful.

Article 1103 was added during the last-minute compromise meeting held on the evening before the Code went to the Senate Committee. It was intended to guard against the risk—created by the deletion of paragraph (C) from article 404 of the Law Institute's Proposed Code²²²—that article 104 would be construed as eviscerating the protections of prior case law concerning the admissibility of "other crimes" evidence against the criminally accused.²²³

Conclusion

The long-awaited Code of Evidence offers a welcomed and much needed organization and modernization of Louisiana's heretofore scattered and uncertain evidence law. Initially, lawyers who are very familiar with federal court practice will find the new Code easier to work with than lawyers whose practice has been exclusively in state courts, for the new Code was generally modelled after the Federal Rules of Evidence. Following the federal pattern enables Louisiana to utilize national case law and treatises as a guide to interpreting those provisions that are identical or similar to the federal model. In a short time, this advantage as well as the clarity and organization of the new Code will win the acceptance of those previously unfamiliar with its style and content. Moreover, since the proper objection and the appropriate judicial ruling will usually be the same as under former law, the change will not be dramatic.

It is unfortunate that in the process of revision and codification more meaningful reforms could not have been effected in several areas of our evidence law. But the new Code was born amid conflict and disagreement and is necessarily a child of compromise. Despite its imperfections, it is an immeasurable improvement over the unstructured and uncertain prior law. And, as always, the opportunity for other needed reforms should be viewed not as lost, but as merely postponed.

222. Proposed La. Code Evid. art. 404(C). See *supra* text accompanying notes 81-85.

223. See *supra* text accompanying notes 28-29.

