

#2016-18

DA ACTION _____
DATE REVISED _____

**LOUISIANA DISTRICT ATTORNEYS ASSOCIATION
PROPOSAL FORM 2016-18**

SUBJECT MATTER (list criminal definition, penalty, or procedure affected):

Domestic Violence and Child Abuse, Admission of Evidence of Other Bad Acts

PRESENT LAW (cite Statute and current function):

There is no such present law in Louisiana. California has such a law.

PROPOSED LAW (proposed change and effect and cite of amended or new statute):

Louisiana Code of Evidence, Article 412.4

PROPOSED STATUTORY LANGUAGE (Clearly indicate language added and/or deleted.)

Evidence of similar crimes, wrongs, or acts in domestic abuse cases, cruelty against juveniles cases

A. When an accused is charged with a crime involving abusive behavior against a family member, household member or dating partner, or with acts which constitute cruelty involving a victim who was under the age of seventeen at the time of the offense, evidence of the accused's commission of another crime, wrong, or act involving assaultive behavior against a family member, household member or dating partner, or acts which constitute cruelty involving a victim who was under the age of seventeen at the time of the offense, or may be admissible and may be considered for its bearing on any matter to which it is relevant, subject to the balancing test provided in Article 403.

B. In a case in which the state intends to offer evidence under the provisions of this Article, the prosecution shall, upon request of the accused, provide reasonable notice in advance of trial of the nature of any such evidence it intends to introduce at trial for such purposes.

C. This Article shall not be construed to limit the admission or consideration of evidence under any other rule.

D. For purposes of this Article:

(1) "Abusive behavior" means any behavior of the offender involving the use or threatened use of force against the person or property of a family member, household member or dating partner of the alleged offender.

(2) "Family member" means spouses, former spouses, parents and children, stepparents, stepchildren, foster parents, and foster children.

(3) "Household member" means any person of the opposite sex presently or formerly living in the same residence with the offender as a spouse, whether married or not, or any child presently or formerly living in the same residence with the offender, or any child of the offender regardless of where the child resides.

(4) "Dating partner" means any person who is or has been in a social relationship of a romantic or intimate nature with the offender and where the existence of such a relationship shall be determined based on a consideration of the following factors:

(a) The length of the relationship.

(b) The type of relationship.

(c) The frequency of interaction between the persons involved in the relationship.

REASON FOR PROPOSAL (brief description of need for change):

Domestic Violence and Child Abuse cases, like sex and molestation cases, are difficult to prosecute due to the relationship with the abuser. Additionally, it is rare that a given incident of abuse, in a Domestic Violence or child abuse case, will occur in a vacuum. It is important to be able to convey to the Trier of Fact the history of abuse that the victim has gone through before and after the incident for which the defendant is charged. Furthermore, domestic and child abusers often abuse other partners and children than the one making the instant complaint.

PROPOSER'S I.D. INFORMATION:

Name & Title: Robert M. White _____ **JD:** 25th _____
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I understand that my participation may be required in ADA Board and ADA Legislative Advisory Committee meetings and/or LDAA Board and LDAA Legislative Committee meetings. If this proposal is accepted as part of the 2016 LDAA Legislative Package, I agree to personally attend legislative committee hearings and be available to testify on any bill filed as a result of this proposal.

Elected District Attorney's Signature (required): _____

Proposer's Signature (required): _____

Email completed proposals to LEGISLATIVEPROPOSALS@LDAA.ORG

MEMORANDUM

**TO: LDAA BOARD OF DIRECTORS
ALL ELECTED DISTRICT ATTORNEYS**

FROM: Robert M. White, PROPOSER

DATE: October 23, 2015

RE: 2016 LEGISLATIVE PROPOSAL

Even though this is a newly proposed article, it greatly resembles and is related to the existing codal article 412.2. Louisiana Code of Evidence Article 412.2 provides in relevant part that:

When an accused is charged with a crime involving sexually assaultive behavior, or with acts that constitute a sex offense involving a victim who was under the age of seventeen at the time of the offense, evidence of the accused's commission of another crime, wrong, or act involving sexually assaultive behavior or acts which indicate a lustful disposition toward children may be admissible and may be considered for its bearing on any matter to which it is relevant subject to the balancing test provided in Article 403.

A trial court ruling admitting the evidence carries with it an implicit conclusion that the trial court found that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *State v. Mark*, 2013-1110 (La.App. 4 Cir. 7/30/14), 146 So.3d 886, 899. The ruling of the trial court on the admissibility of evidence under LSA-C.E. art. 412.2 will not be overturned absent an abuse of discretion. *Id.*

Of significance, the Louisiana Supreme Court has recognized relative to Article 412.2. that:

... in enacting Article 412.2, the Legislature did not see fit to impose a restriction requiring such evidence to meet a stringent similarity requirement for admissibility. We have previously examined the legislative history behind the Article in *State v. Williams*, 2002-1030 (La.10/15/02), 830 So.2d 984. In *Williams*, this Court noted the enactment of the Article was prompted primarily by two decisions of this Court, *State v. McArthur*, 97-2918 (La.10/20/98), 719 So.2d 1037, and *State v. Kennedy*, 2000-1554 (La.4/3/01), 803 So.2d 916. Both cases involved prosecutions for aggravated rape in which the State sought to introduce evidence of other sexual offenses committed by the defendants pursuant to what the State labeled a "lustful disposition" exception to other crimes evidence. In both cases, this Court refused to recognize the so-called "lustful disposition" exception to Article 404's other crimes prohibition, but, in doing so, noted that the evidence sought to be

introduced would be admissible if Louisiana had a rule similar to Federal Rule of Evidence 413. This Court stated “the enactment of Article 412.2 was apparently the legislature’s response to this Court’s statements in *McArthur* and *Kennedy* as the language of Article 412.2 closely follows that of Federal Rule of Evidence 413.” *Williams*, 830 So.2d at 986. Thus, Article 412.2 was enacted to loosen restrictions on “other crimes” evidence, and to allow evidence of “lustful disposition” in cases involving sexual offenses.

State v. Wright, 2011-0141 (La.12/6/11), 79 So.3d 309, 317. Therefore, “[l]ike Congress, the Louisiana Legislature saw a need to lower the obstacles to admitting propensity evidence in sexual assault cases.” *State v. Olivieri*, 03-563 (La. App. 5 Cir. 10/28/03), 860 So. 2d 207, 219. Additionally, a lapse in time generally will go to the weight of the evidence rather than to its admissibility. *State v. Scoggins*, 2010-0869 (La.App. 4 Cir. 6/17/11), 70 So.3d 145, 154. We respectfully suggest that there exists a similar need to lower the obstacles to admitting propensity evidence in domestic abuse and in child abuse cases.

See also: Recent La. Supreme Court case: State v. Robertson, 2015-KK-2095

TALKING POINTS

- Domestic Violence and Child Abuse cases, like sex and molestation cases, are difficult to prosecute due to the relationship with the abuser.
- It is rare that a given incident of abuse, in a Domestic Violence or child abuse case, will occur in a vacuum. It is important to be able to convey to the Trier of Fact the history of abuse that the victim has gone through before and after the incident for which the defendant is charged.
- Domestic and child abusers often abuse other partners and children than the one making the instant complaint.
- The California Evidence Code, Article 1109 is on point. It is attached to this proposal. California jurisprudence has withstood challenges to this law under Crawford v. Washington, Double Jeopardy and Ex Post Facto claims.
- The proposed statute is written in line with the existing article 412.2 in the LA Code of Evidence.
- The existing article 404B is woefully inadequate to address the complex interpersonal issues associated with domestic violence and child abuse.
- Please note that the California Evidence Code article include elder abuse as well.
- The proposal protects the most vulnerable of victims, and those most likely to be killed or hurt in their homes.

In pertinent part, California Evidence Code 1109 reads as follows:

(a)(1) Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352.

(2) Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving abuse of an elder or dependent person, evidence of the defendant's commission of other abuse of an elder or dependent person is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352.

(3) Except as provided in subdivision (e) or (f) and subject to a hearing conducted pursuant to Section 352, which shall include consideration of any corroboration and remoteness in time, in a criminal action in which the defendant is accused of an offense involving child abuse, evidence of the defendant's commission of child abuse is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352. Nothing in this paragraph prohibits or limits the admission of evidence pursuant to subdivision (b) of Section 1101.

(b) In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, in compliance with the provisions of Section 1054. 7 of the Penal Code.

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