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MEMORANDUM FOR
THE AD HOC COMMITTEE ON THE ARIZONA RULES OF EVIDENCE

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Rule 404 Subgroup Report Follow Up

This memorandum reflects the work of the Rule 404 Subgroup following the May 21, 2010 meeting of the Ad Hoc Committee on the Arizona Rules of Evidence. At that May 21 meeting, this Subgroup was tasked with: (1) attempting to revise Arizona Rule of Evidence (“ARE”) 404(a) and (b) to more closely read like to Federal Rule of Evidence (“FRE”) 404(a) and (b) without any making substantive change(s), and (2) attempting to draft an ARE 412 to reflect the substance of A.R.S. § 13-1421 in the same general format as FRE 412. This memorandum reflects those efforts.

I. Changes to ARE 404(a) and (b) to More Closely Conform to FRE 404(a) and (b).

The following compares ARE 404 with FRE 404, with additions to ARE indicated by underlining and deletions by ~~strikeouts~~ designed to have ARE more closely conform to the FRE counterparts.

**Rule 404. Character Evidence not Admissible to Prove Conduct; Exceptions;
~~Other Crimes~~**

(a) Character evidence generally. Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused ~~or civil defendant.~~ Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character or the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution, or evidence of ~~the~~

aberrant sexual propensity ~~of the accused or a civil defendant~~ pursuant to Rule 404(c);

(2) Character of victim. In a criminal case, and subject to the limitations imposed by Rule 412, ~~E~~evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Except as provided in Rule 404(c), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

II. ARE 412.

The following attempts to graft A.R.S. § 13-1421 into an ARE (ARE 412):

ARE 412. Evidence Relating to Victim's Chastity and Specific Instances of Victim's Sexual Conduct.

(a) Evidence Relating to Victim's Chastity. Evidence relating to a victim's reputation for chastity and opinion evidence relating to a victim's chastity are not admissible in any prosecution for any offense in Arizona Revised Statutes Title 13, Chapter 14 (A.R.S. §§ 13-1401, et seq.).

(b) Evidence of Specific Instances of Victim's Sexual Conduct. Evidence of specific instances of the victim's prior sexual conduct may be admitted only if a judge finds, by clear and convincing evidence, that:

- (1) the evidence is relevant and is material to a fact in issue in the case;
- (2) the inflammatory or prejudicial nature of the evidence does not outweigh the probative value of the evidence, and
- (3) the evidence is one of the following:
 - (A) evidence of the victim's past sexual conduct with the defendant;
 - (B) evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease or trauma;
 - (C) evidence that supports a claim that the victim has a motive in accusing the defendant of the crime;

- (D) evidence offered for the purpose of impeachment when the prosecutor puts the victim's prior sexual conduct in issue; or
- (E) evidence of false allegations of sexual misconduct made by the victim against others.

(c) Procedure to Determine Admissibility of Evidence of Specific Instances of Victim's Sexual Conduct. Evidence described in Rule 412(b) shall not be referred to in any statements to a jury or introduced at trial without a court order after a hearing on written motion is held to determine the admissibility of the evidence. If new information is discovered during the course of the trial that may make the evidence described in Rule 412(b) admissible, the court may hold a hearing during the course of the trial to determine the admissibility of the evidence under Rule 412(b).