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**IN THE SUPREME COURT
STATE OF ARIZONA**

PETITION TO AMEND THE
ARIZONA RULES OF EVIDENCE

Supreme Court No. R-11-0039

**Comment of the State Bar of Arizona
on Petition to Amend the Arizona
Rules of Evidence**

Petitioner seeks to amend the comment to Rule 609 of the Arizona Rules of Evidence (“ARE”) to clarify that evidence of convictions involving a dishonest act or false statement *must* be admitted “if the court can readily determine that establishing the element of the crime required proving—or the witness’s admitting—a dishonest act or false statement.”

Petitioner also seeks to amend the comments to ARE 803 and 804 by clarifying that ARE 803(25) and ARE 804(b)(1) have not been changed to conform to the Federal Rules of Evidence.

Lastly, petitioner seeks to amend ARE 608 to delete the references to “cross-examination” in subsection (b) and subdivision (b)(2), and to add an explanatory comment to the 2013 amendment.

ARE 608 prohibits introduction of specific instances of conduct for the purpose of attacking or supporting a witness’s credibility. However, in the discretion of the court if probative of truthfulness or untruthfulness, specific instances of conduct may

1 be inquired into *on cross-examination* of the witness concerning (1) the witness's
2 character for truthfulness or untruthfulness or (2) the character for truthfulness or
3 untruthfulness of another witness as to which character the witness being *cross-*
4 *examined* has testified.

5 The issue is whether inquiry into specific instances of conduct probative of
6 truthfulness or untruthfulness should be limited to cross-examination at trial.

7 Petitioner posits that Rule 608's references to cross-examination "appear to be
8 unnecessary in light of Rule 607," which permits any party to attack the credibility of a
9 witness. While this is true, its provision focuses *only* upon a party's effort to *attack* the
10 credibility of a witness. ARE 608 is broader in scope: it concerns a party's effort to
11 attack *or support* a witness's credibility. Subsection (a) provides that reputation or
12 opinion evidence of truthful character is admissible *only after* the witness's character
13 for truthfulness has been attacked. This prevents a party from bolstering a witness's
14 credibility through reputation and opinion evidence in the absence of any credibility
15 challenge.

16 Subsection (b)—the subsection at issue—is written to achieve the same goal. It
17 flatly precludes the introduction of specific instances of conduct "in order to attack or
18 support the witness's character for truthfulness." However, on cross-examination
19 specific instances of conduct *may* be inquired into if they are probative of the character
20 for truthfulness or untruthfulness of the witness or of another witness whose character
21 the witness being cross-examined has testified about.

22 While it is true that ARE 607 allows a party to *attack* a witness's credibility, it
23 says nothing about a party's effort to *support or bolster* that witness's credibility. ARE
24 608 prohibits a witness's credibility from being *supported or bolstered* unless it is first
25 attacked on cross-examination. Deleting the references to cross-examination as
26 proposed, a party would then be able to *support* the credibility of its own witness

1 through introduction of specific instances of conduct despite the fact that the witness's
2 credibility had not been attacked. Using a child-molestation prosecution as an example
3 (since they are most demonstrative of "swearing contests" in court and thus are nearly
4 entirely dependent upon credibility assessments), if an alleged victim testified that a
5 defendant molested her, the prosecution could adduce evidence on direct examination
6 that the child had won the "Honest Student of the Year" award in school—thereby
7 *supporting* the witness's credibility absent any attack thereon. As written, the rule
8 would permit the introduction of such evidence *only after* the witness's credibility had
9 been attacked (*i.e.*, on redirect examination).

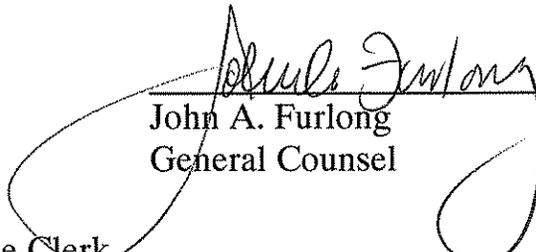
10 Similarly, if a defendant accused of child molestation had been awarded the
11 "Upstanding Citizen Integrity Award" after returning found money, under the
12 proposed rule change his credibility could be *supported/bolstered* on direct
13 examination by that specific instance of conduct in the utter absence of any attack.
14 Under the existing rule, the introduction of such evidence would only be permitted
15 *after* the defendant's credibility had been first attacked on cross-examination (*i.e.*, on
16 redirect examination).

17 In sum, the proposed modification of ARE 608 would expressly permit a party
18 to *bolster* a witness's credibility before that credibility had been called into question by
19 attack on cross-examination. Both subsections of Rule 608 are aimed at preventing
20 this tactic, and with good reason.

21 Conclusion

22 For the reasons discussed above, the State Bar of Arizona recommends that the
23 petition be granted as to the proposed modifications to Rules 609, 803, and 804. The
24 State Bar recommends that the petition be rejected as to the proposed modifications to
25 Rule 608.
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1 **RESPECTFULLY SUBMITTED** this 18th day of May, 2012.

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4 _____
5 John A. Furlong
6 General Counsel

7 Electronic copy filed with the Clerk
8 of the Supreme Court of Arizona
9 this 18th day of May, 2012.

10 by: Kathleen A. Lundgren