

1 Elizabeth Burton Ortiz, Bar No. 012838  
2 Executive Director  
3 Arizona Prosecuting Attorneys' Advisory  
4 Council  
5 3838 N. Central Avenue, Suite 850  
6 Phoenix, AZ 85012  
7 (602) 542-7222 / FAX (602) 274-4215  
8 [Elizabeth.Ortiz@apaacaz.com](mailto:Elizabeth.Ortiz@apaacaz.com)

9 **IN THE SUPREME COURT**  
10 **STATE OF ARIZONA**

11 In the Matter of:

Supreme Court No. R-20-0023

12 **AMENDMENT OF RULE 404 OF**  
13 **THE ARIZONA RULES OF**  
14 **EVIDENCE**

15 **COMMENT OF**  
16 **THE ARIZONA PROSECUTING**  
17 **ATTORNEYS' ADVISORY**  
18 **COUNCIL**

19 **I. BACKGROUND OF PETITION**

20 The Pima County Attorney's Office has filed a petition to add a new rule  
21 404(d) to the Arizona Rules of Evidence allowing propensity evidence in domestic  
22 violence cases. The proposed rule would permit the admission of evidence of other  
23 prior crimes involving domestic violence by a defendant against the same or a  
24 different victim. The proposal follows similar laws adopted in at least four other  
25 states: Alaska, California, Illinois and Michigan. For the same reasons that courts  
in these states, and others, have found this propensity evidence necessary and  
admissible in criminal trials involving domestic violence, the Arizona Prosecuting  
Attorneys' Advisory Council ("APAAC") supports this proposal. However,

1 APAAC recommends that the petitioner amend its proposal to expressly add due  
2 process considerations before evidence of prior crimes of domestic violence is  
3 admitted. APAAC's suggestion is set forth in this comment.  
4

## 5 **II. DISCUSSION/ANALYSIS**

6 It cannot be disputed that domestic violence invokes a unique consequence in  
7 Arizona. It plays a role in the award of joint decision-making and parenting time in  
8 domestic relations cases. *See* A.R.S. §§ 25-403(A)(8),-403.03 (directing courts to  
9 consider evidence of domestic violence in determining legal decision-making and  
10 parenting time). It can form the basis of a self-defense claim in criminal cases. *See*  
11 A.R.S. § 13-415 (allowing justification defense for victims of past acts of domestic  
12 violence). It is the foundation for funding shelters and other services for victims of  
13 domestic violence. *See* A.R.S. §§ 36-3002, 12-116.06 (establishing a domestic  
14 violence service fund).  
15  
16

17 Moreover, the nature of domestic violence crime with its underlying proof  
18 problems creates difficulties in the criminal prosecution of such crimes. *See e.g.*  
19 *Smith v. State*, 501 S.E.2d 523, 528 (Georgia App. 1998) (“[d]omestic violence  
20 usually occurs in the privacy of the home and because of loyalties and lack of  
21 witnesses is often difficult to prove.”); *Crespo v. Crespo*, 972 A.2d 1169, 1176 (New  
22 Jersey App. 2009) (in most domestic violence cases the trial judge has to assess the  
23 credibility of only two witnesses – the victim and the defendant); *State v. Hendricks*,

1 787 A.2d 1270, 1282 (Vermont App. 2001) (Skoglund, J., concurring) (“there is a  
2 trend across the country toward leniency in admitting prior assaults against victims  
3 of domestic violence because of the nature of the crime and the difficult proof  
4 problems posed by conflicting accounts of domestic violence.”). *See also* Carol  
5 Jordan, *Intimate Partner Violence and the Justice System: An Examination of the*  
6 *Interface*, *Journal of Interpersonal Violence*, 19, 1412-1434 (2004).  
7

8  
9 Because of its ignominious position in our society, domestic violence has  
10 attained a special evidentiary significance in the prosecution of its crimes. In order  
11 to more effectively analyze the proposed new rule 404(d) in this petition, a history  
12 of similarly enacted laws in other states is instructive.  
13

14 **A. Alaska**

15 The language of proposed rule 404(d) is identical to the rule enacted in 1997  
16 in the state of Alaska. Alaska Rule of Evidence 404(b)(4). That rule was upheld on  
17 due process and equal protection grounds in *Fuzzard v. State*, 13 P.3d 1163 (Alaska  
18 Ct.App. 2000). The court reasoned that trial judges can exclude the evidence under  
19 Evidence Rule 403 if its probative value is outweighed by its potential for unfair  
20 prejudice. *Id.* at 1167. Moreover, the state has a strong interest in addressing proof  
21 problems posed by domestic violence, and there is a “substantial relationship”  
22 between the purposes of the law and the ends sought to be achieved by it. *Id.* at  
23 1168.  
24  
25

1 Alaska Rule 404(b)(4) was critically analyzed further in *Bingaman v. State*,  
2 76 P.3d 398 (Alaska Ct.App. 2003). In that case the court reversed the admission of  
3 evidence of the defendant's other acts of domestic violence on Rule 403 grounds but  
4 held that "if Evidence Rules 402 and 403 are applied correctly, the evidence admitted  
5 under Rule 404(b)(4) will not deprive a defendant of the due process of law  
6 guaranteed by the constitution." *Id.* at 416. The court warned, however, that a trial  
7 court must conduct a balancing test under Rule 403, explain its decision on the  
8 record, and instruct the jury that such evidence, standing alone, is insufficient to  
9 convict a defendant. *Id.* at 416-17.

12 **B. California**

13 The state of California enacted legislation similar to the Alaska rule in its  
14 Evidence Code. Cal.Evid.Code § 1109 (West 2006). Under the California law,  
15 "evidence of the defendant's commission of other domestic violence" is not made  
16 inadmissible under § 1101 (character evidence generally inadmissible) "if the  
17 evidence is not inadmissible pursuant to Section 352." Evidence Code § 1109(a)(1).  
18 Section 352 is the equivalent to Rule 403, in which evidence may be excluded "if its  
19 probative value is substantially outweighed by the probability that its admission will  
20 (a) necessitate undue consumption of time or (b) create substantial danger of undue  
21 prejudice, of confusing the issues, or of misleading the jury." Evidence Code § 352.  
22 Unlike the Alaska rule, California law expressly specifies that the evidence is subject  
23  
24  
25

1 to a hearing conducted pursuant to Section 352 which should include “consideration  
2 of any corroboration and remoteness in time.” Evidence Code § 1109(d)(3).  
3 Evidence of acts occurring more than 10 years before are inadmissible unless the  
4 interest of justice permits otherwise. Evidence Code § 1109(e).

6 The California law consistently has been upheld as constitutional in numerous  
7 California appellate courts. *See People v. Johnson*, 185 Cal.App.4<sup>th</sup> 520, 522  
8 (Cal.App. 1 Dist. 2010). Those courts have found that “there is an overriding safety  
9 valve built into each statute that continues to prohibit admission of such evidence  
10 whenever its prejudicial impact substantially outweighs its probative value. (§ 352).”  
11 *Id.* at 522. As recently as October 2019 the courts have said that the law “reflects  
12 the Legislature’s determination that in domestic violence cases, similar prior  
13 offenses are uniquely probative of a defendant’s guilt on a later occasion.” *People*  
14 *v. Merchant*, 40 Cal.App.5<sup>th</sup> 1179, 1192 (Cal.App. 4 Dist. 2019).

### 17 C. Michigan

18 The state of Michigan has codified in its Code of Criminal Procedure a statute  
19 providing that in a criminal prosecution for an offense involving domestic violence,  
20 “evidence of the defendant’s commission of other acts of domestic violence ... is  
21 admissible for any purpose for which it is relevant, if it is not otherwise excluded  
22 under Michigan rule of evidence 403.” Mich. Compiled Laws § 768.27b(1). Like  
23 California, evidence of an act occurring more than 10 years before the charged  
24  
25

1 offense is inadmissible unless admitted in the interest of justice. § 768.27b(4). The  
2 law “reflects a ‘policy decision that, in certain cases, juries should have the  
3 opportunity to weigh a defendant’s behavioral history and view the case’s facts in  
4 the larger context that the defendant’s background affords.’” *People v. Schultz*, 754  
5 N.W.2d 925, 927 (Mich. App. 2008), quoting *People v. Pattison*, 741 N.W.2d 558,  
6 620 (2007). The Supreme Court of Michigan has ruled that the statute does not  
7 infringe on the court’s constitutional authority to establish rules of practice and  
8 procedure. *People v. Mack*, 825 N.W.2d 541, 542 (2012).

11 **D. Illinois**

12 Finally, similar to Michigan, the state of Illinois has adopted a statute  
13 providing that in a domestic violence criminal prosecution “evidence of the  
14 defendant’s commission of another offense or offenses of domestic violence is  
15 admissible, and may be considered for its bearing on any matter to which it is  
16 relevant.” 725 Illinois Compiled Statutes § 5/115-7.4 (West Supp. 2007). Unlike  
17 the aforementioned states, however, Illinois has expressly provided for a balancing  
18 test in its statute:  
19  
20

21 (b) In weighing the probative value of the evidence against undue  
22 prejudice to the defendant, the court may consider:

- 23 (1) the proximity in time to the charged or predicate offense;  
24 (2) the degree of factual similarity to the charged or predicate  
25 offense; or

1  
2 (3) other relevant facts and circumstances.

3 725 ILCS § 5/115-7.4(b). The State must disclose the evidence it intends to use in  
4 advance of the trial. 725 ILCS § 5/115-7.4(c).

5 The Illinois Supreme Court has ruled that the statute does not violate due  
6 process or equal protection. *See People v. Dabbs*, 940 N.E.2d 1088 (Illinois 2010).  
7 The law was found to be rationally related to the effective prosecution of domestic  
8 violence offenses (*Id.* at 1098) and provide adequate due process safeguards due to  
9 the required balancing of probative value versus prejudicial effect. *Id.* at 1099. *See*  
10 *also People v. Jenk*, 62 N.E.3d 1089, ¶¶ 25, 33 (Illinois App. 2016) (under *Dabbs*,  
11 section 115-7.4 does not violate due process and “does not violate equal protection  
12 guarantees.”)

13  
14  
15 **E. APAAC Recommendation**

16 After considering the role domestic violence plays in the jurisprudence of  
17 Arizona and viewing the laws and opinions from other states, APAAC supports the  
18 addition of the proposed Rule 404(d) to the Arizona Rules of Evidence. The  
19 proposed rule enhances the public policy interest in curbing domestic violence and  
20 protecting its victims by addressing the difficult proof problems that come with its  
21 conflicting accounts. As the Alaska court stated, “Although evidence of other acts  
22 of domestic violence does show propensity in a domestic violence prosecution,  
23  
24  
25

1 under Rule 404(b)(4) the evidence's tendency in this regard can no longer be deemed  
2 unfair prejudice." *Fuzzard, supra*, at 1167.

3  
4 However, as expressed in the case law analyzing the previously enacted laws,  
5 APAAC recommends that the language of proposed Rule 404(d) be amended to  
6 expressly add due process considerations consistent with Rule 403. APAAC  
7 suggests modifying the proposed rule to add considerations similar to those adopted  
8 in Rule 404(c) ("Character evidence in sexual misconduct cases"). APAAC suggests  
9 adding the following to the proposed rule:  
10

11 In all such cases, the court shall admit evidence of other crimes  
12 involving domestic violence only if the evidentiary value of proof of  
13 the other crimes is not substantially outweighed by danger of unfair  
14 prejudice, confusion of issues, or other factors mentioned in Rule 403.  
15 In making that determination under Rule 403 the court shall make  
specific findings and take into consideration the following factors,  
among others:

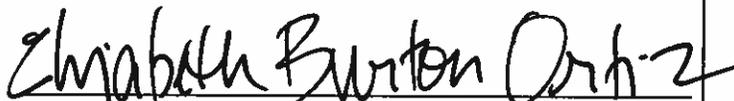
- 16 (1) remoteness of the other crimes;
- 17 (2) similarity or dissimilarity of the other crimes;
- 18 (3) the strength of the evidence that defendant committed the  
other crimes;
- 19 (4) frequency of the other crimes;
- 20 (5) surrounding circumstances;
- 21 (6) other relevant factor.

22 As stated in *Fuzzard*, although admitting evidence of other prior crimes involving  
23 domestic violence does show propensity, with these due process protections in place  
24 that propensity evidence can no longer be deemed to cause unfair prejudice to a  
25 defendant.

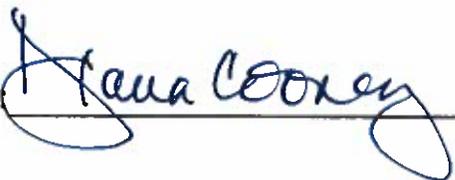
1 **III. CONCLUSION**

2 “Domestic abuse is a prevalent crime with a high recidivism rate; yet, the  
3 offense often goes unreported, and when it is reported, the victim is often the only  
4 witness.” *State v. Hendricks*, 787 A.2d at 1282 (Skoglund, J., concurring). The  
5 Arizona Prosecuting Attorneys’ Advisory Council recognizes the importance of  
6 propensity evidence in prosecuting crimes involving domestic violence and supports  
7 the petition to adopt Rule 404(d). With the added due process considerations  
8 recommended, it is believed both that victims of domestic violence crime will be  
9 protected and defendants rights will be preserved.  
10  
11

12 RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of April, 2020.

13  
14   
15 Elizabeth Burton Ortiz, #012838  
16 Executive Director  
17 Arizona Prosecuting Attorneys’  
18 Advisory Council

18 Electronic copy filed with the  
19 Clerk of the Arizona Supreme Court  
20 this 2<sup>nd</sup> day of April, 2020.

21 By   
22