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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: **PETITION TO AMEND RULE 404 OF THE ARIZONA RULES OF EVIDENCE**	Supreme Court No. R-20-0023 **COMMENT OF THE STATE BAR OF ARIZONA**

Pursuant to Rule 28(e) of the Arizona Rules of Supreme Court, the State Bar of Arizona (the "State Bar") hereby submits the following as its comment to the above-captioned Petition.

The State Bar opposes the Petition to Amend Rule 404 of the Arizona Rules of Evidence because the existing Rule already permits the admission of many types of other act evidence that may be used to explain aspects of a domestic violence relationship. Additionally, the Petition does not explain why the current Rule is deficient in this regard. Moreover, the proposed language does not sufficiently address the need to explain the cycle of domestic violence.

The Petition notes that a domestic violence relationship is cyclical and "includes a tension-building stage, an acute battering incident, and then a phase of

extreme repentance by the abuser." (Petition at 2, *citing* Isabell Scott & Nancy McKenna, *Domestic Violence Practice and Procedure*, § 1:4 (2018).) The Petition also explains that a single act of domestic violence is only one part of a "larger scheme of dominance and control." (*Id*. at 3, *citing* De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 Yale J.L. & Feminism, 359, 388 (1996).)

The language of the proposed amendment is nearly identical to the language of Alaska R. Evid. 404(b)(4), which permits admission of certain narrowly defined domestic violence "crimes." The Petition's proposed language would only permit admission of a limited number of acts covering the "acute battering" stage of the domestic violence cycle. This narrowly tailored language would not help the jury understand the "larger scheme of dominance and control."

The Petition notes several other states have adopted rules admitting other domestic violence acts, including Michigan,[1] which permits the admission of "other acts of domestic violence" but defines "domestic violence" more broadly than Alaska. For purposes of that rule, "domestic violence" is defined as:

> (*i*) Causing or attempting to cause physical or mental harm to a family or household member.

[1] Mich. Comp. Laws Ann. § 768.27b.

> (*ii*) Placing a family or household member in fear of physical or mental harm.
>
> (*iii*) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.
>
> (*iv*) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

Mich. Comp. Laws Ann § 768.27b(6)(a).

This definition encompasses more than just criminal acts and permits the inclusion of other acts in the cycle that may explain or rebut a victims' recantation.

As the Petition points out, certain aspects of the controlling nature of a domestic violence relationship are important to contravene "the myth that 'the victim would leave her abuser if she really experienced the alleged violence.'" (Petition at 5, *citing* Letendre, *Beating Again and Again and Again: Why Washington Needs A New Rule of Evidence Admitting Prior Acts of Domestic Violence*, 75 Wash. L. Rev. 973, 980-82, 999-1000 (2000).) Not all those factors are necessarily domestic violence crimes as defined in § 13-3601. For example, a victim may feel frightened or intimidated into staying with an abuser and recanting her allegation because she fears losing a custody battle over a child or losing necessary financial support from the abuser. Such concerns are relatively common for domestic violence victims, but an abuser's threats or intimidation of this nature would not constitute a domestic

violence "crime" because A.R.S. § 13-1202 only criminalizes threats to cause physical injury or serious property damage. However, this type of intimidation or mental abuse would meet the definition of "domestic violence" under the Michigan rule and would be admissible as relevant other act evidence.

The State Bar agrees that domestic violence cases present unique challenges in explaining the dynamics of a domestic violence relationship but disagrees that the proposed language is adequate to admit relevant, other act evidence that would help jurors better understand the evidence in a criminal domestic violence prosecution.

CONCLUSION

For the reasons stated above, the State Bar of Arizona respectfully requests that this Petition be denied.

RESPECTFULLY SUBMITTED this 1st day of May, 2020.

/s/ Lisa M. Panahi
Lisa M. Panahi
General Counsel

Electronic copy filed with the
Clerk of the Supreme Court of Arizona
this 1st day of May, 2020.

by: Patricia Seguin