

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

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Rule 404 Subgroup Report

This memorandum reflects the work of the Rule 404 Subgroup in anticipation of the May 21, 2010 meeting of the Ad Hoc Committee on the Arizona Rules of Evidence. Section I includes a redline of Arizona Rule of Evidence (“ARE”) 404 compared to Federal Rule of Evidence (“FRE”) 404 as well as related relevant FRE provisions and corresponding Arizona Revised Statutes. Section II summarizes the history of ARE 404, FRE 404 and related FRE provisions and A.R.S. §§ 13-1420 and 1421. Section III summarizes the Subgroup’s discussions regarding whether it may make sense for ARE 404 to be amended to conform with FRE 404 and related FRE provisions.

**I. ARE 404 and FRE 404; FRE 412-415 and A.R.S. §§ 13-1420 and -1421**

ARE 404 and FRE 404 contain substantial differences. In addition, FRE 404 has related provisions (FRE 412-415) that address topics, at least in part, covered by ARE 404 and A.R.S. §§ 13-1420 and 1421. Thus, although a redline comparison of ARE 404 and FRE 404 is provided, it is comparatively less instructive than it may be for other rules of evidence.

**A. Redline**

The following compares ARE 404 with FRE 404, with additions to ARE indicated by underlining and deletions of FRE by ~~strikeouts~~.

**Rule 404. Character Evidence ~~not~~ Not Admissible ~~to~~ 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 ~~In a criminal case, 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 of the aberrant sexual propensity~~ ~~alleged victim~~ of the ~~crime is offered by an~~ accused or a civil defendant pursuant to ~~and admitted under~~ Rule 404(c); ~~(a)(2); evidence of the same trait of character of the accused offered by the prosecution;~~

**(2) Character of ~~alleged~~ victim.**— Evidence ~~In a criminal case, and subject to the limitations imposed by Rule 412, evidence~~ of a pertinent trait of character of the ~~alleged~~ 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 ~~alleged~~ victim offered by the prosecution in a homicide case to rebut evidence that the ~~alleged~~ victim was the first aggressor;

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

**(b) Other crimes, wrongs, or acts.** Except as provided in Rule 404(c), evidence ~~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~~ ~~accident~~, ~~provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.~~

### **(c) Character evidence in sexual misconduct cases**

In a criminal case in which a defendant is charged with having committed a sexual offense, or a civil case in which a claim is predicated on a party's alleged commission of a sexual offense, evidence of other crimes, wrongs, or acts may be admitted by the court if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged. In such a case, evidence to rebut the proof of other crimes, wrongs, or acts, or an inference therefrom, may also be admitted.

(1) In all such cases, the court shall admit evidence of the other act only if it first finds each of the following:

(A) The evidence is sufficient to permit the trier of fact to find that the defendant committed the other act.

(B) The commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged.

(C) The evidentiary value of proof of the other act is not substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403. In making that determination under Rule 403 the court shall also take into consideration the following factors, among others:

- (i) remoteness of the other act;
- (ii) similarity or dissimilarity of the other act;
- (iii) the strength of the evidence that defendant committed the other act;
- (iv) frequency of the other acts;
- (v) surrounding circumstances;
- (vi) relevant intervening events;
- (vii) other similarities or differences;
- (viii) other relevant factors.

(D) The court shall make specific findings with respect to each of (A), (B), and (C) of Rule 404(c)(1).

(2) In all cases in which evidence of another act is admitted pursuant to this subsection, the court shall instruct the jury as to the proper use of such evidence.

(3) In all criminal cases in which the state intends to offer evidence of other acts pursuant to this subdivision of Rule 404, the state shall make disclosure to the defendant as to such acts as required by Rule 15.1, Rules of Criminal Procedure, no later than 45 days prior to the final trial setting or at such later time as the court may allow for good cause. The defendant shall make disclosure as to rebuttal evidence pertaining to such acts as required by Rule 15.2, no later than 20 days after receipt of the state's disclosure or at such other time as the court may allow for good cause. In all civil cases in which a party intends to offer evidence of other acts pursuant to this subdivision of Rule 404, the parties shall make disclosure as required by Rule 26.1, Rules of Civil Procedure, no later than 60 days prior to trial, or at such later time as the court may allow for good cause shown.

(4) As used in this subsection of Rule 404, the term "sexual offense" is as defined in A.R.S. § 13-1420(C) and, in addition, includes any offense of first-degree murder pursuant to A.R.S. § 13-1105(A)(2) of which the predicate felony is sexual conduct with a minor under § 13-1405, sexual assault under § 13-1406, or molestation of a child under § 13-1410.

**B. FRE 412-415**

**FRE 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition.**

**(a) Evidence Generally Inadmissible.** The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

- (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior; and
- (2) Evidence offered to prove any alleged victim's sexual predisposition.

**(b) Exceptions.**

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

- (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;
- (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
- (C) evidence the exclusion of which would violate the constitutional rights of the defendant.

(2) In a criminal case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

**(c) Procedure to Determine Admissibility.—**

(1) A party intending to offer evidence under subdivision (b) must—

- (A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and
- (B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The

motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

**FRE 413. Evidence of Similar Crimes in Sexual Assault Cases.**

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government 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, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purpose of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

- (1) any conduct proscribed by chapter 109A of title 18, United States Code;
- (2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;
- (3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;
- (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or
- (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

**FRE 414. Evidence of Similar Crimes in Child Molestation Cases.**

(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government 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, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, “child” means a person below the age of fourteen, and “offense of child molestation” means a crime under Federal law or the law of a State (as defined in section 514 of title 18, United States Code) that involved—

- (1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;
- (2) any conduct proscribed by chapter 110 of title 18, United States Code;
- (3) any contact between any part of the defendant’s body or an object and the genitals and anus of a child;
- (4) contact between the genitals or anus of the defendant and any part of the body of a child;
- (5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or
- (6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

**FRE 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation.**

(a) In a civil case in which a claim for damages or other relief is predicated on a party’s alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party’s commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

**C. A.R.S. §§ 13-1420 and -1421.**

**13-1420. Sexual offense; evidence of similar crimes; definition**

A. If the defendant is charged with committing a sexual offense, the court may admit evidence that the defendant committed past acts that would constitute a sexual offense and may consider the bearing this evidence has on any matter to which it is relevant.

B. This section does not limit the admission or consideration of evidence under any court rule.

C. For the purposes of this section, “sexual offense” means any of the following:

1. Sexual abuse in violation of section 13-1404.
2. Sexual conduct with a minor in violation of section 13-1405.
3. Sexual assault in violation of section 13-1406.
4. Sexual assault of a spouse if the offense was committed before the effective date of this amendment to this section.
5. Molestation of a child in violation of section 13-1410.
6. Continuous sexual abuse of a child in violation of section 13-1417.
7. Sexual misconduct by a behavioral health professional in violation of section 13-1418.
8. Commercial sexual exploitation of a minor in violation of section 13-3552.
9. Sexual exploitation of a minor in violation of section 13-3553.

**13-1421. Evidence relating to victim’s chastity; pretrial hearing**

A. 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 this chapter. Evidence of specific instances of the victim’s prior sexual conduct may be admitted only if a judge finds the evidence is relevant and is material to a fact in issue in the case and that the inflammatory or prejudicial nature of the evidence does not outweigh the probative value of the evidence, and if the evidence is one of the following:

1. Evidence of the victim’s past sexual conduct with the defendant.
2. Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease or trauma.
3. Evidence that supports a claim that the victim has a motive in accusing the defendant of the crime.
4. Evidence offered for the purpose of impeachment when the prosecutor puts the victim’s prior sexual conduct in issue.
5. Evidence of false allegations of sexual misconduct made by the victim against others.

B. Evidence described in subsection A 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 subsection A admissible, the court may hold a hearing to determine the admissibility of the evidence under subsection A. The standard for admissibility of evidence under subsection A is by clear and convincing evidence.

**D. Comparison of Provisions.**

FRE 404 and ARE 404 differ substantially. FRE 404 “does not contain the matters added by the 1997 amendments to” ARE 404(c) to address the issues and divergent opinions in *State v. Treadaway*, 116 Ariz. 163, 568 P.2d 1061 (1977) (3-2 decision) and *State v. McFarlin*, 110 Ariz. 225, 517 P.2d 87 (1973) (3 member panel), meaning FRE 404 “does not contain a provision comparable to” ARE 404(c) “or the conforming phrases added to” ARE 404(a)(1) or 404(b). Daniel J. McAuliffe, ARIZONA CIVIL RULES HANDBOOK Rule 404 *Comparison with Federal Rule* (2010 ed.). In addition,

The provisions added to the Arizona Rule by the 1997 amendments are roughly similar, in certain limited respects, to new provisions added to the Federal Rules of Evidence in 1994. [FRE 415] permits the introduction, in civil cases in which a claim for relief is predicated on a party’s alleged commission of conduct constituting the offense of sexual assault or child molestation, of evidence of the party’s commission of another offense or offenses of sexual assault or child molestation. The new provisions of [ARE 404(c)] . . . would permit a somewhat broader range of sexual misconduct evidence to be admitted than would the Federal Rule, but also requires much more detailed findings by the trial court before such evidence is admitted. The new provisions of the Arizona Rule [ARE 404(c)] are not at all similar to [FRE 412], which only permits the introduction, in very limited circumstances, of evidence of past sexual misconduct by a *victim* of a crime in criminal cases.

Arizona has not adopted the final phrase of [FRE] 404(b) . . . , added by a 1991 amendment, which requires the prosecution in a criminal case to give the accused, upon request, reasonable notice, generally prior to trial, of the evidence of other crimes of the accused it intends to introduce at trial. There is a prior disclosure requirement, however, for evidence of other crimes, wrongs or acts tending to show an “aberrant sexual propensity” that is to be offered pursuant to the authority conferred by [ARE 404(c)] . . . . Arizona has also not adopted the 2000 amendment to [FRE 404(a)(1)], which permits the prosecution in criminal cases to offer evidence of a pertinent character trait of the accused where evidence of that character trait of the alleged victim has been offered by the accused and admitted. Finally, Arizona has not adopted the 2006 amendments to [FRE

404(a)(1) and (2)], which expressly limit the applications of those exceptions to criminal cases. *Id.*

## **II. History of FRE 404; FRE 412-415; ARE 404 and A.R.S. §§ 13-1420 and 1421**

### **A. FRE 404**

FRE 404 was enacted effective July 1, 1975 and amended effective October 1, 1987, December 1, 1991, December 1, 2000 and December 1, 2006.

The 1987 amendment was technical and no substantive change was intended. (*See* Notes of Advisory Committee on 1987 amendments to Rules [<http://federalevidence.com/advisory-committee-notes> (visited 4/19/2010)].)

The 1991 amendment added a pretrial notice requirement in FRE 404(b) in criminal cases, adding that “the offered evidence is inadmissible if the court decides that the notice requirement has not been met.” *Id.* At that time, the Advisory Committee noted that FRE 404(b) “has emerged as one of the most cited Rules in the Rules of Evidence” and that “the overwhelming number of cases” implicating FRE 404(b) involve evidence offered by the prosecution. *Id.* The Advisory Committee added that the 1991 amendment “does not extend to evidence of acts which are ‘intrinsic’ to the charged offense. Nor is the amendment intended to redefine what evidence would otherwise be admissible under [FRE] 404(b). Finally, the Committee does not intend through the amendment to affect the role of the court and the jury in considering such evidence.” *Id.* (citations omitted).

The 2000 amendment added a provision to FRE 404(a)(1) “to provide that when the accused attacks the character of an alleged victim under [FRE 404(a)(2)] . . . , the door is opened to an attack on the same character trait of the accused.” (*See* Notes of Advisory Committee on 2000 Amendment of Rule [<http://federalevidence.com/advisory-committee-notes> (visited 4/19/2010)].)

The amendment does not affect the admissibility of evidence of specific acts of uncharged misconduct offered for a purpose other than proving character under [FRE] 404(b). Nor does it affect the standards for proof of character by evidence of other sexual behavior or sexual offenses under [FRE] 412-415. By

its placement in [FRE] 404(a)(1), the amendment covers only proof of character by way of reputation or opinion.

The amendment does not permit proof of the accused's character if the accused merely uses character evidence for a purpose other than to prove the alleged victim's propensity to act in a certain way. Finally, the amendment does not permit proof of the accused's character when the accused attacks the alleged victim's character as a witness under [FRE] 608 or 609.

*Id.* (citation omitted).

The 2006 amendment clarified “that in a civil case evidence of a person’s character is never admissible to prove that the person acted in conformity with the character trait.” (*See* Notes of Advisory Committee on 2000 Amendment of Rule [<http://federalevidence.com/advisory-committee-notes> (visited 4/19/2010)].) The amendment is consistent with the original intent of the Rule, which was to prohibit the circumstantial use of character evidence in civil cases, even when closely related to criminal charges. *Id.*

The amendment also clarifies that evidence otherwise admissible under [FRE] 404(a)(2) may nonetheless be excluded in a criminal case involving sexual misconduct. In such a case, the admissibility of evidence of the victim’s sexual behavior and predisposition is governed by the more stringent provisions of [FRE] 412. Nothing in the amendment is intended to affect the scope of [FRE] 404(b). While [FRE] 404(b) refers to the ‘accused,’ the ‘prosecution,’ and a ‘criminal case,’ it does so only in the context of a notice requirement. The admissibility standards of [FRE] 404(b) remain fully applicable to both civil and criminal cases. *Id.*

## **B. FRE 412**

FRE 412 was added in 1978 and amended in 1988 and 1994. [<http://federalevidence.com/rules-of-evidence> (visited 4/18/2010)] FRE 412 is commonly known as the rape shield provision and limits the admissibility of the sexual behavior or predisposition of an alleged victim of sexual misconduct. Such evidence is offered only in limited circumstances in criminal cases and through a balancing test in civil cases, based both

on relevancy and public policy concerns. Steven Goode & Olin Guy Wellborn III, *COURTROOM EVIDENCE HANDBOOK* 117-18 (2007-08 Student ed.).

In general, FRE 412 effectively forecloses a party from offering evidence of an alleged victim's character to prove the action in conformity with that character as otherwise might be allowed under FRE 404(a)(2). *Id.* at 118. FRE 412(d)(1) sets forth specified exceptions applicable only in criminal cases regarding source of semen, injury or other physical evidence; specific instances of sexual behavior regarding the victim offered by the defendant to show consent (or offered by the prosecution) and evidence required by confrontation or due process rights. *Id.* at 119-20. FRE 412(b)(2) has an exception in civil cases allowing the admission of evidence using an "inverted" FRE 403 standard (i.e., if the evidence is otherwise admissible "and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party"). FRE 412 also requires a timely written motion, in camera hearing where the victim and parties have a right to be heard and presumptive sealing of the record. FRE 412(c)(2).

### **C. FRE 413**

FRE 413 was added in 1995. [<http://federalevidence.com/rules-of-evidence> (visited 4/17/2010)] Limited to criminal cases where "the defendant is accused of an offense of sexual assault," it "is designed to supersede in sexual assault cases the general rule, expressed in [FRE] 404, that excludes character evidence when offered to prove conforming conduct. [FRE] 413 is based on the notion that informing the jury of a defendant's commission of other sexual assaults is often crucial to the accurate determination of sexual assault cases because such cases often turn on a dispute as to whether the complainant consented." Steven Goode & Olin Guy Wellborn III, *COURTROOM EVIDENCE HANDBOOK* 122-23 (2007-08 Student ed.) (citation omitted). "Contrary to the general rule barring evidence of a person's character to prove that the person acted in conformity with that character, [FRE] 413 specifically authorizes the admission of evidence of other instances in which the defendant committed a sexual assault [as defined in FRE 413, whether or not resulting in conviction and whether

occurring before or after the charged offense] ‘for its bearing on any matter to which it is relevant.’” *Id.* at 123. As construed, FRE 413 “clearly favors admissibility of other sexual assault evidence,” subject to an FRE 403 balance and disclosure and notice requirements. *Id.* (citing *United States v. Julian*, 427 F.3d 471, 485-88 (7<sup>th</sup> Cir. 2005) (upholding admission of offense occurring 12 years before trial)).

#### **D. FRE 414**

FRE 414 was added in 1995. [<http://federalevidence.com/rules-of-evidence> (visited 4/17/2010)] Limited to criminal cases “in which the defendant is accused of an offense of child molestation,” the rationale and impact of FRE 414 in child molestation criminal cases is substantially identical to the rationale and impact of FRE 413 in sexual assault criminal cases. Steven Goode & Olin Guy Wellborn III, *COURTROOM EVIDENCE HANDBOOK* 124-25 (2007-08 Student ed.) (citing authority). “Even before enactment of [FRE] 414, courts were quite willing to admit evidence of prior sexual acts in prosecution for child sexual abuse.” *Id.* “Child” is defined as person less than 14 years old and Rule also defines “offense of child molestation.” FRE 414(d). As construed, FRE 414 “clearly favors admissibility of other acts of child molestation,” subject to an FRE 403 balance and disclosure and notice requirements. Steven Goode & Olin Guy Wellborn III, *COURTROOM EVIDENCE HANDBOOK* 124-25 (2007-08 Student ed.) (citing *United States v. Mecham*, 115 F.3d 1488, 1491-95 (10<sup>th</sup> Cir. 1997) (upholding admission of 25 year old incident) and *United States v. Larson*, 112 F.3d 600, 602-05 (2d Cir. 1997) (excluding evidence of molestations occurring 21-23 years earlier, but admitting evidence of molestations occurring 16-20 years earlier)).

#### **E. FRE 415**

FRE 415 was added in 1995. [<http://federalevidence.com/rules-of-evidence> (visited 4/17/2010)] FRE 415 “provides that a party in a civil case who is seeking relief based on the other party’s alleged act of sexual assault or child molestation may offer the same types of evidence authorized for admission under [FRE] 413 and 414 in analogous criminal cases.” Steven Goode & Olin Guy Wellborn III, *COURTROOM EVIDENCE HANDBOOK* 126 (2007-08

Student ed.). FRE 415 clearly favors admissibility subject to an FRE 403 balance and disclosure and notice requirements. *Id.*

#### **F. ARE 404**

ARE 404 was adopted effective September 1, 1977 and amended effective November 1, 1988; December 1, 1997 and December 1, 2005.

The 1988 amendments were technical (removing reference to “he” and “his”) with no apparent substantive changes. 157 Ariz. xxxviii, xxxix (Order Amending Various Rules, Arizona Rules of Evidence (10/19/1988)]

The 1997 amendments “made character evidence of sexual propensity admissible in both civil and criminal cases alleging sexual misconduct by the defendant.” Joseph M. Livermore, Robert Bartels & Anne Holt Hameroff, ARIZONA PRACTICE LAW OF EVIDENCE § 404.1 at 91 (4<sup>th</sup> ed. 2000). The 1997 amendments changed ARE 404(c) “to codify and supply an analytical framework for the application of the rule created by case law in *State v. Treadaway*, 116 Ariz. 163, 568 P.3d 1061 (1977), and *State v. McFarlin*, 110 Ariz. 225, 517 P.2d 87 (1973).” Comment to 1997 Amendment to ARE 404. More specifically:

The rule announced in *Treadaway* and *McFarlin* and here codified [in ARE 404(c)] is an exception to the common-law rule forbidding the use of evidence of other acts for the purpose of showing character or propensity.

Subsection (1)(B) of [ARE] 404(c) is intended to modify the *Treadaway* rule by permitting the court to admit evidence of remote or dissimilar other acts providing there is a ‘reasonable’ basis, by way of expert testimony or otherwise, to support relevancy, i.e., that the commission of the other act permits an inference that defendant had an aberrant sexual propensity that makes it more probable that he or she committed the sexual offense charged. The *Treadaway* requirement that there be expert testimony in all cases of remote or dissimilar acts is hereby eliminated.

The present codification of the rule permits admission of evidence of the other act either on the basis of similarity or closeness in time, supporting expert testimony, or other reasonable basis that will support such an inference. To be

admissible in a criminal case, the relevant prior bad act must be shown to have been committed by the defendant by clear and convincing evidence. *State v. Terrazas*, 189 Ariz. 580, 944 P.2d 1194 (1997).

Notwithstanding the language in *Treadaway*, the rule does not contemplate any bright line test of remoteness or similarity, which are solely factors to be considered under subsection (1)(c) of [ARE] 404(c). A medical or other expert who is testifying pursuant to [ARE] 404(c) is not required to state a diagnostic conclusion concerning any aberrant sexual propensity of the defendant so long as his or her testimony assists the trier of fact and there is other evidence which satisfies the requirements of subsection (1)(B).

Subsection (1)(C) of the rule requires the court to make a[n ARE] 403 analysis in all cases. The rule also requires the court in all cases to instruct the jury on the proper use of any other act evidence that is admitted. At a minimum, the court should instruct the jury that the admission of other acts does not lessen the prosecution's burden to prove the defendant's guilt beyond a reasonable doubt, and that the jury may not convict the defendant simply because it finds that he committed the other act or had a character trait that predisposed him to commit the crime charged.

Comment to 1997 Amendment to ARE 404.

The 2005 amendments added to the definition of “sexual offense” any first degree murder pursuant to A.R.S. § 13-1105(A)(2) where the predicate felony was sexual conduct with a minor, sexual assault or molestation of a child as defined in A.R.S. §§ 13-1405, -1406 or -1410. (9/27/2005 Order Amending ARE 404(c)(4).)

**G. A.R.S. §§ 13-1420 and 1421**

A.R.S. § 13-1420 was added in 1996 and amended in 2005. The 2005 amendment substituted “committing a sexual offense,” for “a violation of a sexual offense,” in subsection A; rewrote subsection C(4) (sexual assault of a spouse) and made other nonsubstantive changes. (A.R.S. § 13-1420 Historical and Statutory Notes.)

A.R.S. § 13-1421 was added in 1998 and has not been amended.

**III. Discussion**

The Subgroup met on April 30, 2010 for approximately an hour to generally discuss the charge of the Subgroup and initial thoughts. During this meeting, we discussed various advantages of FRE 404 and ARE 404 and our initial thoughts on whether changes might be warranted. No general consensus was arrived upon at that meeting. Members of the Subgroup agreed to give the issues further consideration; to consult with others and among each other in anticipation of the May 14, 2010 deadline for this Memorandum. Following that meeting, members of the Subgroup conferred with prosecutors and members of the criminal defense bar with experience in Federal and Arizona courts; Judicial Officers on the Arizona Superior Court and others.

The consensus of those involved in the application of ARE 404, as described below, is that the Arizona rule be maintained in favor of FRE 412-414. The judges, prosecutors and defense attorneys also would like the Committee to consider several specific changes to ARE 404, as discussed below. Our Subgroup has not yet had an opportunity to discuss in detail these proposed changes and therefore takes no position on them.

**A. Judicial Officers**

Dave Cole likes ARE 404(c) because it provides a “road map” for lawyers and judges without taking away judicial discretion. He does not think we should discard it in favor of the Federal approach, although he is open to discussing ways in which it could be improved. Should the Committee decide to recommend adoption of a rule to govern evidence of victim conduct, Dave thinks it must consider the interplay A.R.S. § 13-1421, the Arizona Constitutional provisions dealing with victims’ rights and the Arizona Supreme Court’s decision in *Pope v. Super. Ct.*, 113 Ariz. 22, 545 P.2d 946 (1976) (holding inadmissible in rape prosecution evidence concerning accuser’s sexual history).

Sam Thumma had no experience with FRE 412-415 and had limited experience with ARE 404(c) and A.R.S. § 13-1421 in the Juvenile Court context. His believes that, to the extent the Arizona Rules of Evidence are designed to comprehensively list the rules for the admissibility of evidence, there would be merit in adding an ARE that (a) reflects the

substance of A.R.S. § 13-1421 and (b) tracks, where appropriate, FRE 412. His further thinks ARE 404(c) provides helpful specificity about factors to consider and the findings required, which is not expressly present in the Federal Rules of Evidence. In addition, if the intent was to change the Arizona Rules of Evidence to reflect the substance of FRE 413, 414 and 415, the rules could not parrot FRE 413(d) or 414(d), given the different substantive law applicable. Accordingly, and with the above caveats, his general suggestion is to (a) leave ARE 404 as is and consider adding an Arizona Rule of Evidence to reflect the substance of A.R.S. § 13-1421.

### **B. The Prosecution Prospective**

ARE 404(C) is a codification of the case law that prosecutors have utilized to obtain admission of propensity evidence. State prosecutors also rely on the existing case law interpreting 404(C) to admit such evidence. The State prosecutors believe that, because the rule and the existing case law appear to be working, there is no need to adopt the Federal approach. Indeed, they think such an approach is inferior to the present model. Among their concerns with the Federal rules are:

- *Standard of proof.* FRE 404, 412-415 utilize the preponderance standard while the ARE and Arizona case law apply a clear and convincing standard. Adopting to the lower standard could make victims more susceptible to attack.
- *Incompatibility with A.R.S. § 13-1421.* Subject to a FRE 403 probative/prejudice determination, FRE 412 allows victim chastity evidence only when: 1) it would show that a person other than the accused was the source of semen/injury/other physical evidence; 2) it shows consent through prior acts with the accused; or 3) exclusion would violate the accused's constitutional rights. A.R.S. § 13-1421 allows evidence for the matters enumerated under FRE 412. It further allows evidence a) relating to a victim's motive, b) for impeachment when the prosecutor puts the victim's prior sexual conduct in issue, and c) to establish false allegations of sexual misconduct made by the victim against others.
- *Sex Crimes Involving 14-17 Year-Old Victims.* FRE 414 applies only to children under the age of 14. ARE has no such age restriction, thereby

enabling prosecutors to seek admission of propensity evidence in cases involving victim minors 14 years and older.

- *Federal Case Law.* There is some concern that, should the FRE model be adopted, federal case law -- in particular law from the Ninth Circuit Court of Appeals -- may be relied on by state courts in a way harmful to prosecutions.
- *Impeachment.* Unlike the federal rules, the Arizona rules allow prior inconsistent statements to be used as substantive evidence, particularly in sex and domestic violence cases where a high number of victims recant.
- *Scope of Cross-Examination.* The Federal rules limit cross-examination to the scope of the direct; Arizona's rules do not.

### C. The Defense Bar

The criminal defense bar advises against amending ARE 404(c) to include the substantive differences in FRE 412-415 because doing so would pose a threat to criminal defendants' constitutional rights, needlessly prejudice victims of sexual crimes, reduce judicial economy, lead to highly-divergent judicial opinions, and further complicate issues of admissibility. The defense bar further recommends the following changes to improve Arizona's rules in this area:

- *Adopting a rule of evidence to enhance the provisions of A.R.S. § 13-1421.* Such a rule should:
  - Include a "catch-all" provision requiring the admission of evidence needed to protect defendants' constitutional rights such as is in FRE 412(b)(1)(C) ("In a criminal case, the following evidence is admissible, if otherwise admissible under these rules: . . . (C) evidence the exclusion of which would violate the constitutional rights of the defendant.")
  - Not include § 13-1421(A)(5), which provides that "[e]vidence of false allegations of sexual misconduct made by the victim against others" may be admitted at trial subject to relevance, probative/prejudice considerations and only if the evidence sought to be admitted under this section is proved by clear and convincing evidence. This subsection fails to limit "evidence of specific instances of the victim's prior sexual conduct," which is the aim of A.R.S. § 13-1421. *Id.* § 13-1421(A). In practice, therefore, subsection (A)(5) makes it difficult to obtain admission of a victim's prior *false allegations* of sexual conduct *that never actually occurred* by requiring defendants to prove by clear and convincing evidence that the alleged act never occurred.
  - Purposefully exclude from the rule subsections (A)(3) through (A)(5), thereby leaving those provisions to be governed by the admissibility

standards set forth in ARE 104 and not the more onerous clear and convincing standard in A.R.S. § 13-1421(B), which would still govern subsections (A)(1) and (A)(2). This would render it easier to obtain the admission of evidence suggesting a motive to lie, to bring out previous false allegations, or to impeach evidence of the victim's sexual conduct when the State has first raised the issue.

- *Expressly including the standard for admissibility of evidence in ARE 404(b)-(c).* The standards of admissibility for evidence of other sexual acts sought to be admitted under ARE 404(b) or (c) are well established and controlled by the case law. It would eliminate the risk of confusion, reduce needless litigation and protect the rights of criminal defendants to include these standards directly in ARE 404.
- Including a list of specific types of other sexual acts evidence that is admissible under 404(c) and clarifying the types of cases in which other sexual acts evidence is allowed. Noting that ARE 404(c) goes further than do the federal rules in protecting the rights of defendants by limiting the admission of prior sexual act, the defense bar believes the Rule could be improved to provide predictability and the appropriate protections if it:
  - Defined the term “sexual offense” in subsection (c)(4) to clarify confusion created by *State v. Williams*, 209 Ariz. 228, 236 ¶ 32 (App. 2004) (holding that definition of “sexual offense” in 404(c) “does not necessarily preclude a definition more expansive than that provided by A.R.S. § 13-1420”)
  - Replaced “evidence of *other crimes, wrongs, or acts* may be admitted by the court *if relevant* to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged” with “evidence of other crimes, wrongs, or acts *that constitute a sexual offense as defined in subsection (4)* may be admitted by the court if relevant . . .”.
- *Expressly including a hearing requirement in ARE 404(c).* A.R.S. § 13-1421 has a hearing requirement while 404 (b) and (c) do not. Although many trial courts have held 404(b) and (c) hearings relying on *State v. Aguilar*, 209 Ariz. 40, 49-51 ¶¶ 31-38 (2004) (suggesting trial court's error in admitting evidence based on insufficient record), *State v. LeBrun*, 222 Ariz. 183, 186 ¶ 10 (App. 2009) (holding that evidentiary hearing need not be held prior to admission of evidence under ARE 404(b) or (c) increases the possibility that individual courts may not hold such hearings in the future. Given the high burden of proof and the importance of the evidence, a hearing requirement would best protect a defendant's right to challenge the admissibility of this evidence without having it come before the jury.