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MAILING ADDRESS
P.O. BOX 279
DAVISON, MI 48423

517.579.0533 OFFICE
WWW.CDAMONLINE.ORG

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Chairman Kesto and Members of the House Law and Justice Committee:

The Criminal Defense Attorneys of Michigan (CDAM), the statewide professional organization representing criminal defense attorneys, **opposes** HB 4190. CDAM's opposition is about due process, balance and practical application of law.

HB 4190 would permit a prosecutor to introduce testimony that a defendant had committed an unrelated sexual assault to show that the defendant was more likely to have committed the offense in at issue. This is called "propensity" evidence—defendant allegedly was involved in another sexual assault, therefore s/he is predisposed, or has the propensity, to commit sexual assaults. For as long as there have been rules of evidence and with very few and very narrow exceptions, propensity evidence is not allowed in court on account of the danger that a jury will convict because it views the defendant as "bad" (based on the "other act" allegations) rather than on the evidence of the specific charge at hand.

This is not to say that evidence of a defendant's other acts of sexual misconduct is always inadmissible. Under current law and practice, prosecutors commonly introduce evidence of a Defendant's other sexual misconduct under MRE 404(b), where that kind of evidence is relevant to show intent, motive, identity, lack of mistake, pattern, or in any other way OTHER THAN A PERSON'S PROPENSITY to commit a sexual offense. In fact, pretty much the only reason for which evidence of prior sexual misconduct is NOT admissible is to show propensity.

Consider this example: a defendant cannot introduce evidence of a complainant's prior sexual conduct in defense of a rape charge, except in certain circumstances where the evidence is relevant independent of the complainant's sexual history. We support that principle, because anyone, sex traffic workers included, can be raped, and a defendant who sexually

assaulted a sex worker cannot use that sex worker's profession – a sex worker – as evidence in that defendant's own defense; "I can't have raped the complainant because s/he is a prostitute." For the exact same reason, just flipped from complainant to defendant, a prosecutor should not be able to introduce evidence of alleged unrelated sexual misconduct against a Defendant charged with Sexual Assault, *absent an independent ground of relevance*. Victims should be judged on the merits of the particular circumstances of the case, and defendants likewise—no one should be disbelieved or convicted on innuendo and supposition from some alleged prior history.

Again, there is already a reason and mechanism to bring prior behavior as evidence if warranted in the particular case, and that this legislation oversteps that existing mechanism by allowing evidence that taints the process. In essence, this legislation puts a thumb on one side of the scale of justice, which should be instead balanced, by allowing evidence that doesn't *have* to be shown to be relevant to the case. It just assumes that it is relevant, and court cases cannot be a place of assumption.

For those reasons, legal and practical, CDAM opposes HB 4190, and we thank the committee for the opportunity to express our concerns about what would constitute a radical departure from long-established and well-founded rules of evidence in our courts.

Sincerely,

John A. Shea,
Criminal Defense Attorneys of Michigan
Co-Chair, Rules and Laws Committee