

# A SEXUAL RELATIONSHIP, DID WE HAVE ONE? A REVIEW OF THE DEFINITION OF “SEXUAL RELATIONSHIP” WITHIN THE CONTEXT OF ALASKA’S DOMESTIC VIOLENCE LAWS

BETH GOLDSTEIN LEWIS TRIMMER\*

*Under Alaska domestic violence laws, two individuals who have engaged in a “sexual relationship” are “household members.” The Alaska Legislature, however, has left the term “sexual relationship” undefined. This Comment sets out to define the term. Finding no answer in the legislative history and common meaning of a sexual relationship, the Comment concludes that the Alaska Legislature needs to take steps to more clearly define what constitutes a “sexual relationship” for the purposes of the domestic violence laws. Action on the part of the legislature is even more important, this Comment suggests, because a number of criminal, civil, and interpretive consequences may arise from the failure to define “sexual relationship.”*

## TABLE OF CONTENTS

I.	INTRODUCTION .....	238
II.	SEXUAL RELATIONSHIP: LACKING A CLEAR LEGAL OR SOCIETAL DEFINITION .....	240
	A. How Is “Sexual Relationship” Defined?.....	240
	B. The Clinton Case.....	241

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\* Beth Goldstein Lewis Trimmer works for the Alaska Office of Public Advocacy (OPA). She currently serves as an Assistant Public Advocate in the Appeals and Statewide Criminal Defense Unit. Beth received her degree in genetic engineering from Cedar Crest College in Pennsylvania and received her law degree at Franklin Pierce Law School in New Hampshire. Prior to joining the OPA, Beth clerked with the Court of Appeals for the Federal Circuit, served as a patent attorney with Proctor and Gamble Company, and served as an Assistant Federal Public Defender in the Southern District of Ohio.

C.	Most State Legislatures Have Failed to Define “Sexual Relationship” .....	243
III.	HOUSEHOLD MEMBER AS DEFINED BY “ENGAGED IN OR HAVING ENGAGED IN A ‘SEXUAL RELATIONSHIP’” .....	244
A.	The Statute Fails to Define “Sexual Relationship” .....	245
B.	Legislative History: Some Indication of the Scope of “Sexual Relationship”? .....	246
IV.	SO WHAT?: INTERPRETIVE, CIVIL, AND CRIMINAL IMPLICATIONS OF ALASKA’S FAILURE TO DEFINE “SEXUAL RELATIONSHIP” .....	248
A.	Problems in Interpretation Arising from the Statute.....	248
B.	Criminal Implications: Alaska Rule of Evidence 404(b)(4).....	251
C.	Civil Implications: Protective Orders.....	255
V.	TOWARD A CLEARER DEFINITION OF “SEXUAL RELATIONSHIP”: SUCCESSFUL LEGISLATIVE AND JUDICIAL ATTEMPTS TO NARROW THE SCOPE OF A “SEXUAL RELATIONSHIP” .....	256
A.	Legislative Attempts.....	257
B.	Court Attempts .....	259
VI.	CONCLUSION.....	261

## I. INTRODUCTION

“Domestic violence,” as defined in section 18.66.990 of the Alaska Statutes,<sup>1</sup> has a potentially far-reaching meaning. According to subsection three of the statute, the terms “domestic violence” and “crime involving domestic violence” are crimes committed by one “householder member” against another.<sup>2</sup> Such crimes range in severity from homicide, murder, and sexual offenses to criminal trespass and harassment.<sup>3</sup> The far-reaching implications of Alaska’s domestic violence laws rest not only on the broad list of crimes encompassed by the statute, but also by the Alaska Legislature’s expansive definition of “household member.”<sup>4</sup> Under section 18.66.990(5) of the Alaska Statutes, the Alaska Legislature has defined “household member” to include “adults or minors who are engaged in or who have engaged in a sexual relationship.”<sup>5</sup>

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1. ALASKA STAT. § 18.66.990(3) (2006).

2. *Id.*

3. *Id.*; ALASKA STAT. § 11.41 (2006).

4. *See* Carpentino v. State, 42 P.3d 1137, 1141 (Alaska Ct. App. 2002).

5. ALASKA STAT. § 18.66.990(5) (2006).

Although the term “sexual relationship” is used to define the scope of “household member,” for purposes of domestic violence laws in Alaska, “sexual relationship” is neither defined statutorily nor through Alaska case law.<sup>6</sup> Other states’ domestic violence statutes also define household members as persons who either currently, or at sometime in the past, have engaged in a sexual relationship.<sup>7</sup> Although none of these states’ statutes or case law have fully defined the term “sexual relationship,” they provide some insight into how section 18.66.990 of the Alaska Statutes may be revamped to better reflect the legislative intent behind Alaska’s domestic violence legislation.

Even with this guidance from other states, the bottom line is that as section 18.66.990 of the Alaska Statutes currently exists, there is little guidance for the courts and even less for the individuals impacted by its terminology. This is problematic because being deemed a “household member” has significant criminal and civil implications. The focus of this Comment is to analyze the definition and implications of the term “sexual relationship” within the context of Alaska’s domestic violence laws.

As background, Part II explores the etymological, social, and legal meaning of the term sexual relationship. Specifically, it addresses two key interpretive questions associated with the term: what activity is required to constitute a sexual relationship, and are there any temporal requirements to establish a sexual relationship? Although some attempts have been made to define sexual relationship, Part II concludes that no generally accepted definition exists and that neither interpretive question has a generally accepted answer.

Part III examines the term “sexual relationship” as it is used in the Alaska domestic violence laws and as the legislature intended to use it. Two diverging conclusions arise from this examination. First, although “sexual relationship” is textually undefined, the legislative history suggests that only ongoing sexual relationships or past sexual relationships that developed over a significant period of time qualify under the statute. Second, while the legislative history may *suggest* that only ongoing relationships qualify, this is by no means conclusive; the legislative history is ambiguous as to whether a “sexual relationship” requires a minimum length of time. In light of this ambiguity, Part IV identifies and explores the three practical implications of the Alaska Legislature’s failure to define “sexual relationship”: interpretive problems that courts may have, the

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6. *Id.*

7. *See infra* Part II.C.

admission of evidence under Alaska Rule of Evidence 404,<sup>8</sup> and the increased use of protective orders. Part V then concludes with suggestions for change.

## II. SEXUAL RELATIONSHIP: LACKING A CLEAR LEGAL OR SOCIETAL DEFINITION

The term sexual relationship may seem simple enough on its face. But a closer examination begs at least two key interpretive questions. First, what sort of sexual activity is required to establish a sexual relationship? Is sexual intercourse required, or do other forms of sexual activity qualify? Second, for how long or how many times must the requisite sexual activity have occurred to constitute a sexual relationship? Does a casual sexual encounter, such as a one-night stand qualify, or need there be consistent and recurring sexual activity over a period of time? If some time element is required, where is the line drawn?

As Part II demonstrates, the term sexual relationship has no generally accepted legal or social definition. More specifically, the two key interpretive questions above have no clear answer. These interpretive problems make Alaska's failure to statutorily define "sexual relationship," discussed below,<sup>9</sup> even more problematic: with no statutory guidance and no interpretive reference in law or society, Alaska courts are left to their own devices to interpret the term "sexual relationship."

### A. How Is "Sexual Relationship" Defined?

Black's Law Dictionary defines a number of different types of relationships—everything from the attorney-client relationship, to the professional relationship, to the parent-child relationship.<sup>10</sup> However, nowhere in Black's Law Dictionary is sexual relationship defined.<sup>11</sup> The same is true for the American Heritage Dictionary of English Language ("American Heritage Dictionary").<sup>12</sup>

Both Black's Law Dictionary and the American Heritage Dictionary do define a similar term: "sexual relations."<sup>13</sup> The American Heritage Dictionary defines "sexual relations" as

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8. ALASKA R. EVID. 404.

9. *See infra* Part III.

10. BLACK'S LAW DICTIONARY 1314–15 (8th ed. 2004).

11. *Id.*

12. *See* THE AMERICAN HERITAGE DICTIONARY OF ENGLISH LANGUAGE (4th ed. 2006).

13. BLACK'S LAW DICTIONARY 1314–15 (8th ed. 2004); THE AMERICAN HERITAGE DICTIONARY OF ENGLISH LANGUAGE (4th ed. 2006).

“sexual intercourse” and “sexual activity between individuals.”<sup>14</sup> Black’s Law Dictionary’s definition is similar: “sexual relations” include both “sexual intercourse” and “[p]hysical sexual activity that does not necessarily culminate in intercourse.”<sup>15</sup> In a social and legal sense, then, “sexual relations” do not need to rise to the level of sexual intercourse, and can include all forms of sexual activity.

The etymology of the term “relationship” suggests, however, that two individuals who have shared sexual relations do not necessarily have a sexual relationship. The term “relationship” derives from the word “relation,” which, as discussed above, can include sexual intercourse or other physical sexual activity,<sup>16</sup> and the native English suffix *-ship*, meaning something that shows or possesses a quality.<sup>17</sup> It follows that a sexual relationship shows or possesses the quality of sexual relations. More precisely, a sexual relationship shows or possesses the quality of sexual intercourse or some other form of sexual activity.<sup>18</sup>

While this definition of sexual relationship may sound nice, it offers very little interpretive guidance. For one, it is unclear what type of sexual activity is required to establish a sexual relationship. If, as it was assumed above, the term “sexual relations” can be used to interpret sexual relationship, then certain other forms of sexual activity may constitute a sexual relationship. Sexual activity takes multiple forms, however, and the definition provides no guidance as to where to draw the line.<sup>19</sup> It is also possible that not all “sexual relations” constitute a sexual relationship. Must the requisite sexual activity occur only once, i.e., a one-night stand, for it to show or possess the quality of the requisite sexual intercourse? Or, must a course of sexual conduct ensue for the sexual relations to graduate to a sexual relationship? These questions find no answer in the dictionary.

## B. The Clinton Case

One interesting and well-known case that called into question the meaning of a sexual relationship in the legal context was the

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14. THE AMERICAN HERITAGE DICTIONARY OF ENGLISH LANGUAGE (4th ed. 2006).

15. BLACK’S LAW DICTIONARY 1314–15 (8th ed. 2004).

16. See *supra* text accompanying notes 10–15.

17. THE AMERICAN HERITAGE DICTIONARY OF ENGLISH LANGUAGE (4th ed. 2006).

18. See BLACK’S LAW DICTIONARY 1314–15 (8th ed. 2004).

19. See *id.*; see also THE AMERICAN HERITAGE DICTIONARY OF ENGLISH LANGUAGE (4th ed. 2006).

impeachment trial of President William Jefferson Clinton.<sup>20</sup> Paula Jones filed a civil lawsuit against President Clinton alleging sexual harassment.<sup>21</sup> During discovery in *Jones v. Clinton*, President Clinton was deposed and questioned extensively about his involvement with former White House intern Monica Lewinsky.<sup>22</sup> During the course of his deposition, President Clinton testified that he had “no recollection of having ever been alone with Ms. Lewinsky and he denied that he had engaged in an ‘extramarital sexual affair,’ in ‘sexual relations,’ or in a ‘sexual relationship’ with Ms. Lewinsky.”<sup>23</sup> Ms. Lewinsky herself provided an affidavit that denied that she and President Clinton had engaged in a “sexual relationship.”<sup>24</sup> When the President was questioned by his counsel as to whether Ms. Lewinsky’s affidavit denying a sexual relationship with him was true and accurate, the President answered that it was absolutely true.<sup>25</sup>

For purposes of the deposition, and at the request of the President’s counsel, the term “sexual relations” was defined as:

A person engages in ‘sexual relations’ when the person knowingly engages in or causes . . . contact with the genitalia, anus, groin, breasts, inner thigh, or buttocks of any person with an intent to arouse or gratify the sexual desire of any person . . . . ‘Contact’ means intentional touching, either directly or through clothing.<sup>26</sup>

On August 17, 1998, President Clinton testified before a grand jury in Washington, D.C., as part of the Office of Independent Counsel’s criminal investigation, about his relationship with Ms. Lewinsky.<sup>27</sup> During that grand jury appearance, the President defined the activity between himself and Ms. Lewinsky as “inappropriate intimate contact” and stated that “sexual relations as defined by himself and ‘most ordinary Americans’ means, for the most part, only intercourse.”<sup>28</sup> The President himself stated that he did not believe that he engaged in “sexual relations” with Ms. Lewinsky because he never directly touched those parts of her body with the intent to arouse or gratify.<sup>29</sup> During his grand jury

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20. See *Jones v. Clinton*, 36 F. Supp. 2d 1118, 1121–22 (E.D. Ark. 1999).

21. *Id.* at 1120.

22. *Id.* at 1121.

23. *Id.*

24. *Id.* at 1121–22.

25. *Id.* at 1122.

26. *Id.* at 1121 n.5 (alteration in original).

27. *Id.* at 1123.

28. *Id.* at 1130.

29. *Id.* Without expressly ruling on a definition of “sexual relations” or whether or not President Clinton and Monica Lewinsky had a “sexual

testimony, the President stated that “oral sex performed by Ms. Lewinsky on himself would not constitute ‘sexual relations’ as that term was defined” for his deposition.<sup>30</sup>

Even within the context of the specific definition given to sexual relations in the President Clinton-Monica Lewinsky matter, the terms sexual relations and sexual relationship seem to be used interchangeably.<sup>31</sup> Does the act of sexual intercourse result in the establishment of a sexual relationship? Conversely, do sexual acts which do not culminate in sexual intercourse mean that no sexual relationship exists? As noted by the Indiana Court of Appeals, the term “living as a spouse of another” may be based on many things depending upon the individual interpreting the facts. Doesn’t the term sexual relationship present the same quandary?<sup>32</sup> The bottom line is that no generally accepted definition of sexual relationship exists.

### C. Most State Legislatures Have Failed to Define “Sexual Relationship”

Many states have failed to define the term sexual relationship, or a similar term, in their domestic violence statutes. Alongside Alaska,<sup>33</sup> the culprits include Indiana,<sup>34</sup> Pennsylvania,<sup>35</sup> Michigan,<sup>36</sup> and Vermont.<sup>37</sup>

For example, Michigan’s statute defines “family or household member” to include “an individual with whom the person is or has engaged in a sexual relationship.”<sup>38</sup> The Michigan Legislature did not, however, provide any further elaboration on what constitutes a “sexual relationship.”<sup>39</sup> Michigan does not appear to have generated any case law relating to either the breadth of section 400.1501(1)(e) of the Michigan Compiled Laws Annotated or what factors are to be reviewed in determining whether the individual is

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relationship,” the United States District Court for the Eastern District of Arkansas found the President in contempt for making intentionally false statements during his deposition about being alone with Ms. Lewinsky and about engaging in sexual relations with Ms. Lewinsky. *Id.* at 1130–31.

30. *Id.* at 1130 n.16.

31. *See id.* at 1129–30.

32. *See Vaughn v. State*, 782 N.E.2d 417, 420–21 (Ind. Ct. App. 2003).

33. *See* ALASKA STAT. § 18.66.990 (2006).

34. *See* IND. CODE § 35-41-1-10.6(a)(3) (2006).

35. 23 PA. CONS. STAT. § 6102 (2006).

36. MICH. COMP. LAWS § 400.1501 (2006).

37. VT. STAT. tit. 15, § 1101(2) (2005).

38. MICH. COMP. LAWS § 400.1501(1)(e)(iv) (2006).

39. *See id.*

or has been engaged in a “sexual relationship” with the alleged victim.

Vermont’s statute defines “household member” to include “persons who, for any period of time . . . *are engaged in or have engaged in a sexual relationship*, or minors or adults who are dating or who have dated.”<sup>40</sup> The statute goes on to define “dating” as “a social relationship of a romantic nature” and provides factors to consider when determining whether a dating relationship exists or existed.<sup>41</sup> The statute does not, however, further define “sexual relationship,” nor does it imply that courts should apply the “dating” criteria to the determination of what constitutes a “sexual relationship.”<sup>42</sup> Additionally, it appears as though the Vermont courts have not been presented with an opportunity to determine whether, in the absence of applying the factors similar to the “dating” parameters set forth in the statute, the definition of “sexual relationship” is overbroad.<sup>43</sup>

### III. HOUSEHOLD MEMBER AS DEFINED BY “ENGAGED IN OR HAVING ENGAGED IN A ‘SEXUAL RELATIONSHIP’”

The Alaska domestic violence laws do not clearly define the outer limits of what constitutes domestic violence. Crimes occurring between two household members are crimes of domestic violence; the term “household member,” however, is broad and not limited to those living in the same household.<sup>44</sup> Though a sexual relationship is one way of establishing that two people are household members, the Alaska domestic violence laws leave this term largely undefined.<sup>45</sup> It also fails to put any kind of temporal limit on the term; once two people engage in a “sexual relationship,” they could theoretically forever be considered

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40. VT. STAT. tit. 15, § 1101(2) (2005) (emphasis added).

41. *Id.* The factors include “(A) the nature of the relationship;” “(B) the length of time the relationship existed;” “(C) the frequency of interaction between the parties;” and “(D) the length of time since the relationship was terminated, if applicable.” *Id.*

42. *Id.*

43. *See State v. Swift*, 844 A.2d 802 (Vt. 2004) (finding that complainant and defendant both live together and had a sexual relationship where shortly prior to the assault they lived together for six months); *see also State v. West*, 667 A.2d 540 (Vt. 1995) (finding that complainant and defendant were boyfriend and girlfriend at the time of the assault, had two children together, and shared occupancy of the same residence).

44. ALASKA STAT § 18.66.990(5) (2006).

45. *See id.* (stating only that “‘household member’ includes . . . adults or minors who are engaged in or who have engaged in a sexual relationship”).

“household members” under this statute.<sup>46</sup> The legislative history shows this term was never meant to be so sweeping, but a lack of clear legislative guidance has left the scope of the term “sexual relationship” uncertain.

#### A. The Statute Fails to Define “Sexual Relationship”

On April 20, 1995, House Bill 314, “An Act relating to the crime of violating a domestic violence restraining order,” was introduced.<sup>47</sup> The original bill was only four pages long and was directed at revising statutes relating to violations of domestic violence restraining orders.<sup>48</sup> It also included a prohibition against tape recording by defense attorneys of the victim or a witness without their prior consent.<sup>49</sup> The proposed committee substitute bill evolved, however, into a document containing over fifty pages.<sup>50</sup> The proposed substitute presented a more comprehensive approach to domestic violence in Alaska and took much of its structure from the Model Code on Domestic and Family Violence.<sup>51</sup>

Alaska’s definition of “household member” relies heavily on the Model Penal Code on Domestic and Family Violence.<sup>52</sup> The commentary to the Model Code indicates that “household member” is not limited to two people who live together: “The definition of family or household member is broad. Cohabitation is not a prerequisite for eligibility; and the relationship between the victim and the perpetrator need not be current. The Code recognizes that violence may continue after the formal or informal relationship has ended.”<sup>53</sup> Further, the Code’s definition of “household member” includes “adults or minors who are engaged

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46. *Id.*

47. *House Journal*, 19th Leg., 1st Sess., 1399–1400 (Apr. 20, 1995).

48. *See id.*

49. *Violating Domestic Violence Orders: Senate Judiciary Committee Notes on H.B. 314 Before the S. Comm. On the Judiciary*, 19th Leg., tape 96-38, side B (Alaska 1996) [hereinafter *Committee Notes on H.B. 314*], available at [http://www.legis.state.ak.us/cgi-bin/folioisa.dll/cm19/query=\\*/doc/%7B@7296%7D?](http://www.legis.state.ak.us/cgi-bin/folioisa.dll/cm19/query=*/doc/%7B@7296%7D?)

50. *Id.* (statement of Sen. Robin Taylor, Chairman, S. Comm. on the Judiciary).

51. *Id.* (discussing MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE (1994)).

52. *Compare* ALASKA STAT. § 18.66.990(5) (2006) (defining “household member”), *with* MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 102(2) (1994) (defining “family or household member”).

53. MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 102(2) (1994).

in or who have engaged in a sexual relationship.”<sup>54</sup> The Code does not, however, further define what the term “sexual relationship” means in the context of this broad definition and intent.<sup>55</sup> Similarly, section 18.66.990 of the Alaska Statutes also does not define the term “sexual relationship” within the context of the statute.<sup>56</sup>

#### B. Legislative History: Some Indication of the Scope of “Sexual Relationship”?

The legislative history of section 18.66.990 of the Alaska Statutes suggests that not all sexual relationships between two individuals make them “household members” for the purposes of the domestic violence laws.<sup>57</sup> Rather, it appears that for a “sexual relationship” to be established, the sexual relationship must have been ongoing for or developed over a period of time. As Jane Andreen, Executive Director of the Council on Domestic Violence and Sexual Assault, testified before the Senate Judiciary Committee, domestic violence is “a series of controlling behaviors that lead to physical abuse.”<sup>58</sup> Ms. Andreen went on to explain that the behaviors she was speaking of “develop and evolve over a period of time.”<sup>59</sup> Deputy Attorney General Laurie Otto agreed, stating that the underlying cause of domestic violence was one of power and control in the relationship that tends to escalate from verbal abuse.<sup>60</sup> By the time the physical violence occurs, Ms. Otto concluded, the dynamic of control has been developed in the relationship.<sup>61</sup>

Taken together, Ms. Andreen and Ms. Otto’s comments suggest that the domestic violence laws were enacted to address relationships that develop over time.<sup>62</sup> Therefore, it follows that not all sexual relationships should fall within the ambit of the statute. Only those sexual relationships that have the potential to present the problems associated with domestic violence—namely, a

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54. Compare ALASKA STAT. § 18.66.990(5) (defining “household member”), with MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE, § 102(2) (1994) (defining “family or household member”).

55. See MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 102(2).

56. See ALASKA STAT. § 18.66.990 (2006).

57. See *Committee Notes on H.B. 314*, 19th Leg., tape 96-39, side B (Alaska 1996), available at [http://www.legis.state.ak.us/cgi-bin/folioisa.dll/cm19/query=\\*/doc/%7B@7296%7D?](http://www.legis.state.ak.us/cgi-bin/folioisa.dll/cm19/query=*/doc/%7B@7296%7D?).

58. See *id.*

59. *Id.* at tape 96-39, side B, no. 599.

60. *Id.* at tape 96-39, side B, no. 548.

61. *Id.*

62. See *id.* at tape 96-39, side B.

series of actions that establish the dominant partner’s control and influence<sup>63</sup>—should qualify two individuals as “household members.” This would almost certainly mean that a transient sexual encounter, such as a one-night stand, does not qualify as a “sexual relationship.” Where the line should be drawn, however, is not clear from the statute’s text or the legislative history.<sup>64</sup>

The legislative history amplifies another point, as well: a “sexual relationship” need not be ongoing at the time of the crime to qualify two individuals as “household members.”<sup>65</sup> Lauree Hugonin, a representative from the Alaska Network on Domestic Violence and Sexual Assault, testified that domestic violence does not end when a couple has separated.<sup>66</sup> In fact, almost seventy-five percent of the domestic violence reported to the U.S. Department of Justice was inflicted after separation.<sup>67</sup> A past sexual relationship between two people is therefore likely to qualify the two individuals as “household members.”<sup>68</sup>

Again, however, the legislative history and statute itself provide limited guidance as to what past sexual relationships qualify individuals as “household members.”<sup>69</sup> For example, it is unclear if, under the statute, the term “sexual relationship” has any temporal scope.<sup>70</sup> Past sexual relationships are included<sup>71</sup>—but does that mean sexual relationships that have happened in the past five years? Ten years? Longer? Although the legislative history provides no support for a limitless look-back period for individuals who “have engaged in a sexual relationship,”<sup>72</sup> no clear standards exist for determining the appropriate time period.

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63. *See id.* at tape 96-39, side B, no. 599.

64. *See* ALASKA STAT. § 18.66.990 (2006); *Committee Notes on H.B. 314*, 19th Leg., tape 96-39, side B (Alaska 1996), available at [http://www.legis.state.ak.us/cgi-bin/folioisa.dll/cm19/query=\\*/doc/%7B@7296%7D?](http://www.legis.state.ak.us/cgi-bin/folioisa.dll/cm19/query=*/doc/%7B@7296%7D?).

65. *See Committee Notes on H.B. 314*, 19th Leg., tape 96-39, side B, no. 548 (Alaska 1996) (statement of Lauree Hugonin, Member, Alaska Network on Domestic Violence and Sexual Assault), available at [http://www.legis.state.ak.us/cgi-bin/folioisa.dll/cm19/query=\\*/doc/%7B@7296%7D?](http://www.legis.state.ak.us/cgi-bin/folioisa.dll/cm19/query=*/doc/%7B@7296%7D?).

66. *Id.*

67. *Id.*

68. *See* ALASKA STAT. § 18.66.990(5)(D) (2006).

69. *See Committee Notes on H.B. 314*, 19th Leg., tape 96-39, side B, no. 548 (Alaska 1996) (statement of Lauree Hugonin, member, Alaska Network on Domestic Violence and Sexual Assault), available at [http://www.legis.state.ak.us/cgi-bin/folioisa.dll/cm19/query=\\*/doc/%7B@7296%7D?](http://www.legis.state.ak.us/cgi-bin/folioisa.dll/cm19/query=*/doc/%7B@7296%7D?); § 18.66.990(5)(d).

70. *See* ALASKA STAT. § 18.66.990(5)(D).

71. *Id.*

72. *See id.*

IV. SO WHAT?: INTERPRETIVE, CIVIL, AND  
CRIMINAL IMPLICATIONS OF ALASKA'S FAILURE TO DEFINE  
"SEXUAL RELATIONSHIP"

Although the legislative history suggests some limits on the term "sexual relationship,"<sup>73</sup> this does very little to address many of the practical consequences that may result from leaving "sexual relationship" largely undefined. Part IV identifies and explores the interpretive, criminal, and civil consequences of failing to do so.

A. Problems in Interpretation Arising from the Statute

With no statutory definition of "sexual relationship,"<sup>74</sup> and with no clearly accepted legal or societal definition of the term,<sup>75</sup> courts will have a very difficult time determining when a "sexual relationship" has been established. This may lead to arbitrary and capricious interpretations and potentially illogical and inconsistent results.

This interpretive problem is best illustrated by an example. Imagine two friends who have had intermittent sexual relations over the last five years, but no sexual contact at all for the last year and no sexual intercourse ever. An argument ensues between the two friends at a concert they attended with a larger group of friends. Later, when the argument escalates, the woman assaults the man with a deadly weapon.<sup>76</sup> Are the two considered "household members" for the purposes of the domestic violence laws?<sup>77</sup> Indeed, they have had an ongoing relationship and have had sexual relations during that relationship. Their relationship, however, has not been defined solely by sexual relations. Moreover, they have never had sexual intercourse and their sexual relations, which appear to be a series of one-night stands, have not occurred in the last year.

Because judges and juries left to ponder this question find little guidance from the statute, arbitrary and capricious interpretations may result. Indiana provides a good example, although in a slightly different context, of the dangers that stem from such a vaguely worded statute.<sup>78</sup> Indiana defines "family or

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73. See *supra* Part III.B.

74. See ALASKA STAT. § 18.66.990 (2006).

75. See *supra* Part II.A–B.

76. See ALASKA STAT. § 11.41.220 (2006) (making it a class C felony to recklessly place another person "in fear of imminent serious physical injury by means of a dangerous instrument").

77. See ALASKA STAT. § 18.66.990.

78. See IND. CODE § 35-41-1-10.6 (2006).

household member” in its domestic violence laws to include someone who “is or was engaged in a sexual relationship with the other person.”<sup>79</sup> Like Alaska, Indiana has not set forth in its statutory language the definition of “sexual relationship” or provided any time limit on how far in the past the relationship could have occurred.<sup>80</sup>

Although there do not appear to have been any challenges to the constitutionality of Indiana’s definition of “household member,” as defined by “is or was engaged in a sexual relationship with the other person,”<sup>81</sup> Indiana’s former domestic battery statute<sup>82</sup> was challenged as unconstitutionally vague. The result in that case<sup>83</sup> may foretell the outcome of a future challenge to the definition of “sexual relationship” in Alaska’s domestic violence laws.

Under Indiana’s former domestic battery statute, a person committed domestic battery when they knowingly or intentionally touched a person who “is or was living as if a spouse of the other person.”<sup>84</sup> In *Vaughn v. State*, Vaughn challenged as unconstitutionally vague the Indiana domestic battery statute because it did not define what constituted “living as if a spouse of another.”<sup>85</sup> Specifically, Vaughn argued that “no one can know with any reasonable degree of confidence whether they are, or were in the past, living with another as a spouse in terms of the Domestic Battery Statute.”<sup>86</sup> The Indiana Court of Appeals found that the domestic battery statute was unconstitutionally vague as it applied to Vaughn.<sup>87</sup> Specifically, the court found that:

‘Living as a spouse’ of another person may be based upon many things, depending upon the individual interpreting the facts. It is because different people may interpret those words so differently that the General Assembly must clarify what categories of individuals should receive the protection of the

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79. IND. CODE § 35-41-1-10.6(a)(3) (2006).

80. *See id.*

81. *Id.*

82. IND. CODE § 35-42-2-1.3 (1999), *invalidated by* Vaughn v. State, 782 N.E.2d 417 (Ind. Ct. App. 2003) (amended 2003 and 2006).

83. *See Vaughn*, 782 N.E.2d at 418.

84. IND. CODE § 35-42-2-1.3 (1999), *invalidated by* Vaughn v. State, 782 N.E.2d 417 (Ind. Ct. App. 2003) (amended 2003 and 2006).

85. 782 N.E.2d at 419.

86. *Id.*

87. *Id.* at 420–21.

statute and conversely what persons should be subject to punishment for violation of the statute.<sup>88</sup>

To avoid arbitrary and capricious interpretations of its own domestic violence laws,<sup>89</sup> the Alaska Legislature should heed the warning of the Indiana court and clarify the factors that constitute a “sexual relationship.”

With the possibility of arbitrary and capricious interpretation comes the further possibility of illogical and inconsistent results. For example, the current definition of “household member” under section 18.66.990(5)(D) of the Alaska Statutes does not on its face prevent a court from looking back on a person’s entire lifetime to determine whether he or she fits the category of “household member.”<sup>90</sup> Thus, two individuals could have one sexual encounter in high school, reconnect years later, and still be considered household members under the statute.<sup>91</sup> An assault by one of the individuals against the other would then be considered domestic violence, despite not having any ongoing relationship over the last twenty years.<sup>92</sup> Although this would be contrary to the purpose of the domestic violence laws,<sup>93</sup> such an interpretation is completely feasible as the statute is presently constructed.

Likewise, consider two strangers that meet at a bar and engage in sexual intercourse. While engaging in sexual intercourse, one stranger commits an assault against the other. Under the current definition of section 18.66.990(5)(D) of the Alaska Statutes, these individuals may be considered household members under the statute.<sup>94</sup> Such a broad definition of “household member,” without some limitation or look-back period, misconstrues the legislative

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88. *Id.* at 421. As an apparent response to the *Vaughn* case, the Indiana General Assembly amended the domestic battery statute I.C. § 35-42-2-1.3 to include the factors to be reviewed in determining whether a person “is or was living as if a spouse.” See Act of May 12, 2003, IND. CODE. § 35-42-2-1.3 (2003); *Williams v. State*, 798 N.E.2d 457, 460 (Ind. Ct. App. 2003).

89. ALASKA STAT. §§ 18.66.010–990 (2006).

90. See ALASKA STAT. § 18.66.990(5)(D) (2006).

91. See *id.*

92. See *id.*

93. See *supra*, Part III.B (explaining that the purpose of ALASKA STAT. § 18.66.990(5)(D) is to prevent domestic violence, which is characterized by control or power that can only develop in a relationship that has existed over some period of time).

94. See ALASKA STAT. § 18.66.990(5)(D) (defining household members as “adults . . . who are engaged . . . in a sexual relationship.”).

intent behind the statute and does nothing to advance or address the issues associated with domestic violence.<sup>95</sup>

#### B. Criminal Implications: Alaska Rule of Evidence 404(b)(4)

In 1997, the Alaska Legislature amended Alaska Rule of Evidence 404(b) by adding subsection (b)(4).<sup>96</sup> Rule 404(b)(4) allows the following:

In a prosecution for a crime involving domestic violence or of interfering with a report of a crime involving domestic violence, evidence of other crimes involving domestic violence by the defendant against the same or another person or of interfering with a report of a crime involving domestic violence is admissible. In this paragraph, “domestic violence” and “crime involving domestic violence” have the meanings as given in AS 18.66.990.<sup>97</sup>

This evidence rule uses the specific definition of “domestic violence” as set forth in section 18.66.990 of the Alaska Statutes.<sup>98</sup> As discussed above,<sup>99</sup> that definition encompasses adults or minors who are engaged in, or who have engaged in, a “sexual relationship.”<sup>100</sup> Furthermore, the statute provides a limitless look-back period for determining whether or not a “sexual relationship” existed in order to label someone a “household member.”<sup>101</sup> Although other paragraphs of Evidence Rule 404(b) do place a time limit on the look-back period of other bad acts,<sup>102</sup> Rule 404(b)(4) does not have any look-back limitation regarding admissibility of evidence of a prior “crime involving domestic violence” against a defendant.<sup>103</sup>

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95. See *supra* Part III.B (explaining that for control of the relationship to polarize in one party, the relationship must have existed over a period of time).

96. Act of June 3, 1997, ch. 63, § 22, 20th Leg., 1st Sess. (Alaska 1997) (codified as amended at ALASKA R. EVID. 404(b)(4)).

97. ALASKA R. EVID. 404(b)(4).

98. ALASKA STAT. § 18.66.990(3).

99. See *supra* Part III.A (explaining that crimes occurring between two “household members” are crimes of domestic violence, and that two people who are or have been engaged in a “sexual relationship” constitute “household members”).

100. ALASKA STAT. § 18.66.990(5)(D).

101. See *supra* notes 74–77 and accompanying text.

102. See ALASKA R. EVID. 404(b)(2)(i) (allowing evidence of defendant’s other acts toward same or other child in prosecutions for crimes involving physical or sexual abuse of a minor, if the prior offense occurred within the previous ten years).

103. See ALASKA R. EVID. 404(b)(4):

The legislative history of Rule 404(b) provides little to refute the absence of a time limitation.<sup>104</sup> As one court explained, “legislative history of rule 404(b)(4) is scanty” and Rule 404(b) “was tacked onto a victim’s rights bill by the House Finance Committee with very little discussion.”<sup>105</sup> It is interesting to note that, similar to the legislative history of section 18.66.990 of the Alaska Statutes,<sup>106</sup> testimony was provided that “domestic violence is the type of thing that happens over and over again, and tends to escalate in violence.”<sup>107</sup> A further brief discussion regarding the amendment was held before the Senate Judiciary Committee,<sup>108</sup> however, the “legislative minutes and files contain no information regarding the intended purpose or scope of Rule 404(b)(4), nor any other information regarding the need for this rule.”<sup>109</sup> In fact, the Alaska Court of Appeals has found that “Evidence Rule 404(b)(4) is the most far-reaching of the legislative amendments to Rule 404(b)” and it “applies to a much broader range of evidence” than other provisions in Rule 404.<sup>110</sup>

The practical implications of Evidence Rule 404(b)(4) are great. In prosecutions for crimes involving domestic violence, this rule authorizes the trial court to admit evidence of a defendant’s other acts of domestic violence even though the sole relevance of those acts is to show that the defendant characteristically commits

In a prosecution for a crime involving a physical or sexual assault or abuse of a minor, evidence of other acts by the defendant toward the same or another child is admissible if admission of the evidence is not precluded by another rule of evidence and if the prior offenses

- i. occurred within the 10 years preceding the date of the offense charged;
- ii. are similar to the offense charged; and
- iii. were committed upon persons similar to the prosecuting witness.

104. See *Committee Notes on H.B. 9 Before H. Comm. on Finance*, 20th Leg., tape HFC 97-31, side 1, no. 1 – side 2, no. 8 (Alaska 1997) [hereinafter *Committee Notes on H.B. 9*].

105. *Bingaman v. State*, 76 P.3d 398, 405 (Alaska Ct. App. 2003) (discussing *Committee Notes on H.B. 9*, 20th Leg., tape HFC 97-31, side 1, no. 1 – side 2, no. 8 (Alaska 1997)).

106. ALASKA STAT. § 18.66.990 (2006).

107. *Bingaman*, 76 P.3d at 405 (quoting *Committee Notes on H.B. 9*, 20th Leg., tape HFC 97-31, side 1, no. 5 (Alaska 1997) (statement of Dean Guaneli, Chief Assistant Attorney General, Department of Law), available at [http://www.legis.state.ak.us/cgi-bin/folioisa.dll/cm20/query=\\*/doc/%7Bt12950%7D?](http://www.legis.state.ak.us/cgi-bin/folioisa.dll/cm20/query=*/doc/%7Bt12950%7D?)).

108. See *Victim’s Right to Present at Trial: Hearing on H.B. 9 Before the S. Comm. on the Judiciary*, 20th Leg., tape 97-26, side A, no. 00 – tape 97-27, side B (Alaska 1997).

109. *Bingaman*, 76 P.3d at 406.

110. *Id.*

such acts.<sup>111</sup> In other words, the defendant’s past acts can be taken as circumstantial evidence that the defendant acted true to character during the litigated incident.<sup>112</sup> Alaska Rule of Evidence 404(b)(4) specifically exempts prior domestic violence evidence “from the normal prohibition against ‘propensity’ evidence.”<sup>113</sup>

The Alaska Court of Appeals has found that, on its face, Evidence Rule 404(b) “is not limited to evidence of a defendant’s pattern of recurring behavior or escalating abuse.”<sup>114</sup>

Rule 404(b)(4) adopts such an expansive definition of “domestic violence” that it authorizes a court to admit evidence of acts that have little or no relevance to establishing a pattern of physical abuse. Nor is Rule 404(b)(4) limited to instances in which the purported victim of domestic violence does not testify in support of the government’s case. Rather, the rule applies to all prosecutions for crimes of domestic violence.<sup>115</sup>

In finding that Evidence Rule 404(b)(4) is so far-reaching, the Alaska Court of Appeals specifically commented on the definition of “domestic violence” and “household member” as set forth in section 18.66.990 of the Alaska Statutes.<sup>116</sup> The court stated that:

It is the second sentence of Rule 404(b)(4) that gives this rule a uniquely expansive reach. This second sentence declares that “domestic violence” and “crime involving domestic violence” are to be given the meanings ascribed to them in AS 18.66.990. By defining these terms in this way, Rule 404(b)(4) authorizes the admission of evidence concerning acts that have little or nothing to do with the issues that normally would be litigated at a trial for domestic assault.<sup>117</sup>

In response to what the Court of Appeals deemed Rule 404(b)(4)’s “uniquely expansive reach,” the court found that the principle that irrelevant evidence is inadmissible<sup>118</sup> limits the admissibility of evidence under Evidence Rule 404(b)(4).<sup>119</sup> To clarify the interplay between Alaska Rules of Evidence 402 and 404(b)(4), the Court of Appeals gave the following scenario:

Thus, if a man is prosecuted for beating his wife, evidence of other assaults on his wife or other girlfriends might be admissible under Evidence Rule 404(b)(4) because these other assaults arguably tend to prove a relevant trait of the defendant’s

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111. *Id.* at 401.

112. *Id.*

113. *Id.*

114. *Id.* at 406.

115. *Id.*

116. ALASKA STAT. § 18.66.990 (2006).

117. *Bingaman*, 76 P.3d at 406–07.

118. *See* ALASKA R. EVID. 402.

119. *Bingaman*, 76 P.3d at 410.

character. But evidence of the man's reckless driving or incest would be excluded by Evidence Rule 402 (even though these acts might qualify as "crimes involving domestic violence" under AS 18.66.990), because these acts are not relevant to any pertinent character trait of the defendant.<sup>120</sup>

Although the Court of Appeals' limiting scenario appears to work well when a defendant fits squarely within the meaning of "household member,"<sup>121</sup> the potentially broad statutory definition of "sexual relationship" leaves open the possibility of injustice for certain defendants. Most problematically, injustice may prevail on a defendant who is deemed a "household member" under the "sexual relationship" subsection but is not considered a "household member" under the legislative intent of the domestic violence laws.<sup>122</sup>

For instance, a man and a woman meet in a bar and have a one-night stand, during which they engage in sexual intercourse. The next morning, a fight erupts between them and the man puts the woman in a stranglehold, thereby assaulting her. Under section 18.66.990(5)(D) of the Alaska Statutes, the two are "household members" because they arguably had a "sexual relationship."<sup>123</sup> The State then prosecutes the assault, which is a crime encompassed by the "domestic violence" definition of section 18.66.990 of the Alaska Statutes.<sup>124</sup> At the defendant's trial, the State asserts that under Alaska Evidence Rule 404(b)(4), it will introduce evidence of two separate incidents where the defendant placed his ex-wives into strangleholds when provoked by arguments. The incidents occurred during the course of each marriage, one incident three years ago and one twelve years ago. Should the evidence be admitted under the prevailing case law?

Based upon the Alaska Evidence Rule 402/404(b)(4) analysis set forth by the Court of Appeals in *Bingaman v. State*, a trial judge faced with this question would have to look at a number of factors. First, how strong is the government's evidence that the defendant actually committed the other acts?<sup>125</sup> Second, what character traits do the other acts tend to prove?<sup>126</sup> Finally, is this character trait relevant to any material issue in the case?<sup>127</sup> How strongly do the

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120. *Id.* at 413.

121. ALASKA STAT. § 18.66.990(5) (2006).

122. ALASKA STAT. § 18.66.990(5)(D) (2006).

123. *Id.*

124. ALASKA STAT. § 18.66.990(3) (2006).

125. *Bingaman v. State*, 76 P.3d 398, 415 (Alaska Ct. App. 2003).

126. *Id.*

127. *Id.*

defendant’s other acts tend to prove this trait?<sup>128</sup> In answering these questions, the trial judge is directed by the Court of Appeals to analyze whether the defendant’s other acts demonstrate the same type of situational behavior as the crime currently charged.<sup>129</sup>

In the above scenario, the State can successfully meet all three factors. When challenged and embroiled in an argument, the State would argue, this defendant responds by assaulting the person with whom he is arguing, and the defendant’s mode of assault is the stranglehold.

The implications of 404(b)(4) come into play because of the “sexual relationship” component of “household member.” A defendant under these circumstances is subjected to the admission of prior bad acts evidence that would likely be excluded had the same assault occurred between the defendant and a friend with whom he had not had sexual intercourse.<sup>130</sup> This would arguably be the case even if the defendant had similar strangulation incidents with other friends.

Since the term “sexual relationship” has not been defined in the context of the domestic violence laws,<sup>131</sup> its breadth encompasses both situations and individuals not intended to be protected by, or targeted by, the domestic violence laws or the evidentiary rules. This frustrates the true intent of both pieces of legislation.

### C. Civil Implications: Protective Orders

Section 18.66.100 of the Alaska Statutes authorizes a person who is, or has been, a victim of a crime involving domestic violence to file a petition for a protective order against a household member.<sup>132</sup> Under the provisions of a protective order, the court may order a multitude of remedies.<sup>133</sup> Furthermore, in seeking a protective order under this section, it is important to note that only a criminal act is required, not a conviction.<sup>134</sup>

In the context of a protective order, the following scenario implicates the “household member” definition as it relates to the “sexual relationship.” Imagine two co-workers who have a sexual

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128. *Id.*

129. *Id.*

130. ALASKA R. EVID. 404(B).

131. *See supra* Part III.A.

132. ALASKA STAT. § 18.66.100(a) (2006).

133. ALASKA STAT. § 18.66.100–110 (2006).

134. “The legislature consistently uses the phrase ‘crimes involving domestic violence’ in a context which indicates that the reference is to a criminal act, not a conviction.” *State v. Bingaman*, 991 P.2d 227, 230 (Alaska Ct. App. 1999).

encounter one night. Co-worker 1 wants to pursue a relationship; Co-worker 2, however, is not interested and does not reciprocate after the initial sexual encounter. Co-worker 1 then begins sending e-mails threatening to expose the sexual encounter to a loved one. In response, Co-worker 2 sends an e-mail that Co-worker 1 construes as threatening bodily harm. Under section 11.41.270 of the Alaska Statutes, Co-worker 2 may potentially have committed stalking in the second degree.<sup>135</sup> Co-worker 1 could thus seek a protective order pursuant to section 18.66.110 of the Alaska Statutes, because, based upon their one-time sexual encounter, the two would likely be deemed “household members” and the co-worker has committed a crime of domestic violence.<sup>136</sup> Since the two are co-workers, it would not be unrealistic for the court to direct the respondent from going to the individuals’ place of employment, thereby barring the respondent from his or her job.

The classification of these individuals as “household members,”<sup>137</sup> based potentially on one sexual encounter, makes the issuance of a protective order in this scenario a possibility. A legitimate basis may exist for obtaining a protective order against someone who has committed the crime of stalking against another person; allowing such an application by an individual who is not in a significant domestic relationship, however, is less justifiable. The legislative intent behind the issuance of protective orders in the domestic violence arena is not furthered by encompassing individuals who have had only casual encounters in the definition of “household member.”

#### V. TOWARD A CLEARER DEFINITION OF “SEXUAL RELATIONSHIP”: SUCCESSFUL LEGISLATIVE AND JUDICIAL ATTEMPTS TO NARROW THE SCOPE OF A “SEXUAL RELATIONSHIP”

Legislatures in Minnesota and Oregon have provided clearer definitions of “sexual relationship,” or a similar term, in their domestic violence laws.<sup>138</sup> Courts, including an Alaska court,<sup>139</sup> have suggested some interpretive criteria as well. Taken together, the Minnesota and Oregon statutes and the attempts by courts to

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135. ALASKA STAT. §§ 11.41.280(a), (b)(3)(F) (2006).

136. *See* *McComas v. Kirn*, 105 P.3d 1130 (Alaska 2005).

137. ALASKA STAT. § 18.66.990(5)(D) (2006).

138. *See* MINN. STAT. § 518B.01(2)(b)(7) (2006); OR. REV. STAT. § 107.705(e) (2005).

139. *See* *Richart v. State*, No. A-7619, 2001 WL 1299120, at \*1–2 (Alaska Ct. App. Oct. 24, 2001).

clarify the meaning of “sexual relationship” provide models for the Alaska Legislature if it chooses to more clearly define “sexual relationship.”<sup>140</sup>

#### A. Legislative Attempts

Legislatures in Minnesota and Oregon have used different avenues to attempt to better define “sexual relationship” in their domestic violence laws.

In Minnesota, like Alaska, the term “household member” includes “persons involved in a significant romantic or sexual relationship.”<sup>141</sup> Unlike Alaska,<sup>142</sup> however, Minnesota’s statute provides further guidance as to what the term “persons involved in a significant romantic or sexual relationship,” means:

In determining whether persons are or have been involved in a significant romantic or sexual relationship under clause (7), the court shall consider the length of time of the relationship; type of relationship; frequency of interaction between the parties; and, if the relationship has terminated, length of time since termination.<sup>143</sup>

Minnesota’s definition of “sexual relationship” has a number of important differences from Alaska’s definition. Most importantly, Minnesota’s definition explicitly recognizes that it will be the job of a court to determine whether parties in a case “are or have been involved in a significant romantic or sexual relationship” under the statute.<sup>144</sup> Instead of leaving courts with no criteria with which to define the term, however, the Minnesota Legislature has provided significant guidance as to what constitutes a “sexual relationship.”<sup>145</sup> Importantly, the Minnesota Legislature appears to have addressed the two primary problems associated with the Alaska statute: casual sexual encounters and a limitless look-back period.

A number of limiting factors address and appear to exclude casual sexual relationships. First, the Minnesota statute makes clear that only “significant” romantic relationships qualify.<sup>146</sup> Almost certainly, this narrows the “household member” definition by excluding one-night encounters, which have no significance at all. “Significant” may also exclude as “household members” long-

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140. ALASKA STAT. § 18.66.990(5)(D) (2006).

141. MINN. STAT. § 518B.01(2)(b)(7) (2006).

142. ALASKA STAT. § 18.66.990(5)(D) (2006).

143. MINN. STAT. § 518B.01(2)(b)(7) (2006).

144. *Id.*

145. *Id.*

146. *Id.*

term friends who have only infrequent sexual encounters. Two friends who have had sexual intercourse only twice in five years may be said to have a “significant” friendship, but their sexual relationship is far from significant.

If the word “significant” does not immediately exclude casual sexual encounters from Minnesota’s definition of sexual relationship, the other limiting factors should.<sup>147</sup> Courts may consider the “length of time of the relationship; type of relationship; [and] frequency of interaction between the parties.”<sup>148</sup> Courts, in other words, must look not only at the period of time over which the relationship has stretched, but also at the number of times the two parties have interacted in that period. This requirement apparently addresses the situation where two friends have had an ongoing relationship, but only infrequent sexual or romantic encounters. Furthermore, the “type” of relationship matters.<sup>149</sup> Thus, courts may not ignore the difference between a long-standing romantic bond and more transient sexual encounters.

Unlike Alaska,<sup>150</sup> Minnesota’s domestic violence law, on its face, does not provide a limitless look-back period for sexual relationships.<sup>151</sup> To be sure, the statute does include past relationships, as it covers “persons [who] are or have been involved in a significant romantic or sexual relationship.”<sup>152</sup> In considering whether two individuals who have had a sexual relationship in the past qualify as “household members,” however, the statute commands the court to look at the “length of time since termination.”<sup>153</sup> Clearly, then, the court must be cognizant of time considerations. And while the statute could offer more guidance as to what lengths of time are sufficient, the statute at least focuses courts on the key issue: not all past sexual relationships qualify as “sexual relationships” for the purposes of domestic violence.

In Oregon, which also defines “household member” to include partners that have had a sexual relationship,<sup>154</sup> the legislature has not gone as far as Minnesota in assisting courts’ evaluations of whether there is a “sexual relationship.” The Oregon Legislature has, however, squarely addressed one issue that neither the Alaska nor Minnesota Legislatures have: the limitless look-back period.

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147. *Id.*

148. *Id.*

149. *Id.*

150. *See* ALASKA STAT. § 18.66.990(5)(D) (2006).

151. MINN. STAT. § 518B.01(2)(b)(7) (2006).

152. *Id.*

153. *Id.*

154. OR. REV. STAT. § 107.705(e) (2005).

To this end, in the Family Abuse and Prevention Act, the Oregon Legislature defines “family or household member” to include “[p]ersons who have been involved in a sexually intimate relationship with each other *within two years immediately preceding* the filing by one of them of a petition under ORS 107.710.”<sup>155</sup> Unlike Minnesota, which provides courts with interpretive principles to determine whether a past relationship falls under the statute,<sup>156</sup> and Alaska, which provides no guidance on the point whatsoever,<sup>157</sup> the Oregon Legislature has left no doubt. Any sexual relationship that terminated more than two years ago is statutorily excluded.

Less clear is whether the Oregon Legislature’s insertion of the word “intimate”<sup>158</sup> makes its statutory definition of “sexual relationship” any more specific than Alaska’s definition.<sup>159</sup> Arguably, “sexually *intimate* relationship”<sup>160</sup> excludes casual sexual encounters that are transient and/or meaningless, as compared to intimate and/or romantic. The Oregon Legislature, at least, has made clear that not all sexual relationships are included in the domestic violence laws.

## B. Court Attempts

Pennsylvania does not use the term “sexual relationship” in its definition of “family or household member” but uses the term “sexual or intimate partners.” Specifically, the Pennsylvania Protection from Abuse Act defines “family or household members” to include “current or former sexual or intimate partners.”<sup>161</sup>

It is clear from the statutory definition that the Pennsylvania Legislature did not further define the meaning of sexual or intimate partners; however, some Pennsylvania case law touches on a definition. One extremely disturbing opinion from the Court of Common Pleas, Centre County, found that the victim of an ongoing sexual molestation, i.e., an unwilling person in a non-consensual encounter, is deemed to be a “sexual partner” with her abuser for the purposes of seeking a protection order.<sup>162</sup> The

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155. *Id.* (emphasis added).

156. MINN. STAT. § 518B.01(2)(b)(7) (2006).

157. ALASKA STAT. § 18.66.990(5)(D) (2006).

158. OR. REV. STAT. § 107.705(e) (2005).

159. ALASKA STAT. § 18.66.990(5)(D) (2006).

160. OR. REV. STAT. § 107.705(e) (2005) (emphasis added).

161. 23 PA. STAT. ANN. § 6102(a) (2007).

162. *Shay v. Scott*, No. 05-4048, 2006 WL 4091470, at \*5 (Pa. D. & C.4th Mar. 15, 2006).

Pennsylvania Superior Court overturned the finding, defining the term “partner” within the context of title 23, section 6102(a) of the Pennsylvania Consolidated Statutes.<sup>163</sup> The superior court specifically found that the “Act does not define the term ‘partners,’ and it is otherwise unclear whether this term includes the victim of a sex crime. Thus, the term ‘partners’ is not free of all ambiguity.”<sup>164</sup> The court went on to discuss the following:

As we have already made clear, [the legislature’s] intent was to prevent domestic violence and to promote peace and safety within domestic, familial and/or romantic relationships.

There is certainly no domestic, familial or romantic relationship created between an assailant and a victim of a sex assault. By contrast, the persons who undoubtedly fit the act’s definition of family or household members— e.g., spouses, parents, children, relatives, paramours, and persons who undertake romantic relationships—typically share some significant degree of domestic, familial and/or intimate interdependence. . . . In sum, the persons protected by the act as family or household members have a connection rooted in blood, marriage, family standing, or a chosen romantic relationship.

There simply is no connection created by an assault. . . . An assailant and a victim do not, by virtue of a crime, suddenly have a bond regarding the private matters of life. They have no interface concerning personal issues and concerns. . . . Rather, sexual or intimate partners are persons who have mutually agreed to enter such relationships.<sup>165</sup>

The superior court went on to state that “our interpretation of [partners] means that persons who choose to have intimate sexual relationships are within the purview of domestic relations law.”<sup>166</sup> Although the Pennsylvania Superior Court attempted to adequately define the term “partners” for the purposes of domestic violence and domestic relations, it left open the meaning of “intimate or sexual relationships.”

The Alaska Court of Appeals was faced with a very similar set of facts in relation to whether a sexual assault victim and a perpetrator had a “sexual relationship” under section 18.66.990(3) of the Alaska Statutes.<sup>167</sup> In *Richart v. State*, the Court of Appeals was asked to determine whether a defendant and his victim of a

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163. *Scott v. Shay*, 928 A.2d 312, 314–16 (Pa. Super. Ct. 2007).

164. *Id.* at 315.

165. *Id.*

166. *Id.* at 316.

167. *Richart v. State*, No. A-7619, 2001 WL 1299120, at \*1–2 (Alaska Ct. App. Oct. 24, 2001).

sexual assault were considered “household members” on the basis that they were “engaged in a sexual relationship” due to the single prior act of forced sexual contact that was the basis of the sexual assault charge.<sup>168</sup> The Alaska Court of Appeals commented, without resolving the issue, that a single prior act of forced or non-consensual contact does not appear to establish a “sexual relationship.”<sup>169</sup>

## VI. CONCLUSION

Currently, under section 18.66.990 of the Alaska Statutes, the definition of “household members” within the domestic violence context includes adults or minors who are engaged in, or who have engaged in, a sexual relationship.<sup>170</sup> To date, neither in Alaska nor elsewhere has the term “sexual relationship” been defined by statute or case law. In the absence of defining parameters, individuals who have engaged in casual sexual encounters, which may or may not have culminated in sexual intercourse, can be found to be “household members” within Alaska’s domestic violence context. Additionally, Alaska places a limitless look-back period allowing “sexual relationships” decades old to qualify individuals as “household members.” Under Alaska Evidence Rule 404(b)(4),<sup>171</sup> this far-reaching label allows otherwise potentially excludable prior bad acts evidence to be used against a criminal defendant at trial. It may also allow a protection order to be issued against an individual who is not, nor truly was, in any type of a domestic relationship with the petitioner. Such an order could have a devastating impact upon a respondent’s life if the protective order barred the individual from a location like his or her place of employment.

The Alaska Legislature has multiple options available to it to ensure that the definition of “sexual relationship” encompasses only those individuals that the domestic violence laws are meant to protect and target. The Minnesota Statute set forth above provides some solutions that the Alaska Legislature could take to provide a more specific definition for “sexual relationship” under Alaska Statute section 18.66.990(5)(D).<sup>172</sup> First, the qualifier “significant” could be added to “sexual relationship” in order to eliminate the casual sexual encounter as a basis for the label “household

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168. *Id.* at \*2.

169. *Id.*

170. ALASKA STAT. § 18.66.990 (2006).

171. ALASKA R. EVID. 404(b)(4).

172. ALASKA STAT. § 18.66.990(5)(D) (2006).

member.”<sup>173</sup> Additionally, as Minnesota directs in the body of its statute, the Alaska Legislature can direct the courts to consider the length of time of the relationship, the type of relationship, the frequency of interaction between the parties, or, if the relationship has ended, the length of time since termination.<sup>174</sup>

As an alternative to the last inquiry, length of time since termination, the Alaska Legislature could take Oregon’s approach and specify a length of time for the look-back period.<sup>175</sup> Of course, the Alaska Legislature could always opt to specifically define what the term “sexual relationship” means under section 18.66.990 of the Alaska Statutes.<sup>176</sup>

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173. *See* MINN. STAT. § 518B.01(2)(b) (2006).

174. *Id.*

175. OR. REV. STAT. § 107.705(e)75 (2005).

176. ALASKA STAT. § 18.66.990 (2006).