The Pennsylvania Interbranch Commission
for Gender, Racial and Ethnic Fairness

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Daniel A. Durst, Counsel
Committee on Rules of Evidence
Supreme Court of Pennsylvania
Pennsylvania Judicial Center
PO Box 62635
Harrisburg, PA 17106-2635

Re: Comments on Proposed Adoption of Pennsylvania Rule of Evidence 413

Dear Mr. Durst,

We are writing today in response to the September 26, 2020 request from the Supreme Court Committee on Rules of Evidence ("Committee") for comments on its proposed adoption of Pennsylvania Rule of Evidence 413, governing the admissibility of immigration status. The Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness ("Commission") commends the Committee for its work in drafting a new evidentiary rule that will help to reduce bias in Pennsylvania's courts. While the Commission fully supports the concept of the Committee's proposed rule, we would like to offer some suggestions for strengthening it, specifically by adding guidelines for how the admissibility of immigration status will be determined and by providing additional means of retaining the privacy of such information.

As you know, the Commission was established in 2005 to implement the recommendations from the Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System. After three years of study, the Supreme Court Committee produced the report which consisted of 550 pages, covering fourteen individual topics and concluding with 173 recommendations for addressing the deficiencies discovered in the system. Over the past fifteen years, the Commission has focused on promoting the equal application of the law for all Pennsylvanians, including those who have Limited English Proficiency ("LEP"). These individuals are often immigrants, who face linguistic and cultural barriers that may prevent their equal access to justice in our state courts.

A. Background of the Commission's Efforts to Address Improper Use of Immigration Status in Pennsylvania Courts

As stated in the Commission's June 4, 2019 Comments to the first version of the Committee's proposed amendment to Pa.R.E 401, three years ago the Commission learned from attorneys representing immigrants in Pennsylvania's courts that state court jurists were making inquiries into the immigration status of LEP litigants, when it was not relevant to the cases at bar. Evidence of individuals' undocumented status was then passed along to federal Immigration and Customs Enforcement ("ICE") agents, or improperly considered by judges when denying Hispanic criminal defendants and defendants of different ethnicities access to alternative disposition programs. Concerned that such conduct violated Title VI of the Civil Rights Act of 1964, the Commission alerted the Supreme Court of Pennsylvania of these reports in a letter dated February 1, 2018.[1] A memorandum prepared from that letter, entitled "Reports of State Court Judicial Officers' Assumption of Jurisdiction Over Immigration Issues and the Impact of the Presence of Immigration Enforcement Agents in Courthouses on Litigants' Constitutional Rights," contains many examples of such conduct, and is attached to our current set of Comments.

The reports collected from legal services and victim advocacy organizations led the Commission to conclude that, "[t]his conduct obviously reflects an unconstitutional exercise of federal jurisdiction by state court judicial officers over matters relating to immigration, as well as a chilling effect the fear of deportation has had on the due process rights of LEP court users. It also raises a growing concern about a shifting political climate that encourages discrimination against LEP Pennsylvanians, who are often recent immigrants, based on xenophobic fears and stereotypes. This type of conduct has no place in our state courts, as it violates constitutional promises of due process and undermines public confidence in the judiciary."[2] The Commission made a number of short- and long-term recommendations to the Supreme Court of Pennsylvania to clarify the role of state judicial officers in addressing immigration issues, and to protect the constitutional rights of all Pennsylvania court users, regardless of ethnicity or national origin. One such recommendation was to adopt changes to the Pennsylvania Rules of Evidence to limit the admission of evidence of a party's or witness' immigration status, which the Committee is now considering.

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[1] At its core, Title VI of the Civil Rights Act of 1964 prohibits the denial of participation in, or benefit of, a service or program based upon an individual's national origin.

[2] *See* Interbranch Commission, "Reports of State Court Judicial Officers' Assumption of Jurisdiction Over Immigration Issues and the Impact of the Presence of Immigration Enforcement Agents in Courthouses on Litigants' Constitutional Rights," Memorandum, April 5, 2018.

On March 24, 2020, the Commission sent a second letter to the Pennsylvania Supreme Court, after learning that judges across the Commonwealth were continuing to improperly inquire into and use LEP individuals' immigration status in cases where their immigration status was irrelevant to the legal issues presented. The letter also recounted incidents of other court personnel, such as probation officers and deputy sheriffs, providing such information to ICE agents to aid in the detention and deportation of immigrants who had business with the courts. One incident described in the letter involved email exchanges between a Beaver County probation officer and an ICE agent, wherein the probation officer informed the agent of the immigration status of an individual who was a participant in the county's ARD program. The probation officer told the agent that although the individual was only required to check in telephonically, the officer could schedule a meeting with him at the probation office to allow the ICE agent to arrest him at the office. The probation officer also provided the ICE agent with the individual's home address.[3] The individual appeared at the probation office, was arrested and detained by the ICE agent, and ultimately deported to his country of origin without his family. The details of the exchange are set forth in the footnote below. The Commission's March 24, 2020 letter to the Supreme Court detailing other incidents is attached to these Comments.

B. Suggestions for Strengthening Proposed Pennsylvania Rule of Evidence 413

1. Need for *In Camera* Review of Evidence of Immigration Status: While the proposed rule requires prior notice before introduction of evidence of a party's immigration status, it will not protect the privacy interests of a party if the argument takes place in open court. Even if the judge rules that the proffered evidence is inadmissible, the party will have suffered the type of attempted intimidation and exposure that proposed Rule 413 is intended to prevent.

To resolve this problem, the Commission recommends that the Committee amend its proposed rule to conform with Washington State's corresponding Rule 413 (b)(2),

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[3] *Id.* at 8. The text of the email exchange is as follows:

> **Probation (3:11 pm):** He has been processed and placed in the ARD program with me. He is required to report once per month by phone. I have not heard from him yet. I can attempt to get him to report in person if he needs to be taken into custody. The address we have on file is [redacted]. Let me know how I can assist you further.
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> **ICE (3:17 pm):** Sounds good. I'll touch base with the case officer and see how he wants to handle it. Appreciate your willingness to assist. I believe that this is the address he has as well so if he isn't picked up I will let you know and we'll see if we can get something worked out. Thank you[.]
>
> **Probation (3:24 pm):** He was just sentenced only a week ago, so chances are good that I can get him in here without suspicion. I can tell him he has to sign supervision papers, etc. Just let me know...

requiring the court to conduct an *in camera* review of the evidence. However, we would recommend modifying the latter part of Washington State's rule that does not require the review of the *in camera* evidence to be sealed. Instead, we would recommend that the rule mandate the sealing of the *in camera* evidence review. The text we propose would read as follows, "Whenever a party seeks to use or introduce immigration status evidence, the court shall conduct an *in camera* review of such evidence, and the motion, related papers and record of such review shall be sealed, and shall remain under seal unless the court orders otherwise."

2. Separate Standards for Admission of Immigration Status in Criminal and Civil Cases: The Commission also recommends that the Committee incorporate a second facet of Wash. R.E.413, which establishes a different analysis for admission of immigration status in civil versus criminal proceedings. The rule currently proposed by the Committee requires the same analysis for admissibility in both the civil and criminal contexts. In criminal proceedings, defendants have a Sixth Amendment right to confront the witnesses and evidence against them. Consequently, in conformance with Wash. R.E. 413(a),(b), the Commission proposes that the Committee amend its proposed rule to provide that in criminal cases, evidence of immigration status may be admitted, but only if it is an essential fact necessary to prove an element of, or defense to, the criminal action, or where it would be used to show bias or prejudice of a witness. Since there is no such constitutional right of confrontation in civil cases, the Commission recommends that the Committee amend its proposed rule to prohibit the admission of evidence of immigration status in all civil cases, except where it is an essential fact necessary to prove an element of a party's cause of action.

3. Further Restrict Waiver of Advance Notice of Intent to Introduce Immigration Status: The rule proposed by the Committee allows parties to waive the advance notice requirement upon a showing of good cause. The Commission recommends that in view of the serious and irreversible harm that can be caused by revelation of a party's immigration status, the proposed rule be amended to impose a stricter standard for waiver of the advance notice requirement. Specifically, the Commission suggests that the rule permit waiver of the advance notice requirement only when the party moving to introduce evidence shows that they did not know, and with due diligence, could not have known, that evidence of immigration status would be necessary to prove an essential fact in the case.

C. Other States' Recognition of the Prejudicial Effect of This Type of Evidence

As stated in the Commission's June 4, 2019 Comments to the Committee, when courts in other states have considered the admissibility of evidence of a witness' or party's

immigration status under traditional relevancy rules, they have often found that the prejudicial effect of introducing such evidence outweighs its probative value. State courts in Texas,[4] Florida,[5] and New Jersey[6] have all used evidentiary relevance rules to exclude this type of evidence in both criminal and civil cases.

D. Support for Committee's Proposed Establishment of Stand-Alone Rule Governing Only the Admissibility of a Party's or Witness's Immigration Status

The Commission supports the Committee's decision to propose the establishment of a stand-alone rule governing the admissibility of the immigration status of a party or witness. While use of anyone's race, gender, ethnic or other status as a means of promoting discriminatory conduct is repugnant, the use of an individual's immigration status is uniquely harmful; it can, and often has, resulted in the jailing and deportation of innocent individuals, who may have lived and worked in the U.S. for many years, contributing to the economy and community in many positive ways. Moreover, by adopting a new, stand-alone, mandatory rule and a clearly defined procedure to evaluate the use of this evidence, the Committee would alleviate any confusion among state court judges as to their role in immigration matters, and prevent judges from engaging in the improper conduct described in the Interbranch Commission's letters.

In closing, we thank you for your interest in promoting fairness in our justice system. We also appreciate the opportunity to comment upon the Committee's proposal. We believe that with the incorporation of our Commission's proposed amendments, the Committee's proposed rule will provide a clear protective procedure for considering evidence of immigration status, recognizing the inherently prejudicial nature of such evidence and its extremely limited probative value in state court matters. The incidents recounted in both of the Interbranch Commission's letters to the Supreme Court provide ample evidence of the tragic consequences of using such prejudicial information in litigation against an immigrant.

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[4] *See TXI Transp. Co. v. Hughes*, 306 S.W.3d (230) (Tex. 2010) (in a civil case stemming out of a fatal accident, non-party driver's undocumented status was excluded as irrelevant and prejudicial).

[5] *See Maldonado v. Allstate Ins. Co.*, 789 So.2d 464 (Fla.2d DCA 2001) (an undocumented immigrant's status in a lawsuit against his insurer to recover personal injury protection benefits was prejudicial because the plaintiff's illegal status became the focus of the jury's attention).

[6] *See State v. Sanchez-Medina*, 176 A.3d 788 (N.J. 2018) ("Both today and in late 2013 when this trial took place, evidence of a defendant's undocumented immigration status could appeal to prejudice, inflame certain jurors, and distract them from their proper role in the justice system: to evaluate relevant evidence fairly and objectively").

If you have any questions concerning this matter, we would be happy to discuss them at your convenience.

Respectfully,

Rhonda Hill Wilson, Esq.
Commission Co-Chair

Leonard J. Rivera, Esq.
Commission Co-Chair

Lisette M. McCormick, Esq.
Executive Director

cc: Interbranch Commission Members
Interpreter Services Committee Members