

**SUPREME COURT OF PENNSYLVANIA
COMMITTEE ON RULES OF EVIDENCE**

NOTICE OF PROPOSED RULEMAKING

Proposed Adoption of Pa.R.E. 413

The Committee on Rules of Evidence is considering proposing to the Supreme Court of Pennsylvania the adoption of Pennsylvania Rule of Evidence 413 governing the admissibility of immigration status for the reasons set forth in the accompanying explanatory report. Pursuant to Pa.R.J.A. No. 103(a)(1), the proposal is being published in the *Pennsylvania Bulletin* for comments, suggestions, or objections prior to submission to the Supreme Court.

Any reports, notes, or comments in the proposal have been inserted by the Committee for the convenience of those using the rules. They neither will constitute a part of the rules nor will be officially adopted by the Supreme Court.

The Committee invites all interested persons to submit comments, suggestions, or objections in writing to:

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All communications in reference to the proposal should be received by **October 19, 2020**. E-mail is the preferred method for submitting comments, suggestions, or objections; any e-mailed submission need not be reproduced and resubmitted via mail. The Committee will acknowledge receipt of all submissions.

By the Committee on Rules of Evidence,

John P. Krill, Jr.
Chair

**SUPREME COURT OF PENNSYLVANIA
COMMITTEE ON RULES OF EVIDENCE**

REPORT

Proposed Adoption of Pa.R.E. 413

The Committee on Rules of Evidence is considering proposing the adoption of Pennsylvania Rule of Evidence 413 governing the admissibility of evidence of immigration status. The catalyst for this proposal was a recommendation of the Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness for changes to the Pennsylvania Rules of Evidence to limit the admissibility of a party's or witness's immigration status.

The Committee previously proposed amendment of the Comment to Pa.R.E. 401 to include the following guidance:

Generally, evidence of a person's race, sex, gender identity or expression, religion, national origin, immigration status, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation is irrelevant and inadmissible. See Pa.R.E. 402 (evidence not relevant is not admissible). Such evidence may also be subject to analysis under Pa.R.E. 403, concerning unfair prejudice.

49 Pa.B. 2218 (May 4, 2019). The Committee received several comments concerning the need for a rule addressing specifically immigration status given that evidence of immigration status may be used for the purpose of intimidation.

To address this concern, the Committee proposes a standalone rule in the form of Pa.R.E. 413 to address the admissibility of evidence of immigration status. Similar to Washington Rule of Evidence 413, the standalone rule would limit the admission of such evidence to prove an essential fact of, an element of, or a defense to, an action, or a party's or witness's motive. The latter exception for a party's motive is intended to include the use of immigration status as recognized in *Commonwealth v. Philistin*, 53 A.3d 1 (Pa. 2012). The exclusion for a witness's motive is intended to permit the admissibility of immigration status for impeachment purposes to prove the bias or prejudice of a witness.

"Immigration status" is not a defined phrase in the Pennsylvania Rules of Evidence. Federal regulation defines "lawful immigration status" as including six categories of individuals: (1) lawful permanent residents; (2) nonimmigrants admitted under 8 U.S.C. § 1101(a)(15) whose statuses either have been extended or have not expired; (3) refugees whose statuses have not been revoked; (4) asylees whose statuses have not been

revoked; (5) parolees whose statuses have not expired, been revoked, or been terminated; and (6) persons who fall within the purview of the Immigration Nursing Relief Act of 1989 and who have filed their applications for adjustment of status on or before October 17, 1991. See 8 C.F.R. § 1245.1(d)(1). Without differentiation, the use of “immigration status” in a Rule of Evidence would cover both lawful and unlawful immigration status.

The Committee also proposes a function that would put the opponent on notice that a proponent intends to introduce evidence of immigration status. The opponent can then seek a pretrial ruling as to the admissibility of the evidence. This process would be similar to that employed by Pa.R.E. 404(b)(3) for notice in criminal cases for prior bad acts, but the notice would require the specific, rather than general, nature of any evidence of immigration status. Thereafter, the opponent could weigh whether to challenge the relevancy and potential prejudice of the evidence.

All comments, concerns, and suggestions concerning this proposal are welcome.

[This is an entirely new rule.]

Rule 413. Evidence of Immigration Status

Evidence of immigration status may only be used to prove an essential fact of, an element of, or a defense to, an action, or a party's or witness's motive. The proponent shall provide reasonable notice in advance of trial, or during trial if the court excuses advance notice upon good cause shown, of the specific nature of any evidence of immigration status the proponent plans to introduce.

Comment

Pa.R.E. 413 has no counterpart in the Federal Rules. This rule is modeled, in part, after Pa.R.E. 404(b)(3) and without limitation as to the type of case.

In practice, the introduction of immigration status has received heightened consideration in terms of relevancy and prejudice. See, e.g., *Commonwealth v. Sanchez*, 595 A.2d 617 (Pa. Super. 1991) (reference to defendant as an "illegal alien" was irrelevant and prejudicial). This consideration is warranted to avoid potential intimidation of witnesses for fear of deportation. See, e.g., 8 U.S.C. § 1227 (Deportable Aliens). This rule is intended to limit the admissibility of evidence of immigration status for purposes other than those stated in the rule. See, e.g., *Commonwealth v. Philistin*, 53 A.3d 1 (Pa. 2012) (discussing admissibility of immigration status for purpose of proving motive).

This rule requires the proponent to provide notice to the other party prior to the introduction of evidence of immigration status. Notice is intended to afford the opponent the opportunity to seek a ruling as to relevancy or potential for unfair prejudice, if warranted, regardless of use. See Pa.R.E. 401; Pa.R.E. 403. If evidence is relevant, the trial court may consider a cautionary jury instruction to ameliorate its prejudicial effect. See, e.g., *Commonwealth v. Hairston*, 84 A.3d 657 (Pa. 2014).

See also Pa.R.E. 103(d) (Preventing the Jury from Hearing Inadmissible Evidence); Pa.R.E. 104 (Preliminary Questions).