

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

NOTICE OF PROPOSED RULEMAKING

Proposed Amendment of the Comment to Pa.R.E. 401

The Committee on Rules of Evidence is considering proposing to the Supreme Court of Pennsylvania the amendment of the Comment to Pennsylvania Rule of Evidence 401 describing the relevancy of evidence of class 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.

Additions to the text of the proposal are bolded and underlined; deletions to the text are bolded and bracketed.

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 **June 4, 2019**. 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 Amendment of the Comment to Pa.R.E. 401

The Committee on Rules of Evidence is considering proposing the amendment of the Comment to Pennsylvania Rule of Evidence 401 describing the relevancy of evidence of class. 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' immigration status.

The Committee considered the admissibility of a person's immigration status as an evidentiary matter. For example, in *State v. Sanchez-Medina*, 176 A.3d 788 (N.J. 2018), the New Jersey Supreme Court considered the admissibility of a criminal defendant's immigration status in a trial for sexual assault crimes. Recognizing there may be limited circumstances when immigration status may be relevant, the court concluded that those cases are rare. In most cases, immigration status is irrelevant and therefore inadmissible. See *also* Pa.R.E. 402 ("Evidence that is not relevant is not admissible."). The court went on to cite other jurisdictions' case law having a similar holding concerning relevancy. The *Sanchez-Medina* court also cited case law holding that evidence of immigration status can be unduly prejudicial. See *also* Pa.R.E. 403 (excluding relevant evidence if its probative value is outweighed by the danger of unfair prejudice). When seeking to admit this evidence, the court indicated that the issue should first be raised with the judge outside the presence of the jury and, if admitted, it should be accompanied by a limiting jury instruction.

Washington adopted Washington Rule of Evidence 413, effective September 1, 2018, that generally prohibits evidence of immigration status in criminal and civil proceedings. The rule also sets forth procedures to determine the admissibility of such evidence, which generally resemble motion *in limine* practice.

Effective January 1, 2017, the California Evidence Code was amended to exclude evidence of a person's immigration status in a civil action for personal injury or death. Cal. Evid. Code § 351.2. In other civil actions and in criminal proceedings, the court must determine the admissibility of the evidence in an *in camera* hearing. *Id.* §§ 351.3, 351.4 (sunsetting January 1, 2022). There is also pre-existing case law in California limiting the use of immigration status as evidence. See, e.g., *Rodriguez v. Kline*, 186 Cal. App. 3d 1145 (1986).

The Committee believed there was persuasive authority for the exclusion of immigration status that is either irrelevant or unduly prejudicial. The Committee next considered whether the existing Pennsylvania Rules of Evidence, when applied to evidence of immigration status, would operate to exclude such evidence if irrelevant or unduly prejudicial. The Committee believed the existing Rules should, but additional commentary to Rule 401 would be beneficial to guide the application of the Rules.

Thereafter, the Committee considered whether the commentary should address only immigration status or whether there are other classifications capable of undue prejudice without relevance. In this context, the Committee did not believe that only one particular class should be identified; rather, public policy prohibits discrimination against a number of classes. See, e.g., 43 P.S. § 952 (identifying classes subject to the Pennsylvania Human Relations Act); *Policy on Non-Discrimination and Equal Employment*, Supreme Court of Pennsylvania (Rev. 2016); Pennsylvania Code of Judicial Conduct Rule 2.3. Informed by these prohibitions, the Committee attempted to create a more expansive list of classes.

The proposed commentary is intended to reflect within the Pennsylvania Rules of Evidence the construct that evidence of class is presumptively irrelevant. However, the word “generally” is used at the beginning of the commentary to signal that evidence of class is not irrelevant *per se*. For example, disability may be relevant in an action to enforce the Americans with Disabilities Act, 42 U.S.C. §§ 12131 *et seq.* Likewise, immigration status may be relevant in a guilty plea colloquy. See e.g., *Padilla v. Kentucky*, 559 U.S. 356 (2010) (counsel must inform a non-citizen defendant as to whether a plea carries a clear risk of deportation). The Committee also added reference to Pa.R.E. 403 in the Comment to indicate that evidence of class may be relevant under Pa.R.E. 401 and still be excluded as unduly prejudicial.

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

Rule 401. Test for Relevant Evidence

Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.

Comment

This rule is identical to F.R.E. 401.

Whether evidence has a tendency to make a given fact more or less probable is to be determined by the court in the light of reason, experience, scientific principles and the other testimony offered in the case.

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.

The relevance of proposed evidence may be dependent on evidence not yet of record. Under Pa.R.E. 104(b), the court may admit the proposed evidence on the condition that the evidence supporting its relevance be introduced later.

Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced January 17, 2013, effective March 18, 2013; **adopted _____, 2019, effective _____, 2019.**

Committee Explanatory Reports:

Final Report explaining the January 17, 2013 rescission and replacement published with the Court's Order at 43 Pa.B. 651 (February 2, 2013). **Final Report explaining the _____, 2019 amendment of the Comment published with the Court's Order at 49 Pa.B. (_____, 2019).**