SUPREME COURT OF PENNSYLVANIA
COMMITTEE ON RULES OF EVIDENCE

FINAL REPORT[1]

Adoption of Pa.R.E. 413

On August 11, 2021, upon recommendation of the Committee on Rules of Evidence, the Court ordered the adoption of Pennsylvania Rule of Evidence 413 governing the admissibility of evidence of immigration status.

The Committee previously received a recommendation from 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. In response, the Committee proposed amendment of the Comment to Pa.R.E. 401, see 49 Pa.B. 2218 (May 4, 2019), which 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.

Thereafter, the Committee proposed 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 have limited 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. *See* 50 Pa.B. 5222 (September 26, 2020). Another function of the proposed rule 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.

The Committee again received several responses to the proposal. A majority of respondents suggested a bifurcated rule similar to Washington Rule of Evidence 413, with differing provisions applicable to criminal proceedings and civil proceedings to permit admission only when immigration status is an essential fact of a party's cause of action. Further, the waiver of advance notice should be restricted to when the moving

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[1] The Committee's Final Report should not be confused with the official Committee Comments to the rules. Also note that the Supreme Court does not adopt the Committee's Comments or the contents of the Committee's explanatory Final Reports.

party did not know or, with due diligence, could not have known that immigration status would be an essential fact. Finally, the court should be required to conduct an *in camera* review, similar to Washington Rule of Evidence 413, and the review, together with the evidence or motion, should be sealed.

Based on these responses, the Committee revised proposed Pa.R.E. 413 to bifurcate the general exclusion of such evidence, together with exceptions, into paragraph (a) for criminal and juvenile matters and paragraph (b) for civil matters. Both paragraphs were revised to include exceptions "to show bias or prejudice of a witness pursuant to Rule 607." Further, paragraph (a) included an additional exception so application of the rule in criminal or juvenile proceedings would not result in the violation of a defendant's or a juvenile's constitutional rights.

The Committee agreed with the respondents' suggestion for a specific procedure for determining the admissibility of evidence of immigration status. Under Pa.R.E. 103, admissibility may be determined either by a pretrial motion *in limine* or contemporaneous objection in open court. However, experience informs that relying upon contemporaneous objections often cannot "unring the bell" of the issue being raised through the question posed. Moreover, offers of proof in open court, notwithstanding being outside the hearing of the jury, remain on the record and do little to assuage witness intimidation.

Therefore, largely structured after Washington Rule of Evidence 413(a)(1)-(4), paragraph (c) was added as a means for determining the admissibility of immigration status. The process would require a pretrial motion *in limine* filed under seal. Thereafter, the trial court could allow the evidence to be admitted if it was relevant and its probative value outweighed its prejudicial nature. The paragraph also contains an exception for when a party does not know, and with due diligence could not have known, that evidence of immigration status would be necessary at trial.

The Committee observed that two other jurisdictions, in their analogous evidentiary provisions, have included a provision allowing a party to waive the rule's protection and reveal evidence of immigration status. *See* 735 Il.C.S. 5/8-2901(b)(3) (pertinently stating that evidence is admissible if "a person or his or her attorney voluntarily reveals his or her immigration status to the court"); Cal. Evid. Code § 351.3(b)(3), § 351.4(b)(3) (providing that, in civil actions other than for personal injury or wrongful death and in criminal actions, the statute does not "[p]rohibit a person or his or her attorney from voluntarily revealing his or her immigration status to the court").

Although evidence of immigration status has the potential for intimidation and prejudice, if such evidence is probative and the person whose immigration status is revealed does so voluntarily, then the proposed evidentiary and procedural safeguards appear unnecessary. Further, an exception for voluntary disclosure may lessen the

procedural burden on parties when immigration status is admissible pursuant to paragraph (a) or (b).

Therefore, the Committee revised the rule to add paragraph (d), which is modeled after California Evidence Code § 351.3(b)(3). Paragraph (d) contains several noteworthy aspects. First, it pertains to a personal revelation of one's own immigration status, not another person's immigration status. Second, the status must be revealed in court, not to sources outside of court. *Cf*. Pa.R.E. 803(25) (An Opposing Party's Statement). Third, the procedure set forth in paragraph (c) is rendered unnecessary under the circumstances of paragraph (d), *i.e*., "this rule shall not prohibit." A statement to that effect was added to the Comment with an observation that the other Rules of Evidence nonetheless remain applicable even if the procedure of paragraph (c) is not followed.

The Committee received a concern that a Rule of Evidence permitting the use of evidence of immigration status for impeachment purposes may open the door to additional discovery on that topic. Similarly, the respondent expressed concern that permitting evidence of immigration status to be admissible in court as an element of a defense in civil matters pursuant to paragraph (b) may have similar effect. The Committee is not insensitive to such concerns, but the Rules of Evidence are intended to regulate the admissibility of evidence in court proceedings, see Pa.R.E. 101, not the scope of discovery. Notwithstanding, a sentence was added to the Comment indicating that paragraphs (a) and (b) may serve as a basis for limiting discovery about immigration status; however, the procedural mechanism for doing so, *i.e.*, a protective order, is not governed by the Rules of Evidence.

This rule becomes effective October 1, 2021.