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The Honorable Chief Justice Mary E. Fairhurst
Ms. Susan L. Carlson, Clerk
Washington State Supreme Court
PO Box 40929
Olympia, WA 98504-0929

In re: Proposed New Rule of Evidence 413
Evidence of Immigration Status

Dear Chief Justice Fairhurst and Ms. Clarkson:

I write in support of the proposal to adopt new Washington Rule of Evidence 413. I am a professor of law at Gonzaga University School of Law and am in my eighteenth year of teaching Evidence. I am also a former trial attorney. For full disclosure purposes, I am an Illinois-licensed attorney and am not admitted to practice in the State of Washington. However, I am interested in and concerned about the “growth and development of the law of evidence,” Rule ER 102. At present, I am the author of Sections 5421 to 6000 of the Federal Practice and Procedure treatise (West Publications/Thomson Reuters). The treatise tracks developments in evidence law.

I have reviewed the comments submitted by Messrs. Berger, Miller, Lee, Dumm, Revelle, McClain, Peterson, et al. as well as the submission by Ms. Perluss. My comments are limited to an academic viewpoint of the proposed rule. Additionally, because all of the stakeholders appear to support the new rule in civil cases, I will confine my discussion to the proposed rule in the criminal context.

Changes to the rules of evidence should never be made in the absence of significant review and deliberation. This proposed rule has been written, rewritten, and discussed by multiple stakeholders since 2014. Recommendations have been made and adopted to address concerns. There have been nearly three years of analysis and debate on this proposed rule. Interestingly, the wording of Washington Rule of Evidence 102 is broader than that of the Federal Rule. Washington ER 102 provides the following:

Promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

In contrast, the FRE includes the following language:

Promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

The key difference between the Washington Rule and the Federal Rule lies in the word "growth." In fact, the concept of the growth of the law of evidence is embedded in the stated purpose of the Washington Rules of Evidence.

The Washington Association of Criminal Defense Lawyers and the Washington Defender Association, in their letter of December 11, 2015, expressed concern about the proposed rule at that time, using the phrase "unnecessary, unworkable, and would not accomplish proponents' goals." Recently, there have been newspaper accounts about the dramatic decrease in immigrant reporting of crimes.¹ Christopher Dumm and Angus Lee, two Washington attorneys, oppose the proposed rule because (among other things) it imposes a procedural burden on the party wishing to use evidence of immigration status and because of their fear that it imposes barriers to defendants' rights under the Confrontation Clause. With respect to the procedural burden, there is no question that the proposed rule imposes procedural requirements (Proposed Rule 413(a)(1) through (3)). The burden is essentially shifted from the opponent of the evidence to the proponent of the evidence. Given the number of immigrants in Washington (one in every seven people, according to the Governor's Office), this shift is in the best interests of the people of the state of Washington.

In response to the Confrontation Clause objection, I note that the proposed rule specifically contains ER 413(a)(5), "Nothing in this section shall be construed to exclude evidence that would result in the violation of a defendant's constitutional rights." That language is not even necessary, as constitutional rights trump rules of evidence in any event, but the language emphasizes this guarantee.

The issue really may be distilled into the question of whether protection of immigrants is worth the procedural hurdles for proponents of the evidence. I believe it is. This rule is very similar to the rape shield law, added to the Federal Rules in 1978 and to the Washington Rules of Evidence in 1988.² The impetus for the Rape Shield Law was the dramatic underreporting of rapes to the authorities. It was estimated that only one in ten rapes was reported (see comments of Ms. Holtzman, House of Representatives). Similarly, the intent of this proposed rule is to ensure that victims of crimes are not afraid to report them for fear that they will suffer under the immigration laws. It is in the interest of all Washingtonians to clear a path for individuals to report crimes. This is a well-reasoned rule designed to protect both immigrants and the accused.

¹ See, for example: Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation*, The New York Times, April 30, 2017; Manya Brachear Pashman, *Immigrant Women Fear Deportation Under Trump if they Report Domestic Abuse, Advocates Say*, The Chicago Tribune, June 26, 2017; and Tom Dart, *Fearing Deportation, Undocumented Immigrants Wary of Reporting Crimes*, the Guardian, March 23, 2017.

² The "Rape Shield Law" now applies to all sexual offense cases.

Please do not hesitate to contact me should you have any questions. Thank you for giving me the opportunity to comment. Should you wish to contact me, my cell phone number is (509) 868-9750, and my email address is: murphya@gonzaga.edu.

Sincerely,

A handwritten signature in black ink that reads "Ann M. Murphy". The signature is written in a cursive style with a large, stylized initial "A".

Ann M. Murphy
Professor

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, September 12, 2017 8:10 AM
To: Tracy, Mary
Subject: FW: Comments on Proposed WA Rule of Evidence 413
Attachments: letter to WA Supreme Court Final.docx

Mary-this is addressed to the Chief and Susan but it is a rule comment. Is this for you or?

From: Murphy, Ann [mailto:murphya@gonzaga.edu]
Sent: Monday, September 11, 2017 8:44 PM
To: Phillips, Cindy <Cindy.Phillips@courts.wa.gov>; OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Murphy, Ann <murphya@gonzaga.edu>
Subject: Comments on Proposed WA Rule of Evidence 413

Hello.

Attached is a letter addressed to the Honorable Chief Justice Mary E. Fairhurst and to Ms. Susan L. Clarkson with my comments on Washington Proposed Rule of Evidence 413.

Thank you for the opportunity to comment on the proposed rule.

Sincerely,

Ann M. Murphy

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