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September 15, 2017

Via Electronic Mail

Ms. Susan L. Carlson
Clerk
Washington State Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929
E-mail: supreme@courts.wa.gov

RE: Proposed ER 413(b) – Admissibility of Immigration Status in Civil Cases

Dear Ms. Carlson:

I write in support of Proposed Evidence Rule 413(b) concerning the admissibility of immigration status in civil cases.

As the State's chief legal officer, I direct approximately 600 attorneys. In addition to providing legal services to our state agencies, the Governor, and the state Legislature, my office enforces the Consumer Protection Act and protects and promotes the civil rights of all Washingtonians. Critical to these consumer protection and civil rights enforcement efforts is the ability of witnesses and aggrieved persons to provide information and testimony without fear of harassment, discrediting, or retaliation because of immigration status.

Unfortunately, in our experience, a litigation strategy employed by some defendants and/or their counsel is to seek information about the immigration status of the State's witnesses, aggrieved persons, and consumers – information that has no bearing whatsoever on the elements of parties' claims or defenses. This strategy unfairly seeks to discredit people because of their immigration status. In the worst cases, it creates fear that their immigration status will be used to harass or retaliate against them, should they continue to participate in the State's enforcement action.

This scare-tactic litigation strategy is harmful to the State's interest in protecting the consumer and civil rights of all Washingtonians and promoting fair and equal access to justice for all. Proposed Evidence Rule 413(b) would deem evidence of immigration status inadmissible in civil cases, unless immigration status is an essential fact to prove an element of a party's cause of

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action. This useful evidentiary rule is reasonable and prudent, and would be of great help in ameliorating the foregoing concerns.

In addition, Proposed Evidence Rule 413(b) will increase the efficiency of discovery and trial practice, ultimately reducing the cost of some litigation. In *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 671-74 (2010), this Court held that, in at least some circumstances, immigration status should be excluded from trial under Evidence Rule 403 because its probative value is outweighed by the danger of unfair prejudice. Like all applications of ER 403, the *Salas* holding was necessarily fact specific. *See id.* at 673-74 (“We hold that, with regard to lost future earnings, the probative value of a plaintiff’s undocumented status, by itself, is substantially outweighed by the danger of unfair prejudice.”).

For subsequent courts and litigants, applying *Salas* has required a case-by-case analysis. *See generally* ER 403; *Himango v. Prime Time Broad., Inc.*, 37 Wn. App. 259, 265-66 (1984) (ER 403 balancing is based on the facts and circumstances “in a specific case”). And, because an ER 403 determination occurs at the time of trial, *Salas* provides little instruction for resolving discovery disputes regarding immigration evidence. *See, e.g., Diaz v. Wash. State Migrant Council*, 165 Wn. App. 59, 75 (2011) (affirming denial of protective order covering evidence of immigration status because admissibility was “a trial call,” made “following discovery and with both sides armed with the information needed to effectively argue the relative weight of probative value and prejudice”).

A clear, uniform rule limiting immigration evidence to proving an essential element of a party’s cause of action would be a firmer guide to parties in discovery, thereby assisting courts and parties in “secur[ing] the just, speedy, and inexpensive determination of every action.” *See* Civil Rule 1. Finally, and importantly, the proposed rule would ensure that a consistent standard applies statewide.

I appreciate the opportunity to comment on Proposed Evidence Rule 413(b) and express my strong support for it.

Sincerely,

A handwritten signature in black ink, appearing to read "Bob Ferguson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Bob Ferguson
Attorney General

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, September 15, 2017 11:06 AM
To: Tracy, Mary
Subject: FW: Comment in Support of Proposed ER 413(b) by Washington Attorney General
Attachments: Attorney General Comment in Support of Proposed ER 413(b).pdf

Forwarding.

From: Woods, Chamene (ATG) [mailto:ChameneW@ATG.WA.GOV]
Sent: Friday, September 15, 2017 10:54 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment in Support of Proposed ER 413(b) by Washington Attorney General

Dear Ms. Carlson:

Please find attached Attorney General Bob Ferguson's comment in support of Proposed Evidence Rule 413(b).

Thank you,

Chamene M. Woods
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