

Cooley



September 15, 2016

Via Email & First Class Mail

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

Re: Comments on Proposed Evidence Rule 413

Dear Ms. Carlson:

The ACLU of Washington Foundation (“ACLU”), the Washington Defender Association (“WDA”), the Washington Association of Criminal Defense Lawyers (“WACDL”), and OneAmerica respectfully submit the following comments regarding the Court’s consideration of proposed Evidence Rule 413 (“ER 413”). As explained below, our organizations continue to support the adoption of the civil sub-section (413(a)) but strongly oppose the criminal sub-section (413(b)).

Each of our organizations has long been involved with the study and consideration of ER 413—as well as the issues giving rise to the proposed rule. The ACLU, independently and as a member of the Rules Committee of the WSBA’s Access to Justice Board, has engaged in careful study of various iterations of ER 413 for more than two years. Indeed, the ACLU first submitted comments regarding this proposed rule in July 2015 to the Evidence Rules Subcommittee of the WSBA’s Court Rules Committee. And before that, the ACLU submitted an amicus brief to this Court in *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664 (2010).

We understand and appreciate the access-to-justice concerns that have motivated the proponents of the rule, particularly as expressed by Columbia Legal Services, Northwest Immigrant Rights Project, and Legal Voice. We wholeheartedly agree with the views of those organizations in the context of *civil* proceedings, where the constitutional rights of criminal defendants are *not* at stake. In civil matters, as in *Salas*, where evidence of immigration status has no legitimate relevance to the litigation, the civil part of the proposed rule would promote access to justice by properly requiring advance notice and a showing of need before this unnecessarily prejudicial evidence could be introduced. Accordingly, we join in what appears to be nearly unanimous support for the civil subsection of proposed ER 413 and we urge the Court to adopt that portion of the rule.

However, we continue to view the criminal subsection of ER 413 as an unnecessary and superfluous procedural vehicle that creates too great a risk of impingement on defendants’ constitutional rights. Unlike civil litigants, criminal defendants and prosecutors do not stand on equal footing with respect to evidentiary issues. Accused persons have constitutional rights related

to offering evidence at trial that the State does not share, but ER 413(b) skews the constitutional status quo by placing a greater burden on defendants with respect to the introduction of relevant (and potentially exculpatory) evidence. For example, every criminal defendant has a constitutional right to confront the State's witnesses—including the right to a full and fair opportunity to expose an adverse witness's bias, prejudice, and/or motivation to lie. It cannot be denied that a witness's immigration status may be relevant to those factors, particularly where the witness has received an immigration benefit such as a U-visa in exchange for cooperation with the investigation and/or prosecution of the alleged crime. Proposed ER 413(b) imposes significant procedural burdens on criminal defendants' ability to exercise these important constitutional rights, and may in practice render such evidence presumptively inadmissible.

The purported benefits of proposed ER 413(b) are far outweighed by the constitutional dimensions of its burdens on criminal defendants. We do not gainsay the access-to-justice concerns raised by the proponents, particularly with respect to victims of domestic violence and witnesses to violent crimes. But our view is that proposed ER 413(b) is a solution in search of a problem. The Washington courts have repeatedly proven capable of conducting the fact-intensive evidentiary analysis necessary to balance the interests of undocumented victims and witnesses with the paramount constitutional rights of criminal defendants. Most recently, in *State v. Streepy*, 199 Wash. App. 487, 400 P.3d 339 (2017), Division 1 of the Court of Appeals addressed a criminal defendant's challenge to the trial court's denial of his request to cross-examine a witness regarding her alleged receipt of a U-visa in exchange for testifying against him. *Id.*, 199 Wash. App at 498–501. In affirming the trial court's exercise of discretion, the court expressly noted its obligation to consider a criminal defendant's confrontation rights under the federal and state constitutions in the context of evidentiary issues regarding undocumented witnesses. *Id.* at 498.

Nothing in *Streepy* or other Washington authorities suggests that our courts are incapable of applying a constitutionally proper evidentiary analysis in a wide variety of criminal matters involving undocumented victims and witnesses. Given the serious risks to defendants' constitutional rights presented by ER 413(b), we believe that the onerous burden-shifting and procedural aspects of the proposed rule are not necessary to address the proponents' concerns.

We appreciate the Court's careful consideration of these important issues.

Sincerely,

/s/ Christopher B. Durbin
Cooley LLP
Counsel to ACLU of Wash. Foundation

/s/ Enoka Herat
Police Practices & Immigration Counsel
ACLU of Washington Foundation

/s/ Annie Benson
Senior Directing Attorney
Washington Defender Association

/s/ Patricia Fulton
President
Wash. Ass'n of Criminal Defense Lawyers

/s/ Rich Stolz
Executive Director
OneAmerica

cc: WSBA Access to Justice Board
WSBA Access to Justice Board, Rules Committee

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, September 15, 2017 2:48 PM
To: Tracy, Mary
Subject: FW: Comment re proposed Evidence Rule 413
Attachments: 2017-09-15 ACLU-WA et al. Comment Letter re Proposed ER 413.pdf

Forwarding.

From: Durbin, Christopher [mailto:cdurbin@cooley.com]
Sent: Friday, September 15, 2017 2:45 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Enoka Herat <eherat@aclu-wa.org>; abenson@defensenet.org; Rich@weareoneamerica.org; patricia@glblaw.com
Subject: Comment re proposed Evidence Rule 413

Dear Ms. Carlson:

Enclosed please find correspondence to the Court with comments regarding proposed Evidence Rule 413. A hard copy will follow by mail, postmarked today.

Thank you for your attention to this matter. Please do not hesitate to contact me with any questions.

Sincerely,
Chris Durbin

Christopher B. Durbin • Cooley LLP

1700 Seventh Ave. • Suite 1900 • Seattle, WA 98101-1355
Tel: 206-452-8769 • Fax: 206-452-8800
Email: cdurbin@cooley.com • Mobile: 650-906-8798

Boston | Broomfield | Los Angeles | London | New York | Palo Alto | Reston | San Diego | San Francisco | **Seattle** | Washington, DC | Shanghai

This email message is for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply email and destroy all copies of the original message. If you are the intended recipient, please be advised that the content of this message is subject to access, review and disclosure by the sender's Email System Administrator.