

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, September 15, 2017 11:23 AM
To: Tracy, Mary
Subject: FW: Reject Proposed Evidence Rule 413

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From: Kevin March [mailto:MarchK@nwattorney.net]
Sent: Friday, September 15, 2017 11:14 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Reject Proposed Evidence Rule 413

Dear Justices,

I strongly urge the Washington Supreme Court to reject the criminal law aspects of ER 413 for two reasons. First, the rule is completely unnecessary because Washington courts have already demonstrated themselves amply capable of applying the relevancy standards. Second, as the Superior Courts Judges' Association points out, the rule will lead to uncertainty in application and this uncertainty will lead to significant litigation.

As for the rule's necessity, the Court of Appeals' recent decision in State v. Streepy, 199 Wn. App. 487, 400 P.3d 339 (2017), shows that a reworking of longstanding relevancy rules is unnecessary. In Streepy, the complainant's immigration status was irrelevant because she did not know about the U visa program when she called police. Id. at 499-500. And, because her trial testimony (provided after she learned of the U visa program) was consistent with her initial reports to police, "there was no logical connection between [her] testimony and her learning of the U visa program." Id. In addition, the complainant believed she was a lawful U.S. resident given her grant of deferred action for childhood arrivals, so "she had no motivation to provide false or exaggerated testimony for purposes of avoiding deportation or securing a U visa." Id. at 500. Streepy clearly indicates that Washington Courts can conduct relevancy analyses just fine without the need to consult an immigration-specific relevancy rule. See also Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 671-73, 230 P.3d 583 (2010) (similarly demonstrating that the Washington courts are capable of excluding immigration status evidence when its probative value is substantially outweighed by its prejudicial effect under a ER 403 balancing).

Comments like that submitted by the Pacific County Prosecutor "applaud[ing] courts like *State v. Streepy* . . . who make it clear immigration status is not a relevant issue," miss that immigration status is indeed frequently a relevant issue. The Streepy court did not remotely suggest immigration status is never a relevant issue; it merely indicated that it was not relevant under the circumstances of that case. Had the complainant known about the U visa program and had she been incentivized to provide inculpatory testimony pursuant to the U visa program, evidence of her immigration status would unquestionably have become relevant to her bias and motivation to testify and the Streepy court would have decided the case differently. It is troubling that some prosecutors already seem too willing to treat the ER 413 proposal as an out-and-out barrier to the admissibility of immigration status even where such status is plainly relevant to a witness's motivations to testify and therefore is appropriate fodder for cross examination under the confrontation clauses of the Sixth Amendment and article I, section 22.

This leads to the second reason the rule should be rejected—it will cause uncertainty, will overburden already overburdened litigants and attorneys with pretrial litigation, will result in prosecutorial gamesmanship, and will ultimately lead to significant appellate litigation. I agree with the shortcomings of the rule as outlined by the Superior Court Judges' Association. Were the rule adopted, each of these shortcomings—and surely others yet to be identified—

would be litigated in every case where immigration status is potentially relevant in trial courts around the state. This will place additional strain on already crowded caseloads and court dockets, will significantly increase pretrial motions practice in criminal cases, and, as the Pacific County Prosecutor has already indicated, will encourage prosecutors to oppose all evidence of immigration status regardless of its relevancy to the case at hand. In the criminal context, the rule will certainly create significant constitutional litigation in all levels of the Washington courts for many years.

Please reject the criminal aspects of the ER 413 proposal. Thank you for your consideration.

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