



To: Susan L. Carlson, Clerk, Washington State Supreme Court

From: Leslye E. Orloff, Adjunct Professor and Director and Tarja Cajudo, Dean's Fellow, National Immigrant Women's Advocacy Project, American University, Washington College of Law

Re: Comments on Washington Proposed Evidence Rule 413

Date: September 15, 2017

Introduction

The National Immigrant Women's Advocacy Project (NIWAP) is a non-profit organization committed to supporting women and children through education and policy advocacy. NIWAP works to promote the development, implantation, and use of laws, policies, and practices that benefit immigrant women and children. NIWAP staff were involved in the drafting of the Violence Against Women Act (VAWA) immigration provisions and are advocates with more than 35 years' experience working with immigrant victims.

NIWAP is in favor of proposed Evidence Rule 413 (ER 413) as an urgently needed protection of the health and safety of foreign-born children, women and crime victims seeking help from the Washington courts.¹ The ER 413 will facilitate access to justice and the ability of all foreign-born persons to receive fair treatment in the Washington justice system. Since "courts ensure public safety and efficient administration of justice," ER 413 is needed to protect the right of victims and witnesses to access the court system and allow the court to do its crucial work.²

ER 413 would limit the introduction of immigration evidence into court for civil and criminal cases and stop racially and ethnically biased evidence from being used to gain advantage including in custody, protection order and child abuse cases. In criminal cases, it would ensure that immigration status is generally inadmissible except in certain limited case-specific judicially reviewed circumstances.

ER 413 Evidence Rules Benefits for Domestic Violence, Sexual Assault, and Human Trafficking Cases.

Immigrant victims need ER 413 to protect them from those perpetrators who purposely target immigrants as vulnerable victims for sexual assault and domestic violence. Research shows that perpetrators prey on immigrants specifically because of their immigrant status and the reduced likelihood they will report victimization or cooperate with criminal investigations or prosecutions. As a result, immigrant girls are approximately twice as likely as non-immigrant girls to report having experienced recurring sexual assault.³ In fact, immigrant girls are twice as

¹ See California Senate Bill 785.

² California Chief Justice Tani G. Cantil-Sakauye, [Chief Justice Cantil-Sakauye Objects to Immigration Enforcement Tactics at California Courthouses](http://newsroom.courts.ca.gov/news/chief-justice-cantil-sakauye-objects-to-immigration-enforcement-tactics-at-california-courthouses), Letter to Attorney General Sessions and Secretary Kerry, (March 16, 2017), <http://newsroom.courts.ca.gov/news/chief-justice-cantil-sakauye-objects-to-immigration-enforcement-tactics-at-california-courthouses>.

³ Jessica Mindlin, Leslye E. Orloff, Sameera Pochiraju, Amanda Baron, and Ericka Echavarria, [Dynamics of Sexual Assault and the Implications for Immigrant Women](#), National Immigrant Women's Advocacy Project, p. 8 (2013). See also Romero, G.J., Wyatt, G.E., Loeb, T.B., Carmona,

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likely to have suffered sexual assault by the time they reach high school as their non-immigrant peers.⁴ Immigration status, linguistic isolation, and acculturation also affect recovery.⁵ Cumulative trauma makes a victim more vulnerable to future traumatization, eroding the victim's ability to protect themselves and cope with abuse.⁶ In cases of immigrant victims perpetrators continually use immigration related threats to silence victims and keep them from seeking justice. Without ER 413, raising immigration status of the victim in criminal and civil cases exacerbates this problem and is a very effective tool used by perpetrators to elude justice.

Immigrant women are a particularly vulnerable group of victims of domestic violence due to their immigration status.⁷ Abusers of domestic violence victims actively use their power to control their wife's and children's immigration status and threats of deportation as tools that play upon victim's fears to keep their abused spouses and children from seeking help or from calling the police to report the abuse.⁸ The fear induced by immigration-related abuse makes it extremely difficult for a victim to leave her abuser, obtain a protection order, access domestic violence services, call the police for help, or participate in the abuser's prosecution.⁹ The rate of abuse is highest when U.S. citizen men marry immigrant women (59.5%) – three times the national average.¹⁰

Abusers often keep their immigrant spouse from their children from attaining legal immigration status and then try to raise lack of legal immigration status in a custody case in order to win custody of the children despite the perpetrator's history of abuse.¹¹ Moreover, language issues, privacy concerns, shame, self-blame, and culture augment fears of deportation inhibiting immigrant sexual assault victim's access to justice and services.¹² Allowing perpetrators and defendants to use immigration status in court as an extra tool in criminal cases and offensively in civil cases frustrates the basic principle of fairness in the judicial system. This is a tool that is not available to be used in cases that involve U.S. citizens and not immigrants. Arming perpetrators and defendants with another legal tool to use against immigrant victims results less access to justice for victims and more perpetrators who are not held accountable for their crimes.

Fact-Finders May Unwittingly Make Decisions Based On Bias When Immigration Status Evidence Is Admitted.

Continuing to allow perpetrators to raise immigration status in civil and criminal cases undermines VAWA and state laws designed to protect victim. Washington's best interests of the child laws set out clear factors including protecting "the child from physical, mental or emotional harm" and maintaining "a child's emotional growth, health and stability, and physical care".¹³

J.V., and Solis. B.M., *The Prevalence and Circumstances of Child Sexual Abuse among Latina Women*, *Hispanic J. Behavioural Sciences*, 357 (1999).

⁴ Decker, M., Raj, A. and Silverman, J., *Sexual Violence Against Adolescent Girls: Influences of Immigration and Acculturation*, 13 *Violence Against Women* 498, 507 (2007).

⁵ Mindlin, Orloff, Pochiraju, Baron & Echavarría, *supra* note 3, at 10.

⁶ *Id.*

⁷ Giselle Aguilar Hass, Nawal Ammar & Leslye Orloff, *Battered Immigrants and U.S. Citizen Spouses*, p 2 (April 24, 2006), http://www.academia.edu/2236701/Battered_Immigrants_and_U.S._Citizen_Spouses.

⁸ *Id.* at 3.

⁹ *Id.*

¹⁰ *Id.* at 5.

¹¹ *Id.* at 3.

¹² Mindlin, Orloff, Pochiraju, Baron & Echavarría, at 19.

¹³ Wash. Rev. Code Section 26.09.002 (2017).

Introducing evidence of immigration status of a parent or child undermines access to the protections of these laws by distracting the court from its statutorily enumerated best interest factors. ER 413 would level the evidentiary playing field by giving judges an explicit basis in the rules of evidence for granting protective orders regarding discovery of immigration status. A protective order could be justified based on as a violation of Rule 11¹⁴ and an argument that such discovery would not be “reasonably calculated to the discovery of admissible evidence.”¹⁵

Language Access

The diversity of the foreign born and LEP community in Washington make access to justice challenging. In Washington, 13.7% of the state’s population is foreign-born from diverse countries of origin.¹⁶ (Asia 42.4%; Latin America 30.9%; Europe 15.4%; Africa 5.0%; Canada 4.4%; Oceania 1.8%).¹⁷ Approximately 53.2% of Washington’s non-citizen population are Limited English Proficient (LEP).¹⁸ 28.5% of children in the state under age 18 have one or more immigrant parents and 87% of children in immigrant families in Washington are U.S. citizens.¹⁹ The dangers for this population when access to justice is impeded by immigration status fears and threats is significant. Too often, the victim’s lack of legal immigration status combines with limited English proficiency and can result in the perpetrator convincing police to take no action against, not to take a police report, and in the worst instances can result in arrest of the victim instead of or in addition to the perpetrator.²⁰

Perpetrators of domestic violence, sexual assault, and human trafficking are actively involved²¹ in triggering immigrant victims’ deportation, including inducing immigration enforcement officials arrest victims seeking court protection.²² Such interference in access to justice is akin to what occurs in the courtroom when defendants and parties raise immigration status in criminal, family and civil cases. These actions are forms of immigration related abuse that instill fear and immigrant victims to choose between access to justice and deportation.²³

Conclusion

NIWAP supports ER 413 because it promotes fairness and access to justice for all.

¹⁴ Leslye E. Orloff, VAWA Confidentiality: History, Purpose, DHS Implementation and Violations of VAWA Confidentiality Protections, p 23 (2014).

¹⁵ See CR 26(c).

¹⁶ Migration Information, <http://www.migrationinformation.org/datahub/state.cfm?ID=WA> (January 2015).

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

²⁰ Natalie Lee, Daniel J. Quinones, Nawal Ammar & Leslye E. Orloff, National Survey of Service Providers on Police Response to Immigrant Crime Victims, U Visa Certification and Language Access (April 16, 2013), <http://niwaplibrary.wcl.american.edu/pubs/rsch-police-response-immigrant-victims/>.

²¹ Krisztina E. Szabo & Leslye E. Orloff, The Central Role of Victim Advocacy for Victim Safety While Victims’ Immigration Cases Are Pending, p. 1 (June 18, 2014), <http://niwaplibrary.wcl.american.edu/pubs/imm-qref-safetyplanning/>.

²² See Bill to Stop Irrelevant Disclosures of Immigration Status in Open Court Passes Senate Public Safety Committee, Scott Weiner (May 16, 2017), <http://sd11.senate.ca.gov/news/20170516-bill-stop-irrelevant-disclosures-immigration-status-open-court-passes-senate-public>; ICE agents make arrests at courthouses, sparking backlash from attorneys and state supreme court, LA Times (March 16, 2017, 10:40 AM), <http://www.latimes.com/local/lanow/la-me-ln-ice-courthouse-arrests-20170315-story.html>; Shayna Jacobs, Federal immigration agents showing up in NYC courts to arrest defendants, DailyNews (March 26, 2017, 10:19 PM), <http://www.nydailynews.com/new-york/federal-immigration-agents-showing-nyc-courts-article-1.3010003>.

²³ See California Chief Justice Tani G. Cantil-Sakauye, Chief Justice Cantil-Sakauye Objects to Immigration Enforcement Tactics at California Courthouses, Letter to Attorney General Sessions and Secretary Kerry, (March 16, 2017), <http://newsroom.courts.ca.gov/news/chief-justice-cantil-sakauye-objects-to-immigration-enforcement-tactics-at-california-courthouses>.

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Please accept NIWAP's submission of comments on Proposed Evidence Rule 413.

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