WASHINGTON COURTS

Superior Court Judges' Association

September 8, 2017

Honorable Charles W. Johnson, Chair
Supreme Court Rules Committee
c/o Clerk of the Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

Dear Justice Johnson:

RE: Proposed ER 413

The Superior Court Judges' Association Board of Trustees urges the Supreme Court Rules Committee to not adopt Proposed Evidence Rule (ER) 413. Both our Civil and Criminal Laws and Rules Committees have studied the rule. In sum, we believe proposed ER 413 would be redundant of existing evidence rules and therefore is not necessary. In addition, because the proposed rule uses terminology that differs in some regards from current rules (these differences are addressed in more detail below), we are concerned that, if adopted as proposed, the rule would likely be the subject of significant litigation over those different terms. For these reasons, we urge the Supreme Court Rules Committee to not adopt proposed ER 413.

However, should the Rules Committee decide to promulgate an evidence rule on the specific topic of immigration status, we urge that each of the following issues first be addressed:

1) There are many differences between sections a and b. While there may be reasons for using different approaches in the criminal and civil settings to the question of admissibility and the process trial courts would use for determining admissibility, the rationale behind many of the differences between the two sections in the proposed rule is not clear.

2) In (a), the proposed rule refers to the offense "with which ***the*** defendant is charged" (emphasis added). How will this affect multi-defendant cases? Does this result in the severance of more cases?

3) The rule would allow admission of immigration status evidence if it is "an essential fact" of an element or defense. Is this a heightened kind of "relevant" evidence? Would this mean case law addressing relevance and prejudice of immigration status evidence under existing evidence rules (such as *State v. Streepy*, 2017 WL 2839778, and *Salas v. Hi-Tech Erectors*, 168 Wn2d 664 (2010)) would have no bearing on these issues in the future?

4) The rule would allow for potential admission if it goes to bias or prejudice. What about motive?

5) Why is there a specific procedure for when the evidence is offered to show bias or prejudice, but no specific procedure when offered to prove an essential element of or defense to a charge?

6) Section (a)(4) appears to be an ER 401-403 analysis. First, is there a need to essentially repeat 401-403? Second, if repeated, this language is different from ER 403. The language in (a)(4) allows the evidence if the probative value outweighs its prejudicial effect, but leaves out the word "substantially" (in front of outweighs) that exists in 403. Thus, the language in this rule actually makes it easier to get in the immigration evidence in 403 terms, which seems contradictory to the intent of the rule.

7) In section (b), the rule only allows this evidence if it goes to an essential fact of a cause of action. What about defenses (as allowed on the criminal side)?

8) In section (b), why is there no provision for the possibility of this evidence being admissible to attack the bias or prejudice (or motive) of a witness, as allowed on the criminal side in section (a)?

9) In section (b)(1), the rule would not preclude this evidence anyway, as it is post-trial and not offered to go to the jury.

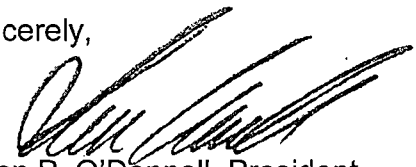
10) In section (b)(2), the burden of mandatory in-camera reviews outweighs any perceived need or benefit. This committee strongly objects to a rule that mandates in camera review in every case. In camera reviews are generally inconsistent with "open courts" and should not occur unless a trial judge determines on a case-by-case basis that such a review is justified under applicable open courts principles. In addition, in camera reviews are time-consuming and burdensome – so they should be used only after the trial court determines they are necessary.

11) Also in section (b)(2), the reference to GR 15 is puzzling. Given that the language in (b)(2) is permissive, how is this different than any other situation, in which a party can move to have documents sealed under GR 15? Also, the final sentence provides that if the evidence is allowed to be used, the court must make findings of fact and conclusions of law regarding the permitted use. First, it is not clear why

formal findings/conclusions are needed. Second, under the language of section (b) as currently written, there is only one possible permissive use, namely "an essential fact to prove an element of a party's cause of action."

Thank you for consideration of our concerns. Please feel free to contact me at sean.odonnell@kingcounty.gov or Judge Mary Sue Wilson at wilsonm@co.thurston.wa.us if you would like to discuss our comments.

Sincerely,



Sean P. O'Donnell, President
Superior Court Judges' Association

cc: SCJA Board of Trustees
Judge Mary Sue Wilson
Judge Roger Rogoff
Ms. Janet Skreen

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Tracy, Mary

From: Jennings, Cindy
Sent: Wednesday, September 13, 2017 11:08 AM
To: Hinchcliffe, Shannon; Tracy, Mary
Subject: Letter from Judge Sean O'Donnell re Proposed ER 413
Attachments: 20170913_101425.pdf

From: noreply@courts.wa.gov [mailto:noreply@courts.wa.gov] **On Behalf Of** noreply@
Sent: Wednesday, September 13, 2017 10:14 AM
To: Jennings, Cindy <Cindy.Jennings@courts.wa.gov>
Subject: Scanned image from MX-M464N