



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

From: Leslye E. Orloff, Adjunct Professor and Director, National Immigrant Women's Advocacy Project ("NIWAP") 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 is the nation's expert on the rights and services available to immigrant victims of domestic violence and leads national advocacy efforts for legal protection, social services, and economic justice for immigrant women, identifying problems and complex legal issues encountered by immigrant survivors of abuse.

NIWAP is in favor of proposed Evidence Rule 413 (ER 413) because it is urgent and necessary for the protection for the immediate preservation of the public peace, health, or safety of undocumented residents of Washington.¹ It immediately helps protect undocumented residents' ability to participate 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. It would also remove potential for racial and ethnic stereotyping that result from injection of immigration status evidence into fact-finding process. In civil cases, it would balance the concerns of prejudice against immigrants with the legitimate need of defendants to raise status issues. In criminal cases, it would indicate that immigration status is generally inadmissible except in certain judicially reviewed circumstances.

Immigration status evidence is of special concern in the context of criminal and civil cases involving domestic violence, sexual assault, and trafficking in persons.

Immigrant victims in Washington need ER 413 to protect them from those perpetrators who purposely target immigrants as victims of crimes such as sexual assault and domestic violence. Research shows that there are perpetrators who prey on immigrants specifically because of their immigrant status and the perpetrators' assumption that immigrant victims will be less likely to enter the judicial system.

Research based upon data from a large representative sample of high school girls in Massachusetts found that immigrant girls were approximately twice as likely as non-immigrant

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>.

National Immigrant Women's Advocacy Project (NIWAP, pronounced *new-app*)

American University, Washington College of Law

4300 Nebraska Avenue NW · Washington, D.C. 20016

(o) 202.274.4457 · niwap@wcl.american.edu · wcl.american.edu/niwap

girls to report having experienced recurring sexual assault both in the past year and in their lifetimes.³ In fact, immigrant girls are twice as likely to have suffered sexual assault by the time they reach high school as their non-immigrant peers, including recurrent incidents of sexual assault.⁴ Further, security of immigration status, isolation language abilities, level of acculturation affect recovery.⁵ Cumulative trauma makes a victim more vulnerable to future traumatization, eroding victim's ability to protect themselves and cope with abuse.⁶ Most significantly, many victims decline to report sexual assault to law enforcement for fear they will lose their privacy.⁷

Research data demonstrates that immigrant women are a particularly vulnerable group of victims of domestic violence. In particular, research studies have found that 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 so as to keep their abused spouses and children from seeking help or from calling the police to report the abuse.⁸ Research on domestic violence conducted among immigrants indicates that immigrant women are very often victims of domestic violence due to vulnerability related to their immigration status.⁹ 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.¹⁰ Although foreign-born men and U.S. citizen men born in the United States are equally likely to be perpetrators of domestic violence, the likelihood of abuse rises significantly when the U.S. citizen men marry immigrant women.¹¹ Among abused immigrant spouses, the vast majority of the 64% married/formerly married women who reported abuse were married to and abused by U.S. citizens.¹² Data further suggest that when U.S. citizens are married to foreign women the abuse rate is approximately three times higher than the abuse rate in the general population in the United States.¹³

Moreover, abusers of immigrant victims keep the immigrant mother of their children from attaining legal immigration status and then try to raise her lack of legal immigration status in a custody case in order to win custody of the children despite the perpetrator's history of abuse.¹⁴ Language issues, privacy concerns, shame, self-blame, and culture can present significant barriers to an immigrant sexual assault victim's ability to access services.¹⁵ Thus, 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. Arming perpetrators

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, 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 & Echavarria, supra note 3, at 10.

⁶ Id.

⁷ Id.

⁸ Giselle Aguilar Hass, Nawal Ammar & Leslye Orloff, Battered Immigrants and U.S. Citizen Spouses, *Legal Momentum* p 2 (April 24, 2006), http://www.academia.edu/2236701/Battered_Immigrants_and_U.S._Citizen_Spouses.

⁹ Id. at 3.

¹⁰ Id.

¹¹ Id. at 5.

¹² Id.

¹³ Id.

¹⁴ Id. at 3.

¹⁵ Mindlin, Orloff, Pochiraju, Baron & Echavarria, at 19.

and defendants with another legal tool to use against immigrant victims results in allowing more perpetrators on the streets.

Fact-finders may unwittingly make decisions based on prejudice if immigration status evidence is admitted.

Further, the laws designed to protect immigrant victims will no longer have an effect. Under Washington’s Revised Code Section 26.09.002 of 2017, Washington provides clear factors the courts should use in determining the best interests of the child.¹⁶ The Washington legislatures ask courts to determine the best interests of the child by protecting “the child from physical, mental or emotional harm” and maintaining “a child’s emotional growth, health and stability, and physical care.”¹⁷ These elements do not include an analysis of the child’s immigration status. Indeed, an introduction of immigration status evidence distracts the court from determining the best interests of the child based upon the enumerated factors only.

One of the other effects of the proposed rule could be to give 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 an argument that such discovery would not be “reasonably calculated to the discovery of admissible evidence.”¹⁸

Language Access

In Washington, 13.7% of the state’s 7.2 million people is foreign-born with approximately 2.8% undocumented or temporary visa holders.¹⁹ Further, 42.4% of the population originate from Asian countries, 30.9% originate from Latin American countries, 15.4% originate from European countries, 5.0% originate from African countries, 4.4% originate from Canada, and 1.8% originate from Oceania.²⁰ Approximately 53.2% of Washington’s non-citizen population have Limited English Proficiency, i.e. they speak English less than very well.²¹

NIWAP expresses its concern about the deterrent effect on immigrant victim access to the judicial system should Washington fail to enact ER 413. As in the 2016 initiative to have Customs and Border Protection provide interpretation services to local law enforcement, several negative effects result from this interference in the judicial system. 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 him, to not take a police report, and in the worst instances can result in arrest of the victim instead of or in addition to the perpetrator.²²

One of the causes of this problem is that perpetrators of domestic violence, sexual assault, and human trafficking are actively involved in continuing to pursue ways to have the victim picked up

¹⁶ Wash. Rev. Code Section 26.09.002 (2017).

¹⁷ *Id.*

¹⁸ *See* CR 26(c).

¹⁹ Migration Information, <http://www.migrationinformation.org/datahub/state.cfm?ID=WA> (January 2015).

²⁰ *Id.*

²¹ *Id.*

²² 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/>.

by immigration enforcement officers at CBP and ICE.²³ These efforts are in retaliation against victims seeking help or leaving abusive employers and abusive homes and in an effort to silence victims and keep them from seeking help. Further, there is evidence that ICE agents have attended courts, monitored trials, and made arrests in California and New York.²⁴ Such interference in access to justice offends the sense of fairness central to the judicial system. By instilling a sense of fear, immigrant victims and witnesses are forced to choose between access to justice and deportation.²⁵ Failure to enact ER 413 could result in similar blockages to immigrant victims' access to the judicial system.

Conclusion

NIWAP supports ER 413 because it provides immigrants with access to the courts and a fair trial is essential for our justice system. As of 2011, Washington was home to 943,664 immigrants. According to the Governor's office, one in every seven people in the state are immigrants. This new rule would promote equitable access to justice, which is imperative to protect immigrant victims from the perpetrators who retaliate against them.²⁶

²³ 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/>.

²⁴ 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, Daily News (March 26, 2017, 10:19 PM), <http://www.nydailynews.com/new-york/federal-immigration-agents-showing-nyc-courts-article-1.3010003>.

²⁵ 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>.

²⁶ See generally Krisztina E. Szabo & Leslye E. Orloff, at 1.