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Daniel A. Durst, Counsel
Committee on Rules of Evidence
Supreme Court of Pennsylvania
Pennsylvania Judicial Center
P.O. Box 62635
Harrisburg, PA 17106-2635

Re: Pennsylvania Law Professors' Comment to Proposed Amendment to the Comment to Pa.R.E. 401 – Class Relevance

Dear Mr. Durst:

We respectfully submit comments to the proposed amendment to the comment to Rule 401 of the Pennsylvania Rules of Evidence. We write this letter as law professors from law schools in the Commonwealth of Pennsylvania who have testified, lectured, researched, or written about issues related to immigration law, evidence, or criminal law. Several of us direct clinics that represent immigrants who have cases that involve the intersection of immigration law and civil/criminal proceedings.

We applaud the Committee's consideration of this issue in response to the request by the Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness for changes to the Pennsylvania Rules of Evidence to limit the admissibility of a party's or witness' immigration status. In particular, we focus our comments solely on the aspect of the rule related to immigration status.

The issue of raising immigration status in court proceedings is a fundamental access to justice issue. Access to the courts is foundational under the First, Fifth and Fourteenth Amendments of the U.S. Constitution and the Remedies Clause of the Pennsylvania Constitution. Immigrants

cannot be denied the equal opportunity to exercise their constitutional rights. *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Plyler v. Doe*, 457 U.S. 202 (1982). Problem arise, however, when courts or parties inquire into immigration status as part of the court proceeding. Such inquires chill the participation of immigrants, whether they are plaintiffs, defendants, victims, or witnesses. A plaintiff who has suffered from hazardous workplace conditions, for example, may refrain from proceeding with a court case if she is forced to reveal her immigration status during the course of the proceeding. Not only do such inquires result in undermining her right to a safe workplace but they also impact the rights of her coworkers at the same workplace. As a result, courts are less effectively able to adjudicate cases, which interferes with the fundamental responsibility and obligation of the courts to vindicate the legal rights of parties.

Parties are known to raise immigration status deliberately as an intimidation tactic prior to and during the course of a proceeding. *See, e.g., Arias v. Raimondo*, 860 F.3d 1185, 1187-88 (9th Cir. 2017). In response, courts across the country have ruled that immigration status is irrelevant. *See, e.g., Rosas v. Alice's Tea Cup, LLC*, 127 F. Supp. 3d 4, 9 (S.D.N.Y. 2015); *Berdejo v. Ideal Sys., Inc.*, No. 3:09-cv-0509, 2012 WL 3260422, at *2 (M.D. Pa. Aug. 8, 2012); *Villareal v. El Chile, Inc.*, 266 F.R.D. 207, 212 (N.D. Ill. 2010); *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 325 (D.N.J. 2005); *Clemente v. State*, 707 P.2d 818, 829 (Cal. 1985); *Peterson v. Neme*, 281 S.E.2d 869, 872 (Va. 1981). They have not only emphasized the limited relevancy of such information but also the unfair prejudice that such information has on proceedings. *State v. Sanchez-Medina*, 176 A.3d 788, 794-95 (N.J. 2018); *Salas v. Hi-Tech Erectors*, 168 Wash. 2d 664, 671-72 (2010). It is precisely the *in terrorem* effect of such information on litigants and future litigants that motivates courts to exclude such information from court proceedings. *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064 (9th Cir. 2004); *Flores v. Albertsons, Inc.*, No. CV0100515AHM(SHX), 2002 WL 1163623, at *6 (C.D. Cal. Apr. 9, 2002).

While the proposed amendment to the comments for Rule 401 would be a laudable step forward, we are convinced that the issue of immigration status is significant enough that it should be placed within an evidence rule itself. A separate rule would be preferable and more effective because comments to the rules are not legally binding. As noted in the comment to Rule 101:

> Comments are prepared by the Pennsylvania Supreme Court's Committee on Rules of Evidence for the convenience of the Bench and Bar. The Comments have not been adopted by the Supreme Court and it is not intended that they have precedential significance.

Based on this difference in authority, a rule directly addressing the general irrelevance of immigration status would be more effective than a comment to the rules. Reports have indicated that courts can be confused about the relevancy of immigration status, resulting in the inquiry into the immigration status of parties.[1] While the comment provides additional guidance, it is merely a

[1] Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness, Memorandum on Reports of State Court Judicial Officers' Assumption of Jurisdiction Over Immigration Issues and the Impact of the Presence of Immigration Enforcement Agents in Courthouses on Litigants' Constitutional Rights 2 (Apr. 5, 2018), available at http://www.pa-interbranchcommission.com/_pdfs/Memo_re_Immigration_in_State_Courts_Anon.pdf; SHELLER CENTER FOR SOCIAL JUSTICE, OBSTRUCTING JUSTICE: THE CHILLING EFFECT OF ICE'S ARRESTS OF IMMIGRANTS AT THE COURTHOUSE 8-9 (2019).

suggestion without precedential significance that continues to permit the use of wide discretion on the issue of immigration status in individual courtrooms.

Given the importance of increasing access to justice for immigrants in the Pennsylvania courts, the issue of immigration status should be addressed in a specific rule in Article IV. Rule 610, for example, provides a good example of how the Pennsylvania Rules of Evidence have addressed the use of specific information (e.g., religious beliefs) within court proceedings. Further, the inclusion of a specific rule will provide the possibility of addressing the issue of immigration status in a more nuanced fashion.[2] A rule should specify that immigration status is presumptively irrelevant and provide for extremely limited exceptions and clear procedures for how a court can determine whether those limited exceptions are applicable, particularly in criminal proceedings.[3]

Washington and California both address the issue of immigration status directly in their evidence rules and have delineated limited exceptions to their general prohibition on relevance. Wash. R.E. 413; Cal. Evid. Code §§ 351.2-351.3 (addressing civil actions); § 351.4 (addressing criminal actions). They include, for example, setting forth protective procedures for determining when an exception should be made, including a motion with an offer of proof and an in camera hearing to determine whether such evidence may be admissible.[4] A new rule on immigration status would offer clarity on the rights of immigrants and defendants, and best protect and ensure access to justice and due process for all parties.

We appreciate your careful consideration of our comments to the proposed amendment.

Sincerely,

(Institutional affiliations for identification purposes only)

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[2] If a new evidence rule cannot be created, the language within the comment, at a minimum, should be more specific about the presumptive irrelevance of immigration status and outline the procedure for considering limited exceptions.

[3] The criminal defense bar, for example, has raised concerns about the constitutional rights of the accused and the instances in which immigration status may be relevant to presenting a defense. We have no objection to additional language in the comment that emphasizes the already existing constitutional right of a criminal defendant to present a defense and/or confront witnesses.

[4] Pennsylvania's Rape Shield Law provides a similar procedure where the defendant can file a written motion with an offer of proof and the court can provide an in camera review to determine the relevancy and admissibility of such evidence. 18 Pa. Cons. Stat. § 3104.

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