

THE COURTS

Title 225—RULES OF EVIDENCE

[225 PA. CODE ART. IV]

Order Approving the Adoption of Pennsylvania Rule of Evidence 413; No. 878 Supreme Court Rules Doc.; correction

(*Editor's Note:* The following Order is reprinted in its entirety to correct the erroneous assignment to Title 231 Pa. Code as published at 51 Pa.B. 5192 (August 21, 2021).)

Order

Per Curiam

And Now, this 11th day of August, 2021, upon the recommendation of the Committee on Rules of Evidence; the proposal having been published for public comment at 49 Pa.B. 2218 (May 4, 2019) and 50 Pa.B. 5222 (September 26, 2020):

It is Ordered pursuant to Article V, Section 10 of the Constitution of Pennsylvania that Pennsylvania Rule of Evidence 413 is adopted in the following form.

This Order shall be processed in accordance with Pa.R.J.A. No. 103(b), and shall be effective October 1, 2021.

Annex A

TITLE 225. RULES OF EVIDENCE

ARTICLE IV. RELEVANCE AND ITS LIMITS

(*Editor's Note:* The following rule is added and printed in regular type to enhance readability.)

Rule 413. Evidence of Immigration Status.

(a) *Criminal or Delinquency Matters; Evidence Generally Inadmissible.* In any criminal or delinquency matter, evidence of a party's or a witness's immigration status shall not be admissible unless immigration status is an essential fact to prove an element of, or a defense to, the offense, to show motive, or to show bias or prejudice of a witness pursuant to Rule 607. This paragraph shall not be construed to exclude evidence that would result in the violation of a defendant's or a juvenile's constitutional rights.

(b) *Civil Matters; Evidence Generally Inadmissible.* In any civil matter, evidence of a party's or a witness's immigration status shall not be admissible unless immigration status is an essential fact to prove an element of, or a defense to, the action, or to show bias or prejudice of a witness pursuant to Rule 607.

(c) *Procedure.* Unless a party did not know, and with due diligence could not have known, that evidence of immigration status would be necessary, the following procedure shall apply prior to any such proposed use of immigration status evidence:

(1) The proponent shall file under seal and serve a written pretrial motion containing an offer of proof of the relevancy of the proposed evidence supported by an affidavit.

(2) If the court finds that the offer of proof is sufficient, the court shall order an *in camera* hearing.

(3) The court may admit evidence of immigration status pursuant to paragraph (a) or paragraph (b) if it finds

the evidence is reliable and relevant, and that its probative value outweighs the prejudicial nature of evidence of immigration status.

(d) *Voluntary Revelation.* This rule shall not prohibit a person, or the person's attorney, from voluntarily revealing his or her immigration status to the court.

Comment

Pa.R.E. 413 has no counterpart in the Federal Rules. This rule is modeled, in part, after Washington Rule of Evidence 413.

In practice, the introduction of immigration status has received heightened consideration in terms of relevancy and prejudice. *See, e.g., Commonwealth v. Sanchez*, 595 A.2d 617 (Pa. Super. 1991) (reference to defendant as an "illegal alien" was irrelevant and prejudicial). This consideration is warranted to avoid potential intimidation of witnesses for fear of deportation. *See, e.g., 8 U.S.C. § 1227* (Deportable Aliens). This rule is intended to limit the admissibility of evidence of immigration status for purposes other than those stated in the rule. *See, e.g., Commonwealth v. Philistin*, 53 A.3d 1 (Pa. 2012) (discussing admissibility of immigration status for purpose of proving motive). Paragraphs (a) and (b) may serve as a basis for limiting discovery about immigration status.

This rule requires the proponent to seek pretrial approval prior to the introduction of evidence of immigration status. If evidence is admissible, the trial court may consider a cautionary jury instruction to ameliorate its prejudicial effect. *See, e.g., Commonwealth v. Hairston*, 84 A.3d 657 (Pa. 2014).

Nothing in this rule prohibits a court from unsealing a motion.

The procedure set forth in paragraph (c) is unnecessary for immigration status voluntarily revealed pursuant to paragraph (d). However, all other Rules of Evidence remain applicable. *See, e.g., Pa.R.E. 402, 403.*

Official Note: Adopted August 11, 2021, effective October 1, 2021.

Committee Explanatory Report:

Final Report explaining the August 11, 2021 adoption of Rule 413 published with the Court's Order at 51 Pa.B. 6140 (September 25, 2021).

FINAL REPORT¹

Adoption of Pa.R.E. 413

On August 11, 2021, upon recommendation of the Committee on Rules of Evidence, the Court ordered the adoption of Pennsylvania Rule of Evidence 413 governing the admissibility of evidence of immigration status.

The Committee previously received a recommendation from 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's immigration status. In response, the Committee proposed amendment of the Comment to Pa.R.E. 401, see 49 Pa.B. 2218 (May 4, 2019), which received several comments concerning the need for a rule

¹ The Committee's Final Report should not be confused with the official Committee Comments to the rules. Also note that the Supreme Court does not adopt the Committee's Comments or the contents of the Committee's explanatory Final Reports.

addressing specifically immigration status given that evidence of immigration status may be used for the purpose of intimidation.

Thereafter, the Committee proposed a standalone rule in the form of Pa.R.E. 413 to address the admissibility of evidence of immigration status. Similar to Washington Rule of Evidence 413, the standalone rule would have limited the admission of such evidence to prove an essential fact of, an element of, or a defense to, an action, or a party's or witness's motive. *See* 50 Pa.B. 5222 (September 26, 2020). Another function of the proposed rule would put the opponent on notice that a proponent intends to introduce evidence of immigration status. The opponent can then seek a pretrial ruling as to the admissibility of the evidence. This process would be similar to that employed by Pa.R.E. 404(b)(3) for notice in criminal cases for prior bad acts, but the notice would require the specific, rather than general, nature of any evidence of immigration status. Thereafter, the opponent could weigh whether to challenge the relevancy and potential prejudice of the evidence.

The Committee again received several responses to the proposal. A majority of respondents suggested a bifurcated rule similar to Washington Rule of Evidence 413, with differing provisions applicable to criminal proceedings and civil proceedings to permit admission only when immigration status is an essential fact of a party's cause of action. Further, the waiver of advance notice should be restricted to when the moving party did not know or, with due diligence, could not have known that immigration status would be an essential fact. Finally, the court should be required to conduct an *in camera* review, similar to Washington Rule of Evidence 413, and the review, together with the evidence or motion, should be sealed.

Based on these responses, the Committee revised proposed Pa.R.E. 413 to bifurcate the general exclusion of such evidence, together with exceptions, into paragraph (a) for criminal and juvenile matters and paragraph (b) for civil matters. Both paragraphs were revised to include exceptions "to show bias or prejudice of a witness pursuant to Rule 607." Further, paragraph (a) included an additional exception so application of the rule in criminal or juvenile proceedings would not result in the violation of a defendant's or a juvenile's constitutional rights.

The Committee agreed with the respondents' suggestion for a specific procedure for determining the admissibility of evidence of immigration status. Under Pa.R.E. 103, admissibility may be determined either by a pretrial motion *in limine* or contemporaneous objection in open court. However, experience informs that relying upon contemporaneous objections often cannot "unring the bell" of the issue being raised through the question posed. Moreover, offers of proof in open court, notwithstanding being outside the hearing of the jury, remain on the record and do little to assuage witness intimidation.

Therefore, largely structured after Washington Rule of Evidence 413(a)(1)–(4), paragraph (c) was added as a means for determining the admissibility of immigration status. The process would require a pretrial motion *in limine* filed under seal. Thereafter, the trial court could allow the evidence to be admitted if it was relevant and its probative value outweighed its prejudicial nature. The paragraph also contains an exception for when a party does not know, and with due diligence could not have known, that evidence of immigration status would be necessary at trial.

The Committee observed that two other jurisdictions, in their analogous evidentiary provisions, have included a provision allowing a party to waive the rule's protection and reveal evidence of immigration status. *See* 735 Il.C.S. 5/8-2901(b)(3) (pertinently stating that evidence is admissible if "a person or his or her attorney voluntarily reveals his or her immigration status to the court"); Cal. Evid. Code § 351.3(b)(3), § 351.4(b)(3) (providing that, in civil actions other than for personal injury or wrongful death and in criminal actions, the statute does not "[p]rohibit a person or his or her attorney from voluntarily revealing his or her immigration status to the court").

Although evidence of immigration status has the potential for intimidation and prejudice, if such evidence is probative and the person whose immigration status is revealed does so voluntarily, then the proposed evidentiary and procedural safeguards appear unnecessary. Further, an exception for voluntary disclosure may lessen the procedural burden on parties when immigration status is admissible pursuant to paragraph (a) or (b).

Therefore, the Committee revised the rule to add paragraph (d), which is modeled after California Evidence Code § 351.3(b)(3). Paragraph (d) contains several noteworthy aspects. First, it pertains to a personal revelation of one's own immigration status, not another person's immigration status. Second, the status must be revealed in court, not to sources outside of court. Cf. Pa.R.E. 803(25) (An Opposing Party's Statement). Third, the procedure set forth in paragraph (c) is rendered unnecessary under the circumstances of paragraph (d), i.e., "this rule shall not prohibit." A statement to that effect was added to the Comment with an observation that the other Rules of Evidence nonetheless remain applicable even if the procedure of paragraph (c) is not followed.

The Committee received a concern that a Rule of Evidence permitting the use of evidence of immigration status for impeachment purposes may open the door to additional discovery on that topic. Similarly, the respondent expressed concern that permitting evidence of immigration status to be admissible in court as an element of a defense in civil matters pursuant to paragraph (b) may have similar effect. The Committee is not insensitive to such concerns, but the Rules of Evidence are intended to regulate the admissibility of evidence in court proceedings, see Pa.R.E. 101, not the scope of discovery. Notwithstanding, a sentence was added to the Comment indicating that paragraphs (a) and (b) may serve as a basis for limiting discovery about immigration status; however, the procedural mechanism for doing so, i.e., a protective order, is not governed by the Rules of Evidence.

This rule becomes effective October 1, 2021.

[Pa.B. Doc. No. 21-1612. Filed for public inspection September 24, 2021, 9:00 a.m.]

Title 231—RULES OF CIVIL PROCEDURE

PART I. GENERAL

[231 PA. CODE CH. 1915]

Proposed Amendment of Pa.R.C.P. No. 1915.11-2

The Domestic Relations Procedural Rules Committee is planning to propose to the Supreme Court of Pennsylvania

nia the amendment of Pa.R.C.P. No. 1915.11-2—Appointment of Guardian *Ad Litem*—for the reasons set forth in the accompanying publication report. Pursuant to Pa.R.J.A. No 103(a)(1), the proposal is being published in the *Pennsylvania Bulletin* for comments, suggestions, or objections prior to submission to the Supreme Court.

Any reports, notes, or comments in the proposal have been inserted by the Committee for the convenience of those using the rules. They neither will constitute a part of the rules nor will be officially adopted by the Supreme Court.

Additions to the text of the proposal are bolded and underlined; deletions to the text are bolded and bracketed.

The Committee invites all interested persons to submit comments, suggestions, or objections in writing to:

Bruce J. Ferguson, Counsel
Domestic Relations Procedural Rules Committee
Supreme Court of Pennsylvania
Pennsylvania Judicial Center
PO Box 62635
Harrisburg, PA 17106-2635
Fax: 717-231-9531
domesticrules@pacourts.us

All communications in reference to the proposal should be received by November 5, 2021. E-mail is the preferred method for submitting comments, suggestions, or objections; any e-mailed submission need not be reproduced and resubmitted via mail. The Committee will acknowledge receipt of all submissions.

*By the Domestic Relations
Procedural Rules Committee*

JENNIFER P. BIERLY, Esquire,
Chair

Annex A

TITLE 231. RULES OF CIVIL PROCEDURE

PART I. GENERAL

CHAPTER 1915. ACTIONS FOR CUSTODY OF MINOR CHILDREN

Rule 1915.11-2. [Appointment of Guardian Ad Litem] Guardian Ad Litem.

(Editor's Note: The following proposed text would replace the current rule text in its entirety.)

(a) *Appointment.*

(1) On its own motion or a party's motion, the court may appoint a guardian *ad litem* if the court finds that the appointment is necessary for determining the child's best interest.

(2) The court's order appointing the guardian *ad litem*, as provided in Pa.R.C.P. No. 1915.21, may apportion to the parties the reasonable cost of the guardian *ad litem*.

(b) *Qualifications.* The guardian *ad litem* shall be a licensed attorney or licensed mental health professional.

(c) *Duties.* As provided in 23 Pa.C.S. § 5334, which has been suspended in part by Pa.R.C.P. No. 1915.25, the guardian *ad litem* shall perform the duties as enumerated in Section 5334, including representing the child's best interest but not the child's legal interest or act as the child's legal counsel.

(d) *Report.* As required by 23 Pa.C.S. § 5334(b)(6), the guardian *ad litem* shall prepare a written report, which shall include specific recommendations relating to the child's best interest.

(1) The written report may include a subject child's statement to the guardian *ad litem* that would otherwise be inadmissible under the Pennsylvania Rules of Evidence provided the requirements of Pa.R.E. 703 are satisfied.

(2) The guardian *ad litem* shall file the written report with the prothonotary, which shall become part of the record, except as set forth in subdivision (d)(4).

(3) The guardian *ad litem* shall provide the report to the parties and the court when filed but not later than 20 days prior to a hearing or trial.

(4) *Comments. Objections.*

(i) Within ten days of receiving the guardian *ad litem*'s report, a party may file with the prothonotary and serve on the other party and the court:

(A) a comment to the report, which shall become part of the record; or

(B) an objection to the report's admissibility, in whole or in part, including a child's statement to the guardian *ad litem*.

(ii) The court shall determine the admissibility issue prior to the hearing or trial.

(5) A party may subpoena:

(i) a witness interviewed by the guardian *ad litem* or identified in the report to appear and testify at the hearing or trial; or

(ii) the guardian *ad litem* for the production of a document relied upon by the guardian *ad litem* in preparing the report.

(e) *Testimony.*

(1) The guardian *ad litem* shall attend the court proceedings and, as necessary, testify.

(2) If called to testify by a party or the court, the guardian *ad litem* shall be subject to cross-examination by any party, including the party calling the guardian *ad litem* to testify.

(3) The guardian *ad litem* may testify about a subject child's statement included in the written report, except as determined by the court as provided in subdivision (d)(4)(ii).

(f) The order appointing a guardian *ad litem* shall be in substantially the form set forth in Pa.R.C.P. No. 1915.21.

Official Note: 23 Pa.C.S. § 5334 is suspended insofar as it (1) requires that a guardian *ad litem* be an attorney, (2) permits the guardian *ad litem* to represent both the best interests and legal interests of the child, (3) provides the guardian *ad litem* the right to examine, cross-examine, present witnesses, and present evidence on behalf of the child, and (4) prohibits the guardian *ad litem* from testifying.

REPUBLICATION REPORT

Rule Proposal 181

The Domestic Relations Procedural Rules Committee (Committee) is proposing an amendment to Pa.R.C.P. No. 1915.11-2—Appointment of Guardian *Ad Litem*. Previously, the Committee published this rule proposal for public comment in the *Pennsylvania Bulletin*, 50 Pa.B. 7007 (December 12, 2020). After reviewing the comments received from the original publication and additional deliberations, the Committee is republishing the Rule Proposal. Specifically, the proposed amendment would permit a GAL to testify or include in the GAL's report a

minor child's statement even if the statement would be otherwise inadmissible hearsay provided the statement satisfies Pennsylvania Rule of Evidence 703.

As noted in the originally published Rule Proposal's Publication Report, the Committee received a request for rulemaking on the admissibility of a child's statement to a guardian *ad litem* (GAL) in a custody hearing or trial. The Rules of Civil Procedure provides for a GAL's appointment when the court finds that a GAL is necessary for the court to determine the child's best interest. As set forth in 23 Pa.C.S. § 5334(b), a GAL is required to meet with a child of an appropriate age in order to ascertain the facts. Often while meeting with the GAL, the child makes statements to the GAL that could impact a court's best interest analysis. However, the Pennsylvania Rules of Evidence does not provide for the blanket admissibility of a child's hearsay statements made to a GAL, and unlike dependency actions under the Juvenile Act, 42 Pa.C.S. §§ 6301 *et seq.*, in which a hearsay statement may be admissible in dispositional hearings, similar statements in a child custody action do not have a statutory exception and, as such, are inadmissible unless a hearsay exception applies.

Often, however, the child's statement is included in a GAL's report or testimony. As reported to the Committee, the statement's admissibility varies from court to court. Some courts will allow the statement into evidence since it could impact the child's best interest; while other courts will disallow the statement as hearsay unless a hearsay exception applies. To remedy the disparate treatment of the child's statement to a GAL, the Committee believes the current rule should be amended.

The originally published Rule Proposal 181 suggested that an exception to the hearsay rule was necessary to reflect the admissibility of the statement made to the child's GAL as the statement often is probative of the child's best interest. Instead, after additional deliberations, the Committee is now proposing that the GAL is akin to an expert witness, and that if the child's statement complies with Pa.R.E. 703, *i.e.*, is the type of statement or data a GAL would rely upon in forming their opinion on the child's best interest, the statement or information should be admissible and may be incorporated into the GAL's report or testimony. In this way, the procedural rule reflects that most information gathered by the GAL is not firsthand information, including a child's statement, but acquired from other sources; nevertheless, this information should be included in the report or testimony, as appropriate.

As such, the Committee is proposing an amendment to Pa.R.C.P. No. 1915.11-2—Appointment of Guardian *Ad Litem*. The rule proposal rewrites the rule in its entirety; however, the majority of the changes are stylistic and format changes. The substantive change related to the admissibility of a child's hearsay statement to a GAL is included in subdivision (d)(1). As result of the proposed change, the GAL's report and testimony would be treated similarly to an expert witness' report and testimony under Pa.R.E. 702—706.

An additional substantive change in the republished Rule Proposal is deleting the rule's reference to allow the court to determine whether confidential information under 23 Pa.C.S. § 5336 can be provided to the parties. Section 5336(b) identifies specific information that is expressly prohibited from disclosure to the parties. As such, the court does not have the discretion to order the disclosure of this information. Of course, the court retains

the discretion under Section 5336(c) to limit a party's access to certain records or information set forth in Section 5336(a).

All comments, concerns, and suggestions concerning this rule proposal are welcome.

[Pa.B. Doc. No. 21-1613. Filed for public inspection September 24, 2021, 9:00 a.m.]

DISCIPLINARY BOARD OF THE SUPREME COURT

Notice of Administrative Suspension

Notice is hereby given that the following attorneys have been Administratively Suspended by Order of the Supreme Court of Pennsylvania dated August 11, 2021, pursuant to Pennsylvania Rules of Disciplinary Enforcement 219 which requires that all attorneys admitted to practice in any court of this Commonwealth must pay an annual assessment of \$225.00. The Order became effective September 10, 2021.

Notice with respect to attorneys having Pennsylvania registration addresses, which have been administratively suspended by said Order, was published in the appropriate county legal journal.

Abrams, Adele Lois
Takoma Park, MD

Anderson, Marc Andrew
Houston, TX

Axelrod, Russell L.
Plantation, FL

Bannon, William D.
Westfield, NJ

Bateman, Meredith Dorothy Margaret
Portland, OR

Bennett, David Richard
West Palm Beach, FL

Bokosha, Terence
Houston, TX

Bosch, Gerard Richard
Wilson, WY

Breit, William David
Virginia Beach, VA

Brett, Elizabeth August
Arvada, CO

Como, Frank Michael
Waverly, NY

Corbett, Jonah Gregory
Linwood, NJ

Craft, Micah Leeann
Wayne, NJ

Dan, Jonathan Elliot
Arlington, MA

Deal, Joseph D.
Atlantic City, NJ

Dixon, E. A. Jr.
Beaufort, SC

Dube, Dimitri
Dallas, TX

Dunkel-Bradley, Dorothy Ann
Nuevo, CA

Elbert, John B.
Sewell, NJ

Giles, George Benjamin
Oakwood, OH

Greene, Douglas C.
Arlington, TX

Gulick, Stacey Lee
Great Neck, NY

Hellman, Steven Edward
Houston, TX

Higgins, Brian Scott
Great Neck, NY

Hollander, Deborah Ilana
Lawrence, NJ

Holmes, Malika Hollis
Brooklyn, NY

Hordis, Steven
Woodland Township, NJ

Kuntz, Darrell Wilmer III
Midlothian, VA

Lenchner, Herbert L.
Fort Myers, FL

Leonard, Madison Adele
Wilmington, DE

Levande, Eric M. D.
Boca Raton, FL

Martin, Quin Harry
Hampton, NJ

Moyer, Joseph W.
Malden, MA

Murphy, Kathleen Ann
Wilmington, DE

Nanda, Laura Anne
Westfield, NJ

Rogers, Donovan
Shannon, MS

Roman, Rebecca Lynne
Brazil

Sanchez, Terri Lynn
New Castle, DE

Schlachte, Christian
Ben Lomond, CA

Schrimpf, William Wallace Sr.
Birmingham, AL

Segal, Eleanor Tintner
Newark, DE

Siemann, John Thomas
Findlay, OH

Smith, Jeremy D.
Cincinnati, OH

Stephens, Thomas Wade
Sugar Land, TX

Swan, David I.
Tysons, VA

Taney, Francis Xavier Jr.
Haddon Heights, NJ

Waldt, Dean Christian
Phoenix, AZ

Walston, Jeannie Bugg
Birmingham, AL

Waties, David Wayne
Marlton, NJ

SUZANNE E. PRICE,
Attorney Registrar

[Pa.B. Doc. No. 21-1614. Filed for public inspection September 24, 2021, 9:00 a.m.]