

AGENDA ITEM

121 NOVEMBER 2017

DATE: October 27, 2017

TO: Members, Regulation and Discipline Committee
Members, Board of Trustees

FROM: Andrew Tuft, Attorney, Office of Professional Competence

SUBJECT: San Francisco District Attorney Request for Proposed New Rule of Professional Conduct

EXECUTIVE SUMMARY

The Committee on Professional Responsibility and Conduct ("COPRAC" or "Committee") has received a request for a new rule of professional conduct seeking to prohibit an attorney from disclosing a person's immigration status in open court or include that information in a public record, absent certain circumstances. This agenda item presents a recommendation from COPRAC and staff that the Board of Trustees ("Board") refer this proposal to the Commission for the Revision of the Rules of Professional Conduct ("Commission") to provide their input concerning the proposed new rule request.

BACKGROUND

COPRAC is charged with studying and submitting to the Board recommendations regarding proposed additions and amendments to the Rules of Professional Conduct of the State Bar. Authority for COPRAC to engage in the rule making process is stated in the State Bar Board Book under Tab 5.1, Article 2, section 8, which provides:

The committee shall, upon reference of the Board of Trustees or its secretary, or on its own initiative with the concurrence of the Board Committee, study and submit recommendations to the Board of Trustees regarding proposed additions or amendments to or repeal of Rules of Professional Conduct of the State Bar or other laws governing the conduct of attorneys. In formulating its recommendations to the board, the committee shall cause its proposals to be published and solicit written comments thereon and, as directed by the Board of Trustees, conduct public hearings thereon.

On August 31, 2017, the then chair of COPRAC received a letter from the San Francisco District Attorney, George Gascon, requesting COPRAC consider proposing a new rule of professional conduct.¹ The proposed rule seeks to prohibit an attorney from disclosing a person's

¹ This letter is included as Attachment A.

immigration status in open court or include that information in a public record, unless such disclosure is authorized by the court.

COPRAC met on October 13, 2017, in San Francisco. At that meeting, following discussion among the Committee members and upon the recommendation from staff, COPRAC took action to recommend to the Board that this proposed new rule request be referred to the Rules Revision Commission ("Commission") for their input and consideration.

DISCUSSION

Although COPRAC is authorized to study and submit to the Board recommendations concerning proposed additions and amendments to the rules of professional conduct; currently, the State Bar has an appointed Commission to assist the Board with any questions the California Supreme Court ("Court") might have concerning the proposed set of new and amended rules submitted to the Court on March 30, 2017.

Both COPRAC, and its staff, believe the Commission is best suited to conduct an initial review of the request for a new rule and to provide a preliminary recommendation. The Commission has the subject matter expertise concerning the entire set of proposed new and amended rules that have been adopted by the Board and are pending before the Court. As a result, the Commission is positioned to consider this request in light of the proposed rules and to offer guidance to the Board and to COPRAC on the extent to which, if any, the San Francisco District Attorney's concerns might be addressed by provisions found in the proposed rules. If the Commission's report reveals that the concerns are not addressed by the proposed rules, then the Board could discuss, at that time, whether to instruct COPRAC to begin consideration and drafting of a new or amended rule. The actual development of a new or amended rule in response to the San Francisco District Attorney's request should fall on COPRAC given that the Commission is scheduled to sunset on March 9, 2018.

Commission's Charter

Staff did not execute the referral of this proposed new rule request directly to the Commission because the Commission's Charter limits the Commission's activity to questions or requests received from the Court concerning the proposed new and amended rules submitted to the Court on March 30, 2017.² The relevant portion of the Commission's Charter reads:

Following the State Bar's anticipated submission of a request that the Supreme Court of California approve comprehensive amendments to the Rules of Professional Conduct of the State Bar of California, the Commission is charged with reviewing any substantive questions, or requests for further action, thereafter received from the Court concerning the proposed rules and providing recommendations for a State Bar response.

Although the Commission's Charter appears to limit the Commission's authority to responding to questions and requests from the Court, the Commission serves to aid and assist the Board in developing the current set of new and amended rules of professional conduct. If the Board agrees that the Commission possesses unique expertise for conducting an initial assessment of the proposed new rule request, the Board can assign the Commission to consider the request by passing the resolution set forth below.

² The current Commission's Charter is included as Attachment B.

FISCAL/PERSONNEL IMPACT

None.

RULE AMENDMENTS

This agenda item only requests a process for considering a new rule of professional conduct as submitted by the San Francisco District Attorney. A Board decision to adopt a rule amendment would be the subject of a separate agenda item. Board adopted amendments to the rules only become operative if approved by the Court.

BOARD BOOK IMPACT

None.

STRATEGIC PLAN GOALS & OBJECTIVES 2017-2022

Goal: 2. Ensure a timely, fair, and appropriately resourced admissions, discipline, and regulatory system for the more than 250,000 lawyers licensed in California.

Objective: None.

RECOMMENDATION

The Regulation and Discipline Committee recommends that the Board of Trustees approve the following resolution:

RESOLVED, that upon the recommendation of the Regulation and Discipline Committee the Board of Trustees assigns the Commission for the Revision of the Rules of Professional Conduct to review the San Francisco District Attorney's request for a new rule of professional conduct and provide a report on the extent to which, if any, the San Francisco District Attorney's concerns are addressed by provisions found in the proposed new and amended rules presently pending with the Supreme Court of California.

ATTACHMENT(S) LIST

- A.** Letter from San Francisco District Attorney Proposing New Rule of Professional Conduct
- B.** Charter for the Extended Second Commission



George Gascón
District Attorney

August 21, 2017

Suzanne Burke Spencer
Chair, California State Bar Committee on Professional Responsibility and Conduct
32351 Coast Highway
Laguna Beach, CA 92651

RE: Rule Proposal - Immigration Status in Court Hearings

Dear Chair Spencer:

I am writing to respectfully propose a rule change to the Committee on Professional Responsibility and Conduct. The rule change will help victims, witnesses and litigants feel comfortable asserting their rights in our courthouses. In civil and criminal cases, individuals are being publicly identified as undocumented immigrants in open court. If an undocumented victim or witness fears that their immigration status is going to be aired in public they are far less likely to come forward, and the chilling effect this has on participation undermines the fair administration of justice.

As we already know, undocumented immigrants are increasingly less likely to report crimes or testify in court, especially amid a current climate where anti-immigrant rhetoric is increasingly common. Forty-four percent of Latino crime victims (not just undocumented immigrants) are already less likely to contact police fearing the interaction may result in inquiries into their status or that of people they know. What's worse, an astounding seventy percent of undocumented immigrants are less likely to contact law enforcement authorities if they were victims of a crime.¹ Common sense dictates that far fewer are willing to take the next step and take the stand to testify, especially if their immigration status is going to be broadcasted publicly in an open courtroom.

In fact, amid a climate of fear in immigrant communities LAPD has indicated that reports of sexual assault are down 25 percent and reports of domestic violence are down 10 percent since the beginning of 2017 compared with the same period last year. According to SFPD data reports of domestic violence are down 18 percent among the Latino community and down 29 percent among the city's Asian community for the first half of 2017 compared to the same time in 2016. As you may know, San Francisco has a considerable Asian immigrant population as well.

Meanwhile, Immigration and Customs Enforcement (ICE) agents have been apprehending undocumented immigrants at our courthouses. In response, on March 17, 2017, California Chief Justice Cantil-Sakauye sent a letter to Attorney General Jeff

¹ Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* (May 2013) Department of Urban Planning and Policy University of Illinois at Chicago
<www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.pdf> (as of Aug. 2, 2017).

Letter from San Francisco District Attorney Proposing New Rule of Professional Conduct
CITY AND COUNTY OF SAN FRANCISCO OFFICE OF THE DISTRICT ATTORNEY



George Gascón
District Attorney

Sessions and Department of Homeland Security Secretary John F. Kelly about these reprehensible tactics. According to Chief Justice Cantil-Sakauye, the practice “undermine[s] the judiciary’s ability to provide equal access to justice.”

In order to ensure equal access and the fair administration of justice, I would like to propose that the State Bar create a new rule governing the conduct of California’s Attorneys. Proposed language for such a rule may include:

No member shall disclose a person’s immigration status in open court or include that information in a public record, except as authorized by the court. A member seeking to introduce this evidence shall request that the court conduct an in camera hearing and/or file any pleading that references a person’s immigration status under seal. If the court determines that the evidence of a person’s immigration status is not relevant or admissible, the transcript and pleadings shall remain sealed. If the court determines that the evidence of a person’s immigration status is relevant or admissible, the court shall order that the transcript and any related pleadings be filed in the public court records.

This rule shall not apply if a person’s immigration status is necessary to prove an element of an offense or an affirmative defense or the undocumented party, victim, or witness, or their representative, chooses to self-identify.

Someone’s country of origin has no bearing on whether they are suitable to take the stand. This proposed rule change ensures individuals from all backgrounds in our community can comfortably come forward and play an integral role in our justice system. With renewed confidence, California can continue to ensure that crimes are reported, that the State Bar promotes equal access and participation, and the fair administration of justice.

Please let me know if I can be of additional service. Thank you for your time and consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'George Gascón', written over the printed name and title.

George Gascón
San Francisco District Attorney

CC: James P. Fox
President, California State Bar

CHARTER FOR THE EXTENDED SECOND COMMISSION

Following the State Bar's anticipated submission of a request that the Supreme Court of California approve comprehensive amendments to the Rules of Professional Conduct of the State Bar of California, the Commission is charged with reviewing any substantive questions, or requests for further action, thereafter received from the Court concerning the proposed rules and providing recommendations for a State Bar response. If the response involves drafting rule revisions, the Commission should be guided by following the principles:

1. The Commission's revisions should respond to the questions or issues posed by the referral from the Supreme Court.
2. The Commission's revisions should promote confidence in the legal profession and the administration of justice, and ensure adequate protection to the public.
3. The Commission should consider the historical purpose of the Rules of Professional Conduct in California, and ensure that the proposed rules set forth a clear and enforceable articulation of disciplinary standards, as opposed to purely aspirational objectives.
4. The Commission's revisions should eliminate or minimize, when and if appropriate, unnecessary differences between California's rules and the rules used by a preponderance of the states (in some cases in reliance on the American Bar Association's Model Rules) in order to help promote a national standard with respect to professional responsibility issues whenever possible.
5. The Commission's revisions should facilitate compliance with and enforcement of the Rules by eliminating ambiguities and uncertainties.
6. Substantive information about the conduct governed by the rule should be included in the rule itself. Official commentary to the proposed rules should not conflict with the language of the rules, and should be used sparingly to elucidate, and not to expand upon, the rules themselves.

Proposed amendments developed by the Commission should be accompanied by a report setting forth the Commission's rationale for retaining or changing any rule and related commentary language.

The terms of the officers, members and advisors appointed to the Commission shall end on March 9, 2018 or when terminated by the Board, whichever is earliest.