

From: [Mark Tuft](#)
To: [Difuntorum, Randall](#); [Tuft, Andrew](#); [McCurdy, Lauren](#)
Subject: RRC-3 SF DA Rule Request
Date: Friday, January 12, 2018 12:56:50 PM

However well intended, the San Francisco District Attorney's rule proposal should be considered as a possible rule of court and not as a separate rule of professional conduct for several reasons:

1. The stated objective for the rule is to ensure equal access to the courts and to not discourage undocumented immigrants from reporting crimes and testifying in court. It is not to regulate lawyers per se.
2. Even if an argument could be made that prohibiting lawyers from disclosing a person's immigration status in open court or in the public record except as authorized by the court is the proper subject of an ethics rule, the rule would be ineffective in achieving the stated objective. The growing number of pro se litigants would not be bound by the rule. Nor would parties or witnesses in the matter. Nor would law enforcement. Disclosure of a person's immigration status could occur in discovery and in ways other than in open court or court filings. Unless all the participants in the legal matter before the court are constrained by the same rule, the SF DA's proposed rule would not be completely effective.
3. If a lawyer's inquiry or assertion about another person's immigration status has no substantial purpose other than to intimidate, embarrass or obstruct the person's access to the judicial system, the conduct would violate Model Rule 4.4(a). Although I voted in favor of including a version of paragraph (a) in proposed Rule 4.4(a), the Commission decided not to include that provision in the rules recommended for adoption by the Supreme Court. I would entertain a motion to reconsider that decision in light of the concerns raised by the San Francisco District Attorney. Short of that, Washington's Comment [4] would not find a suitable home in our rules.
4. If a lawyer threatens to reveal a person's undocumented status for the purpose of gaining an advance in a civil action, the conduct would violate proposed Rule 3.10 (threatening another to gain an advantage in a civil dispute) and current Rule 5-100.
5. If a lawyer sought to disclose a person's undocumented status in an effort to dissuade the person from being a witness or reporting a crime, the conduct would violate Model Rule 3.4(f) (a lawyer shall not . . . (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless [(1) and (2) provide exceptions]. The Commission's rule does not include this provision.
6. Depending on the circumstances, disclosing a person's immigration status could also violate proposed Rule 8.4(d) (engaging in conduct that is prejudicial to the administration of justice).

In summary, I am not in favor of the single purpose rule the SF DA proposes; nor would I agree to a rule of professional conduct that does not include the predicate found in Model Rule 4.4(a) that there is no substantial purpose other than to embarrass, harm or prejudice the rights of an

undocumented person. I have no objection to COPRAC issuing an ethics opinion that the conduct could violated several existing and/or proposed rules depending on the circumstances. Finally, I recommend that the SF DA be advised that he may wish to consider a California rule of court rather than a rule of professional conduct as a more effective means of achieving his objective.

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AGENDA ITEM

121 JANUARY 2018

DATE: January 16, 2018

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

On August 31, 2017, the Committee on Professional Responsibility and Conduct ("COPRAC" or "Committee") received a request from the San Francisco District Attorney, George Gascon, 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. On November 2, 2017, the Board of Trustees Committee on Regulation and Discipline ("RAD") assigned this rule request COPRAC and instructed COPRAC to report its conclusions and recommendations to RAD at the January meeting.

This agenda item presents COPRAC's conclusions and recommendations concerning the new rule request. The Committee does not recommend adoption of the rule as proposed and offers three alternative options for consideration.

BACKGROUND

Attachment A to this memo is the November 2, 2017 RAD agenda item which provides the relevant background for this matter, including the full text of the August 31, 2017 letter from the San Francisco District Attorney requesting a new rule of professional conduct. The rule requested seeks to prohibit an attorney from disclosing a person's immigration status in open court or including that information in a public record, absent certain circumstances.

On November 2, 2017, RAD directed COPRAC to study the proposed new rule request and provide its conclusions and recommendations concerning the request to the Board of Trustees at the January meeting.

DISCUSSION

COPRAC met on December 1, 2017 in Los Angeles, and January 12, 2018 in San Francisco, to study the proposed new rule request. Following study and discussion, the Committee finalized their report and recommendations at their January 12th meeting and that report is provided as Attachment B. The Committee does not recommend that the rule as proposed should be

adopted and presents three alternative options for the Board to consider. Some of the reasons for the Committee's recommendation include:

- The proposed rule is currently being considered by the Legislature in pending Senate Bill 785 (Weiner, 2017).¹
- The proposed rule raises separation of powers concerns because it purports to govern a court's procedures and discretion for ruling on evidentiary and procedural matters.
- The breadth of the proposed rule raises significant constitutional concerns, including: issues of federalism; the right to an effective defense in criminal matters; and First Amendment protections.
- The proposed rule is only a partial solution to the identified problem because it would only restrain attorneys from disclosing the immigration status of persons involved in the proceeding. Many parties however proceed without representation and would not be similarly constrained.
- The proposed rule could unduly deter legitimate uses of immigration status in pending actions, and the exception (for situations where immigration status is necessary to prove an element or where the undocumented person self-identifies) is not broad enough to eliminate the rule's chilling effect.
- The proposed rule might also drive up the cost of litigation and place an undue burden on already overburdened courts to conduct *in camera* hearings.

Instead of pursuing a proposed new rule of professional conduct specifically focused on immigration status, the Committee recommends considering three alternative options for addressing this issue. None of these options raise the issues or concerns addressed above.

The three alternative options are:

- (1) Add a Comment to one of California's existing or proposed rules of professional conduct. One rule for which such a Comment might be appropriate is proposed Rule of Professional Conduct 8.4(d), which forbids conduct that is prejudicial to the administration of justice. The State of Washington Rule of Professional Conduct 4.4, Comment [4] could serve as an example for such an approach.²
- (2) Provide an even firmer foundation for a Comment of the kind proposed above by undertaking to propose and adopt a version of ABA Model Rule 4.4(a) (Respect for Rights of Third Persons) in California with a Comment similar to that made in the Washington rule.

¹ The text of Senate Bill 785 is included as Attachment C.

² Washington Rule of Professional Conduct 4.4 is included as Attachment D.

- (3) Prepare a comprehensive ethics opinion making clear the current restraints on the improper use of immigration status, either under the current rules, or under the proposed rules once approved by the Supreme Court.³

FISCAL/PERSONNEL IMPACT

None

RULE AMENDMENTS

This agenda item presents the report and recommendations following study of 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

Staff observes that at the November 2, 2017 RAD meeting, there was an expectation that the input to be received from COPRAC and the Rules Revision Commission would present options for action for consideration by RAD and the full Board. Accordingly, staff doesn't believe RAD is obligated to take action on any of the options and would be consistent with the prior discussion if RAD permitted the full Board to consider this matter without a specific RAD recommendation endorsing any of the options.

However, should RAD decide that it is beneficial for RAD to take action to recommend one of the options presented, proposed resolution language is presented below.

Upon motion made, seconded and unanimously adopted, it is

RESOLVED, that the Board of Trustees assigns the Committee on Professional Responsibility and Conduct to draft [a comment to proposed rule 8.4] [an ethics opinion] [a proposed new Rule of Professional Conduct] that addresses the circumstances when, in connection with a proceeding before a tribunal, a lawyer's public disclosure of an undocumented person's immigration status constitutes a cause for discipline; and it is

³ An example of such an approach is North Carolina 2005 Formal Ethics Opinion 3, which is included as Attachment E.

FURTHER RESOLVED, that the Committee on Professional Responsibility and Conduct is directed to report back to the Board's Committee on Regulation and Discipline by March 31, 2018, at the latest.

ATTACHMENT(S) LIST

- A.** November 2, 2017 RAD agenda item, including Attachment A – Letter from San Francisco District Attorney Proposing New Rule of Professional Conduct
- B.** Committee on Professional Responsibility and Conduct Report and Recommendation Concerning Proposed New Rule of Professional Conduct Concerning Disclosure of a Person's Immigration Status in Open Court
- C.** Senate Bill 785
- D.** Washington Rule of Professional Conduct 4.4 (Respect for Rights of Third Person)
- E.** North Carolina 2005 Formal Ethics Opinion 3

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



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

January 12, 2018

Board of Trustees
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Rule Proposal Regarding Attorneys' Disclosure of a Person's Immigration Status in Court

Dear State Bar of California Board of Trustees:

COPRAC thanks the Board of Trustees for the opportunity to provide our report and recommendations on the Rule of Professional Conduct proposed by San Francisco District Attorney George Gascon in his letter of August 21, 2017.

I. The Proposed Rule

The proposed rule would restrict attorneys' ability to disclose a person's immigration status in open court or include that information in a public record without prior court approval. Mr. Gascon's proposed rule would provide as follows:

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 offence or an affirmative defense or the undocumented party, victim, or witness, or their representative, chooses to self-identify.

II. Summary of Recommendations

As discussed in detail below, we recommend that this proposed rule not be adopted for the following reasons:

- (a) The proposed rule is currently being considered by the Legislature in pending Senate Bill 785 (Weiner, 2017).

- (b) The proposal raises separation of powers concerns because it purports to govern a court's procedures and discretion for rulings on evidentiary and procedural matters.
- (c) This proposal has a very broad sweep that raises significant constitutional concerns: federalism, the right to an effective defense in criminal matters, and First Amendment.
- (d) This proposal may unduly deter the legitimate use of immigration status in pending actions, and the exception (immigration status is necessary to prove an element or where the undocumented person self identifies) is not broad enough to eliminate the rule's chilling effect. And it will drive up the cost of litigation and place an added burden on already overburdened courts to conduct *in camera* hearings.
- (e) This proposal is but a partial solution to the identified problem, because it only restrains attorneys from disclosing the immigration status of persons involved in the proceeding. Many parties proceed without representation and would not be similarly constrained.

Therefore, we recommend that the Board of Trustees consider the following alternative options (which are not mutually exclusive, and which require additional study) to address this timely and important issue:

- (1) Add a comment to one of California's existing or proposed Rules of Professional Conduct. One rule for which such a comment might be appropriate is proposed Rule of Professional Conduct 8.4(d), which forbids conduct that is prejudicial to the administration of justice, using a comment to Washington Rule of Professional Conduct, Rule 4.4(a) as a guide.
- (2) Place a firmer foundation under a comment of the kind proposed above by undertaking to propose and enact a version of Model Rule 4.4(a) in California with a Comment similar to that made in the Washington rule.
- (3) Prepare a comprehensive ethics opinion making clear the current restraints on the improper use of immigration status, either under the current rules, or under the proposed rules once approved by the Supreme Court.

III. Discussion of Recommendations

While this proposal has the laudable goal of preserving access to the courts for litigants and providing a safe environment for victims of, and witnesses to, crimes to testify without fear of facing potential deportation or other immigration consequences, this Committee does not recommend that Mr. Gascon's proposed rule be further studied by the bar or proposed to the California Supreme Court for consideration. After setting out the reasons for that conclusion, we outline some potential alternative ways that the State Bar might address the issues raised by Mr. Gascon's letter.

First, the proposed rule involves a complex and politically charged issue which is better addressed by the legislature than through a Rule of Professional Conduct. There is pending legislation which addresses the concerns which Mr. Gascon has identified as the motivation for this proposed rule, namely Senate Bill 785 introduced by Senator Weiner in February 2017, which is still under consideration at the Senate. Mr. Gascon's proposed rule closely follows the language of SB 785.

Second, the proposed rule purports to govern a court's procedures and discretion for rulings on evidentiary and procedural matters and therefore raises separation of powers concerns. For example, this rule requires attorneys to request *in camera* hearings, and appears to require the court to hold the requested *in camera* hearings to determine whether a person's immigration status is relevant and admissible and, if so, to order the transcripts and pleadings related to this issue to be sealed. These are all procedural and evidentiary matters which depend on the facts of each individual case, and which tie in to already existing statutes and Rules of Court on these topics. These concerns reinforce the conclusion that the issue is more appropriate for legislative consideration.

Third, the proposed rule has a very broad sweep that raises significant constitutional concerns of at least three kinds. First, the rule raises significant federalism concerns because on its face it would apply in federal Article III and Article I courts and purports to bind those courts in resolving issues of federal law.

The rule also raises potential constitutional concerns regarding the right to an effective defense in criminal matters. This Committee lacks sufficient expertise to comment on the full range of circumstances in which the immigration status of a person may become relevant and admissible in all criminal matters, but offers two examples: (a) the immigration consequences of how a crime is charged may be at issue (e.g., if it is a felony or a misdemeanor), even where the immigration status is not necessary to prove the elements of a claim or defense; criminal defense attorneys and prosecutors have an independent duty to consider the immigration consequences of a criminal charge [see Cal. Penal Code § 1016.3]; (b) in limited circumstances, the criminal defendant may need to refer to the immigration status of a witness or a victim, by way of impeachment, to address the motivation of the criminal accusation. At a minimum, before enacting such a rule, there should be a thorough canvas of the views of the prosecution and criminal defense bars – again a task better suited for the legislature.

The proposed rule will likely also face First Amendment challenges, because it is a prior restraint on attorneys' speech based on an attorney's interpretation of substantive law, namely whether the immigration status of a person is necessary to prove the elements of a claim or defense.

Fourth, we have a variety of concerns about whether the rule, as drafted, will accomplish its stated purposes without unduly deterring the legitimate use of immigration status. In this regard, we note that the exception to the rule for cases where immigration status is necessary to prove an element or where the person involved self identifies is not broad enough to eliminate the rule's chilling effect. It requires an attorney to reach a legal conclusion that the immigration status is necessary to prove a claim or defense, and if a court or disciplinary agency later concludes that she was wrong, the attorney will face discipline for her error in interpreting and applying

substantive law. Because of the risk of professional discipline, attorneys may be reluctant to proceed under the exception. This, in turn, will drive up the cost of litigation and place an added burden on already overburdened courts to conduct *in camera* hearings. And the waiver (choice to self-identify) only appears to apply to undocumented persons. What if a person who is in the country legally wishes to introduce his / her immigration status for some relevant and admissible reason? An attorney representing such a person cannot allow the client to do so without first following the mandatory *in camera* procedure. On balance, then, the net result of the rule could be to deter litigants from pursuing legitimate uses of immigration status because of the added cost of having to follow the mandatory *in camera* procedure.

Fifth and finally, the proposed rule is but a partial solution to the identified problem, because it only restrains attorneys from disclosing the immigration status of persons involved in the proceeding. Many parties proceed without representation and would not be similarly constrained.

Even if the State Bar were to conclude that it made sense to consider a new Rule of Professional Conduct to address Mr. Gascon's concerns, it would be wise to await the Legislature's action on SB 785 before proposing any new rule, in order to avoid possible conflicts between a Rule of Professional conduct and a statute, particularly where, as here, the two would address the same issues from different perspectives.

Instead of considering a new Rule of Professional Conduct specifically focused on immigration status, there are at least three other options to address this very important and timely issue. None of these options raise the kinds of separation of powers, constitutional or overbreadth concerns that Mr. Gascon's proposed rule presents.

First, there is the potential to add a comment to one of California's existing or proposed Rules of Professional conduct. One rule for which such a comment might be appropriate is proposed Rule of Professional Conduct 8.4(d), which forbids conduct that is prejudicial to the administration of justice.

The possible content of such a comment is suggested by a comment to Washington Rule of Professional Conduct, Rule 4.4(a). Washington Rule 4.4(a) provides, "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." The Comment to this rule further states:

"the duty imposed by paragraph (a) of this Rule includes an assertion or inquiry about a third person's immigration status when the lawyer's purpose is to intimidate, coerce, or obstruct that person from participating in a civil matter. Issues involving immigration status carry a significant danger of interfering with the proper functioning of the justice system. See *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 230 P.3d 583 (2010). When a lawyer is representing a client in a civil matter, a lawyer's communication to a party or a witness that the lawyer will report that person to immigration authorities, or a lawyer's report of that person to immigration authorities, furthers no substantial purpose of the civil adjudicative

system if the lawyer's purpose is to intimidate, coerce, or obstruct that person. A communication in violation of this Rule can also occur by an implied assertion that is the equivalent of an express assertion prohibited by paragraph (a). See also Rules 8.4(b) (prohibiting criminal acts that reflect adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects), 8.4(d) (prohibiting conduct prejudicial to the administration of justice towards judges, lawyers, LLLTs, other parties, witnesses, jurors, or court personnel or officers, that a reasonable person would interpret as manifesting prejudice or bias on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status.)"

The Committee believes that a comment along these lines would be valuable because it clarifies that it is unethical to raise the immigration status of a person in court, or report a person to the immigration authorities for the purpose of coercion, intimidation or obstruction. This is important because an attorney may have a legitimate and lawful purpose for raising the immigration status of a person, or even reporting that person to the authorities, and should not fear disciplinary proceedings for taking such legitimate actions. Mr. Gascon's proposed rule does not allow for such a consideration. Moreover, while the Committee has not yet resolved the question, we believe that there may well be good reason to restrict the application of such a comment to civil cases. On the other hand, because the proposed comment applies only to lawyer conduct the purpose of which is "to intimidate, coerce, or obstruct" a person from participating in a legal proceeding, the comment could apply equally to criminal proceedings. As in civil proceedings, lawyer conduct for the purpose of intimidating, coercing or obstructing justice is generally unethical in the criminal context as well.

The pairing of such a comment with proposed rule 8.4(d) would have the additional advantage of making clear that the wrongful use of immigration status extends beyond threatening "to present criminal, administrative or disciplinary charges to obtain an advantage in a civil dispute" [rule 5-100(A)], because proposed rule 8.4(d) is broader in scope. For example, it may subject an attorney to discipline for actually reporting a person to the immigration authorities to gain an advantage for his/her client by, for example, getting the opposing party deported and terminating her suit. *Compare Arias v. Raimondo*, 860 F.3d 1185 (9th Cir. 2017) (petition for *certiorari* to the U.S. Supreme Court pending) (attorney's actions in seeking deportation of plaintiff constitute unlawful retaliation under anti-discrimination law).

A second alternative would be to place a firmer foundation under a comment of the kind proposed above by undertaking to propose and enact a version of Model Rule 4.4(a) in California with a Comment similar to that made in the Washington rule. We note that it does not appear that the Rules Commission made a considered decision to reject Rule 4.4(a) on its merits. Hence reconsideration might well make sense.

A third alternative would be to prepare a comprehensive ethics opinion making clear the current restraints on the improper use of immigration status, either under the current rules, or under the proposed rules once approved by the Supreme Court. It is conceivable that such an opinion might cover much of the ground that would be covered by the Washington state comment discussed above.

Thank you for taking the Committee's report and recommendations into consideration. We remain ready to be of any further assistance on this matter, including by taking further steps on any of the options outlined above.

Very truly yours,

Andrew I. Dilworth, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



SB-785 Evidence: immigration status. (2017-2018)

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Date Published: 08/23/2017 04:00 AM

AMENDED IN SENATE AUGUST 22, 2017

AMENDED IN SENATE JULY 10, 2017

AMENDED IN SENATE MAY 23, 2017

AMENDED IN SENATE MAY 04, 2017

CALIFORNIA LEGISLATURE— 2017–2018 REGULAR SESSION

SENATE BILL

No. 785

Introduced by Senator Wiener
(Principal coauthor: Assembly Member Gonzalez Fletcher)
(Coauthor: Assembly Member Chiu)

February 17, 2017

An act to ~~amend Section 351.2 of, and to add Section 351.3 to,~~ *add and repeal Sections 351.3 and 351.4 of* the Evidence Code, relating to evidence, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

SB 785, as amended, Wiener. Evidence: immigration status.

Existing law provides that all relevant evidence is admissible in an action before the court, including evidence relevant to the credibility of a witness or hearsay declaring, subject to specified exceptions. Existing law also provides that, in civil actions for personal injury or wrongful death, evidence of a person's immigration status is not admissible and discovery of a person's immigration status is not permitted.

In civil actions other than those specified above, this bill would prohibit the disclosure of a person's immigration status in open court *by a party* unless the party seeking the disclosure first requests a confidential in camera hearing and the presiding judge determines that the evidence is relevant and ~~not otherwise inadmissible because its probative value is outweighed by other considerations.~~ *admissible*. This bill would ~~also apply the same this~~ prohibition to criminal ~~actions.~~ *actions, but would also include a prohibition on the inclusion of a person's immigration status in public court records. The provisions of the bill would be repealed on January 1, 2022.*

Attachment C. - Senate Bill 785

The California Constitution provides for the Right to ~~Truth-in-Evidence~~, *Truth-in-Evidence*, which requires a 2/3 vote of the Legislature to exclude any relevant evidence from any criminal proceeding, as specified.

Because this bill may exclude from a criminal action information about a person's immigration status that would otherwise be admissible, it requires a 2/3 vote of the Legislature.

This bill would declare that it is to take effect immediately as an urgency statute.

Vote: 2/3 Appropriation: no Fiscal Committee: no Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

~~SECTION 1. Section 351.2 of the Evidence Code is amended to read:~~

~~351.2. (a) (1) In a civil action for personal injury or wrongful death, evidence of a person's immigration status shall not be admitted into evidence, nor shall discovery into a person's immigration status be permitted.~~

~~(2) This subdivision does not affect the standards of relevance, admissibility, or discovery prescribed by Section 3339 of the Civil Code, Section 7285 of the Government Code, Section 24000 of the Health and Safety Code, and Section 1171.5 of the Labor Code.~~

~~(b) (1) In a civil action not governed by subdivision (a), evidence of a person's immigration status shall not be disclosed in open court unless the party seeking the disclosure first requests a confidential in camera hearing and the judge presiding over the matter determines that the evidence is relevant and is not inadmissible pursuant to Section 352.~~

~~(2) This subdivision does not do either of the following:~~

~~(A) Limit discovery in a civil action;~~

~~(B) Prohibit an individual or his or her attorney from voluntarily revealing his or her immigration status to the court.~~

SECTION 1. *Section 351.3 is added to the Evidence Code, to read:*

351.3. *(a) (1) In a civil action not governed by Section 351.2, evidence of a person's immigration status shall not be disclosed in open court by a party except as first authorized by a court's ruling pursuant to paragraph (2).*

(2) (A) A party seeking the disclosure of a person's immigration status under this section shall request a confidential in camera hearing at which the judge presiding over the matter shall determine if the evidence is relevant and admissible.

(B) If the judge decides at the hearing described in subparagraph (A) that the evidence is relevant and admissible, the evidence may be disclosed in open court.

(C) If the judge decides at the hearing described in subparagraph (A) that the evidence is irrelevant or inadmissible, the moving party may object to the ruling and may preserve the objection in camera on the record, with the record to be kept confidential pursuant to subdivision (b) of Section 2.585 of the California Rules of Court.

(b) This section does not prohibit an individual or his or her attorney from voluntarily revealing his or her immigration status to the court.

(c) This section shall remain in effect only until January 1, 2022, and as of that date is repealed.

SEC. 2. ~~Section 351.3~~ **351.4** is added to the ~~Elections~~*Evidence* Code, to read:

351.3.351.4. *(a) (1) In a criminal action, evidence of a person's immigration status shall not be disclosed in open court unless the party seeking the disclosure requests a confidential in camera hearing and the judge presiding over the matter determines that the evidence is relevant and is not inadmissible pursuant to Section 352: or included in public court records by a party except as first authorized by a court's ruling pursuant to paragraph (2).*

(2) (A) A party seeking the disclosure of a person's immigration status under this section shall request a confidential in camera hearing at which the judge presiding over the matter shall determine if the evidence is relevant and admissible.

Attachment C. - Senate Bill 785

(B) If the judge decides at the hearing described in subparagraph (A) that the evidence is relevant and admissible, the evidence may be disclosed in open court and in public court records.

(C) If the judge decides at the hearing described in subparagraph (A) that the evidence is irrelevant or inadmissible, the moving party may object to the ruling and may preserve the objection in camera on the record, with the record to be kept confidential pursuant to subdivision (b) of Section 2.585 of the California Rules of Court.

(b) This section does not do any of the following:

(1) Apply to cases in which a person's immigration status is necessary to prove an element of an offense or an affirmative defense.

~~(2) Apply to bail hearings in which a person's immigration status is relevant to determining his or her flight risk.~~

~~(3)~~

(2) Limit discovery in a criminal action.

~~(4)~~

(3) Affect obligations imposed by Section 1054 of the Penal Code.

~~(5)~~

(4) Affect the standards of relevance, admissibility, or discovery.

~~(6)~~

(5) Prohibit an individual or his or her attorney from voluntarily revealing his or her immigration status to the court.

(c) This section shall remain in effect only until January 1, 2022, and as of that date is repealed.

SEC. 3. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the California Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to immediately help protect undocumented residents of California and their ability to participate in the California justice system, it is necessary that this act take effect immediately.


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Rules of Professional Conduct

RPC 4.4

RESPECT FOR RIGHTS OF THIRD PERSON

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

[Originally effective September 1, 1985; amended effective September 1, 2006; September 1, 2016.]

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an e-mail or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this rule, "document or electronically stored information" includes in addition to paper documents, e-mail and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[Comment [[2] amended effective September 1, 2016.]

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

[Comments adopted effective September 1, 2006; September 1, 2016.]

Additional Washington Comments [4-5]

[4] The duty imposed by paragraph (a) of this Rule includes a lawyer's assertion or inquiry about a third person's immigration status when the lawyer's purpose is to intimidate, coerce, or obstruct that person from participating in a civil matter. Issues involving immigration status carry a significant danger of interfering with the proper functioning of the justice system. See *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 230 P.3d 583 (2010). When a lawyer is representing a client in a civil matter, a lawyer's communication to a party or a witness that the lawyer will report that person to immigration authorities, or a lawyer's report of that person to immigration authorities, furthers no substantial purpose of the civil adjudicative system if the lawyer's purpose is to intimidate, coerce, or obstruct that person. A communication in violation of this Rule can also occur by an implied assertion that is the

Attachment D. - Washington Rule of Professional Conduct 4.4 (Respect for Rights of Third Person)

equivalent of an express assertion prohibited by paragraph (a). See also Rules 8.4(b) (prohibiting criminal acts that reflect adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects), 8.4(d) (prohibiting conduct prejudicial to the administration of justice), and 8.4(h) (prohibiting conduct that is prejudicial to the administration of justice toward judges, lawyers, LLLTs, other parties, witnesses, jurors, or court personnel or officers, that a reasonable person would interpret as manifesting prejudice or bias on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status).

[Comment [4] adopted effective August 20, 2013.]

[5] A risk of unwarranted intrusion into a privileged relationship may arise when a lawyer deals with a person who is assisted by an LLLT. Although a lawyer may communicate directly with a person who is assisted by an LLLT, see Rule 4.2 Comment [12], client-LLLT communications are privileged to the same extent as client-lawyer communications. See APR 28K(3). An LLLT's ethical duty of confidentiality further protects the LLLT client's right to confidentiality in that professional relationship, see LLLT RPC 1.6(a). When dealing with a person who is assisted by an LLLT, a lawyer must respect these legal rights that protect the client-LLLT relationship.

[Comment [5] adopted effective April 14, 2015.]

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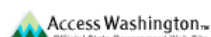
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S3

2005 Formal Ethics Opinion 3

July 14, 2005

Immigration Prosecution to Gain An Advantage in a Civil Matter

Opinion rules that a lawyer may not threaten to report an opposing party or a witness to immigration officials to gain an advantage in civil settlement negotiations.

Inquiry:

During the discovery phase of a civil lawsuit, the defense lawyer learns that the plaintiff may be in the country illegally. Some of the plaintiff's witnesses may also be in the country illegally. The plaintiff's immigration status is entirely unrelated to the civil suit.

May the defense lawyer threaten to report the plaintiff or a witness to immigration authorities to induce the plaintiff to capitulate during the settlement negotiations of the civil suit?

Opinion:

This is a matter of first impression. The Rules of Professional Conduct and the ethics opinions have previously addressed only the issue of threatening criminal prosecution to gain an advantage in a civil matter.

Before 1997, Rule 7.5 of the Rules of Professional Conduct made it unethical for a lawyer "to present, participate in presenting, or threaten to present criminal charges primarily to obtain an advantage in a civil matter." The rule was not included in the Rules of Professional Conduct when they were comprehensively revised in 1997. Nevertheless, a lawyer may not use a threat of criminal prosecution with impunity. Threats that constitute extortion, compounding a crime, or abuse of process are already prohibited by other rules. See Rule 3.1 (meritorious claims); Rule 4.1 (truthfulness in statements to others); Rule 4.4 (respect for rights of third persons); Rule 8.4(b) and (c) (prohibiting criminal or fraudulent conduct). Moreover, 98 FEO 19 provides that a lawyer may present or threaten to present criminal charges in association with the prosecution of a civil matter but only if the criminal charges are related to the civil matter, the lawyer believes the charges to be well grounded in fact and warranted by law, and the lawyer does not imply an ability to improperly influence the district attorney, the judge or the criminal justice system.

The present inquiry involves the threat, not of criminal prosecution, but of disclosure to immigration authorities. Whether making such a threat is criminal extortion is a legal determination outside the purview of the Ethics Committee. If it is, the conduct is prohibited under Rule 8.4(b). Even where a lawyer may lawfully threaten to report a party or a witness to immigration authorities to gain leverage in a civil matter, the exploitation of information unrelated to the client's legitimate interest in resolving the lawsuit raises some of the same concerns as threatening to pursue the criminal prosecution of the opposing party for an unrelated crime.

In ABA Formal Opinion No. 92-363, threats of criminal prosecution are permitted only when there is a nexus between the facts and circumstances giving rise to the civil claim, and those supporting criminal charges. As explained in the opinion, requiring a relationship between the civil and criminal matters

tends to ensure that negotiations will be focused on the true value of the civil claim, which presumably includes any criminal liability arising from the same facts or transaction, and discourages exploitation of extraneous matters that have nothing to do with evaluating that claim. Introducing into civil negotiations

Attachment E. - North Carolina 2005 Formal Ethics Opinion 3

an unrelated criminal issue solely to gain leverage in settling a civil claim furthers no legitimate interest of the justice system, and tends to prejudice its administration.

ABA Formal Op. No. 92-363; see also Rule 8.4(d)(prohibiting conduct that is prejudicial to the administration of justice).

There is no valid basis for distinguishing between threats to report unrelated criminal conduct and threats to report immigration status to the authorities: the same exploitation of extraneous matters and abuse of the justice system may occur. Rule 4.4(a) prohibits a lawyer, when representing a client, from using means that have no substantial purpose other than to embarrass, delay, or burden a third person. In addition, the prohibition on conduct that is prejudicial to the administration of justice "should be read broadly to proscribe a wide variety of conduct including conduct that occurs outside the scope of judicial proceedings." Rule 8.4, cmt. [4]. The threat to expose a party's undocumented immigration status serves no other purpose than to gain leverage in the settlement negotiations for a civil dispute and furthers no legitimate interest of our adjudicative system. Therefore, a lawyer may not use the threat of reporting an opposing party or a witness to immigration officials in settlement negotiations on behalf of a client in a civil matter.

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