
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: SB 785 **Hearing Date:** May 16, 2017
Author: Wiener
Version: May 4, 2017
Urgency: Yes **Fiscal:** No
Consultant: SC

Subject: *Evidence: Immigration Status*

HISTORY

Source: San Francisco District Attorney's Office

Prior Legislation: SB 54 (De León), pending referral in the Assembly
AB 291 (Chiu), currently in the Assembly
AB 2159 (Gonzalez), Ch. 132, Stats. 2016
SB 674 (De León), Ch. 721, Stats. 2015
AB 560 (Gomez), Ch. 151, Stats. 2015

Support: Coalition for Humane Immigrant Rights

Opposition: None known

PURPOSE

This bill prohibits the inclusion of a person's immigration status in a public court record unless the party seeking its inclusion first seeks and obtains a ruling by the judge presiding over the case that the evidence is relevant.

Existing law states that only relevant evidence is admissible, and except as otherwise provided by statute, all relevant evidence is admissible. (Evid. Code, §§ 350, 351.)

Existing law provides that relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post-conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, subject to the existing statutory role of evidence relating to privilege or hearsay, or inadmissibility. (Cal. Const., art. I, § 28, as adopted June 8, 1982.)

Existing law defines "relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code, § 210.)

Existing law authorizes a court in its discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352.)

Existing law allows the credibility of a witness to be attacked or supported by any party including the party calling him. (Evid. Code, § 785.)

Existing law states that except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

- His or her demeanor while testifying and the manner in which he testifies;
- The character of his or her testimony;
- The extent of his or her capacity to perceive, to recollect, or to communicate any matter about which he or she testifies;
- The extent of his or her opportunity to perceive any matter about which he or she testifies.
- His or her character for honesty or veracity or their opposites;
- The existence or nonexistence of a bias, interest, or other motive;
- A statement previously made by him or her that is consistent with his or her testimony at the hearing;
- A statement made by him or her that is inconsistent with any part of his or her testimony at the hearing;
- The existence or nonexistence of any fact testified to by him or her;
- His or her attitude toward the action in which he or she testifies or toward the giving of testimony; or
- His or her admission of untruthfulness. (Evid. Code, § 780.)

Existing law provides for the following procedure if evidence of sexual conduct of the complaining witness is offered to attack the credibility of the complaining witness in specified sex offense cases:

- A written motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness.
- The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated. The affidavit shall be filed under seal and only unsealed by the court to determine if the offer of proof is sufficient to order a hearing as provided below. After that determination, the affidavit shall be resealed by the court.

- If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant.
- At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant, and is not inadmissible, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the court order.
- An affidavit resealed by the court shall remain sealed, unless the defendant raises an issue on appeal or collateral review relating to the offer of proof in the sealed document, as provided. (Evid. Code, § 782, subd. (a).)

Existing law provides that 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. (Evid. Code, § 351.2.)

This bill provides, in cases not governed by Evidence Code section 351.2, that evidence of a person's immigration status shall not be included in a public court record unless the party seeking its inclusion first seeks and obtains a ruling by the presiding judge at an in-camera hearing that the evidence is relevant.

This bill specifies that the provisions in this bill do not prohibit an individual from voluntarily revealing his or her immigration status to the court.

This bill contains an urgency clause.

COMMENTS

1. Need for This Bill

According to the author:

In March 2017, California Chief Supreme Court Justice Tani Cantil-Sakauye sent a letter to U.S. Attorney General Jeff Sessions and Homeland Security Secretary John Kelly expressing concern over reports of immigration agents stalking undocumented immigrants in California courthouses. Chief Justice Cantil-Sakauye said, "Our courthouses serve as a vital forum for ensuring access to justice and protecting public safety. Courthouses should not be used as bait in the necessary enforcement of our country's immigration laws."

According to news accounts there have been numerous documented examples of defense attorneys exposing the immigration status of multiple witnesses and victims of crimes in California courthouses. In addition there have been reports of immigration agents throughout the country monitoring and detaining individuals at courthouses.

By publicly airing the immigration status of individuals in our courthouses even when it is irrelevant to the trier of fact, some officers of the courts are chilling participation by undocumented immigrants by conveying to them that participation may lead to their deportation.

2. Incidents of ICE Agents Arresting Immigrants in State Courts

The purpose of this bill is to provide protection to immigrants in court rooms who may be targeted by Immigration and Customs Enforcement (ICE) agents for deportation. Recent reports of ICE agents arresting immigrants in state courthouses has raised concerns by local jurisdictions that the practice has a chilling effect on immigrants' participation in prosecuting criminals as witnesses and reporting victims. In response to states' concerns over these arrests, the Departments of Justice and Homeland Security defended the practice and stated that immigration agents will continue to make arrests at courthouses and encouraged cities to revoke their sanctuary policies if they object. (Kopan, *Trump Administration Says ICE Courthouse Arrests Will Continue*, CNN, Mar. 31, 2017 <<http://www.cnn.com/2017/03/31/politics/ice-arrests-courthouses-sessions-kelly/>> [as of May 10, 2017].)

As discussed below, Congress has long-recognized the importance of undocumented immigrants' ability to fully participate in the investigation and prosecution of crimes without fear of deportation. As such, Congress passed laws to provide temporary protection from deportation for immigrant victims of crime in order to facilitate reporting of crimes by immigrants and to improve their relationships with law enforcement agencies.

3. U-Visas Generally

The U-visa was created under the Violence Against Women Act (VAWA) of 2000 for immigrant victims of crime. If approved for a U-visa, the crime victim and qualifying family members are given temporary legal status in the United States as well as temporary work authorization. The victim may also apply for permanent legal status after a few years.

In creating the U-visa, the intent of Congress was to strengthen the ability of law enforcement agencies to investigate and prosecute certain crimes against immigrants and to offer protection to victims who fear cooperating with law enforcement due to their immigration status. Congress recognized that a victim's cooperation and assistance are essential to the effective detection, investigation and prosecution of crimes. However, where a victim fears deportation, the victim will be unlikely to come forward to cooperate and assist in the investigation of these crimes.

To meet the four statutory eligibility requirements for the U-visa, the applicant must: (1) have suffered substantial physical or mental abuse as a result of having been a victim of certain criminal activity; (2) possess information concerning such criminal activity; (3) have been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of a crime; and (4) have been the victim of a criminal activity that occurred in the United States or violated the laws of the United States. (INA § 101, subd. (a)(15)(U).)

Because the U-visa provides protection from deportation to noncitizens, it is possible that someone could have a motive to claim he or she was a crime victim in order to obtain a visa, and as such the information could be relevant in a criminal case where a witness's credibility is subject to examination. As reported in a recent article, "Court records from several cases tried in San Francisco over the past few years show Adachi's attorneys regularly quizzed immigrants

living here illegally about a special visa available to crime victims, apparently to cast doubt on their credibility. The attorneys have pressed their questioning about the visas, regardless of whether the alleged victim had applied for the visa and even if the victim testified he or she didn't know about the visa when reporting the crime.” A deputy public defender in San Francisco states in the article that “the U visa is sometimes the only way an immigrant without documentation can obtain legal status. ‘I’m sure 9 times out of 10, it’s used in a completely proper way,’ he said. “But like anything, there is always the possibility of someone exaggerating and embellishing in order to get a tremendously important benefit. It’s our job to ask about any potential benefit.”” (Knight, *SF Courts Anything but Safe for Some Immigrants in Sanctuary City*, San Francisco Chronicle, Apr. 2, 2017 <<http://www.sfchronicle.com/news/article/SF-courts-anything-but-safe-for-some-immigrants-11045155.php>> [as of May 9, 2017].)

4. Amendments to be Adopted in Committee

The author intends to amend this bill to clarify the hearing is to be conducted by the judge presiding over the case, rather than the “presiding judge.” The amendments will also specify that if information about the person’s immigration status is relevant, the judge must make a further determination that the information is not inadmissible under Evidence Code section 352 which gives a judge discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will either necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. The amendments will also authorize sealing of the record if the judge determines that the information is not relevant or inadmissible. The amendments will clarify that the provisions of this bill do not limit discovery.

5. Arguments in Support

The Coalition for Humane Immigrant Rights (CHIRLA) writes in support of this bill:

In March 2017, California Chief Supreme Court Justice Tani Cantil-Sakauye sent a letter to U.S. Attorney General Jeff Sessions and Homeland Security John Kelly expressing concern over reports of Immigration Customs and Enforcement (ICE) agents stalking undocumented immigrants in California courthouses. These incidents are not isolated as there have been reports in Texas and in Colorado where ICE agents have been present to apprehend a victim of domestic violence. According to news accounts there have been numerous documented examples of defense attorneys in our state exposing the immigration status of multiple witnesses and victims of crimes in California courthouses.

By publicly airing the immigration status of individuals in our courthouses even when it is irrelevant to the trier of fact, some officers of the court are chilling participation by undocumented immigrants by conveying to them that participation may lead to their deportation.

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