
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair

2021 - 2022 Regular

Bill No: SB 836 **Hearing Date:** March 8, 2022
Author: Wiener
Version: February 18, 2022
Urgency: Yes **Fiscal:** No
Consultant: SC

Subject: *Evidence: immigration status*

HISTORY

Source: San Francisco District Attorney's Office
Los Angeles County District Attorney's Office
Coalition for Humane Immigrant Rights
California Employment Lawyers Association
Legal Aid at Work

Prior Legislation: SB 785 (Wiener), Ch. 12, Stats. 2018

Support: Asian Americans Advancing Justice – California; California Rural Legal Assistance Foundation; Centro Legal De La Raza; Disability Rights California; Ella Baker Center for Human Rights; Equal Rights Advocates; Friends Committee on Legislation of California; La Raza Centro Legal; Oakland Privacy; Tides Advocacy; UC Hastings Community Justice Clinics; Warehouse Worker Resource Center

Opposition: None known

PURPOSE

The purpose of this bill is to reenact provisions of law that prohibited the disclosure of a person's immigration status in open court unless the judge determines in an in camera hearing that the evidence is admissible.

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.)

Prior law, until January 1, 2022, provided that in a civil action not governed by Evidence Code Section 351.2, evidence of a person's immigration status shall not be disclosed in open court by a party or his or her attorney unless the judge presiding over the matter first determines that the evidence is admissible in an in camera hearing requested by the party seeking disclosure of the person's immigration status. (Evid. Code, §351.3, subd. (a).)

Prior law, until January 1, 2022, specified that the prohibition against disclosing a person's immigration status in civil actions does not:

- Apply to cases in which a person's immigration status is necessary to prove an element of a claim or an affirmative defense;
- Impact otherwise applicable laws governing the relevance of immigration status to liability or the standards applicable to inquiries regarding immigration status in discovery or proceedings in a civil action, as provided; or,
- Prohibit a person or his or her attorney from voluntarily revealing his or her immigration status to the court. (Evid. Code, §351.3, subd. (b).)

Prior law, until January 1, 2022, provided that on a criminal action, evidence of a person's immigration status shall not be disclosed in open court by a party or his or her attorney unless the judge presiding over the matter first determines that the evidence is admissible in an in camera hearing requested by the party seeking disclosure of the person's immigration status. (Evid. Code, § 351.4, subd. (a).)

Prior law, until January 1, 2022, specified that the prohibition against disclosing a person's immigration status in criminal actions does not:

- Apply to cases in which a person’s immigration status is necessary to prove an element of an offense or an affirmative defense;
- Limit discovery in a criminal action; or,
- Prohibit a person or his or her attorney from voluntarily revealing his or her immigration status to the court. (Evid. Code, § 351.4, subd. (b).)

Prior law, until January 1, 2022, contained intent language that stated that the act did not alter a prosecutor’s existing obligation to disclose exculpatory evidence.

Prior law, until January 1, 2022, contained an urgency clause “[i]n order to immediately help protect undocumented residents of California and their ability to participate in the California justice system.”

This bill reenacts Evidence Code sections 351.3 and 351.4 and contains the same intent language regarding not altering a prosecutor’s existing obligation to disclose exculpatory evidence.

This bill contains an urgency clause.

COMMENTS

1. Need for this Bill

According to the author of this bill:

Senate Bill 836 removes the sunset date on Senate Bill 785, which protected a person’s immigration status in a public court record, unless the presiding judge determined that immigration status was relevant information. Senate Bill 785 (Wiener, Chapter 12, Statutes of 2018) was enacted to keep immigration status private in public court records, but it expired on January 1, 2022. SB 836 ensures that public courts continue to protect a person’s immigration status.

SB 785 prohibited the inclusion of evidence of a person’s immigration status in a public court record -- unless the party seeking its inclusion obtained a ruling by the presiding judge at an in-camera hearing that the evidence was relevant -- until January 1, 2022. SB 785 guaranteed a procedural requirement that protected a person’s immigration status from being exposed in open court prior to review by the presiding judge. Immigration status was only considered admissible evidence when a judge ruled it to be so at an in camera hearing. Only then could it be part of public court records. SB 785 did not prohibit an individual from voluntarily revealing their own immigration status in court. The protections established by SB 785 also applied to both civil and criminal cases.

In March 2017, California Chief Supreme Court Justice Tani Cantil-Sakauye sent a letter to U.S. Former Attorney General Jeff Sessions and Former 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.”

Prior to SB 785 becoming law, there were numerous documented examples of defense attorneys exposing the immigration status of witnesses and victims of crimes in California courthouses. In addition, there were reports of immigration agents throughout the country monitoring and detaining individuals at courthouses.

The protections guaranteed by SB 785 ended on January 1, 2022. Many immigrants continue to feel apprehension in court settings for fear of being targeted and arrested by Immigration and Customs Enforcement (ICE) agents. Every day that passes without these protections puts immigrants at risk.

2. Immigration Arrests at Courthouses

The purpose of the original law that this bill seeks to reenact was to provide protection to immigrants in court rooms who may be targeted by Immigration and Customs Enforcement (ICE) agents for deportation. Under the Trump Administration, there were increased reports of ICE agents arresting immigrants in courthouses which raised concerns by local jurisdictions that the practice had a chilling effect on immigrants' participation in prosecuting criminals as victims and witnesses. In response to states' concerns over these arrests, the Departments of Justice and Homeland Security (DHS) defended the practice stating 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 Feb. 24, 2022].)

In January of 2018, ICE issued guidelines on arrests at courthouses which stated that the ICE would continue to take “actions against specific, targeted aliens with criminal convictions, gang members, national security or public safety threats, aliens who have been ordered removed from the United States but have failed to depart, and aliens who have re-entered the country illegally after being removed, when ICE officers or agents have information that leads them to believe the targeted aliens are present at that specific location.” (ICE, Directive No. 11072.1: Civil Immigration Enforcement Actions Inside Courthouses (Jan. 10, 2018), <https://www.ice.gov/sites/default/files/documents/Document/2018/ciEnforcementActionsCourthouses.pdf> [as of Feb. 24, 2022].)

The directive noted that “[i]ndividuals entering courthouses are typically screened by law enforcement personnel to search for weapons and other contraband. Accordingly, civil immigration enforcement actions taken inside courthouses can reduce safety risks to the public, targeted alien(s), and ICE officers and agents.” (*Ibid.*) The directive also stated that “courthouse arrests are often necessitated by the unwillingness of jurisdictions to cooperate with ICE in the transfer of custody of aliens from their prisons and jails.” (*Ibid.*)

In April of 2021, DHS under the Biden Administration issued new guidelines that limited when immigration arrests could take place in courthouses. The new policy allows for immigration arrests at courthouses to occur when: (1) it involves a national security matter, (2) there is an imminent risk of death, violence, or physical harm to any person, (3) it involves hot pursuit of an individual who poses a threat to public safety, or (4) there is an imminent risk of destruction of

evidence material to a criminal case. The guidelines specify however that arrests may be made based on public safety threats in the absence of hot pursuit where necessary and with prior approval. (See <https://www.dhs.gov/news/2021/04/27/dhs-announces-new-guidance-limit-ice-and-cbp-civil-enforcement-actions-or-near> [as of Feb. 28, 2022].)

3. Effect of this Legislation

This bill reenacts prior law that created a procedure by which evidence of a person's immigration status could be disclosed in open court. The process required a party to request admission of such evidence and the judge presiding over the case to first determine its admissibility in an in camera hearing prior to disclosure, except as specified.

This process is similar to existing law which allows for a judge to determine, outside the presence of a jury, whether evidence of sexual conduct may be admitted into evidence in certain sex offense cases. This process does not apply when a person's immigration status is necessary to prove an element of a crime or an affirmative defense. Additionally, the bill is not intended to limit discovery in a criminal action or prohibit a person or their attorney from voluntarily revealing their immigration status.

The prior law sunset in January of this year. This bill reenacts the prior law permanently and contains an urgency clause.

4. Proposition 8 Truth in Evidence

In 1982, the California voters passed Proposition 8, also known as the Victim's Bill of Rights. The initiative enacted the "Right to Truth in Evidence," and adopted a constitutional provision pertaining specifically to evidence in criminal proceedings. (Cal. Const., art. I, § 28, as adopted June 8, 1982.) The provision of the California Constitution prohibits laws that exclude relevant evidence in criminal cases except upon a two-thirds vote by the Legislature. Because this bill could exclude evidence of a person's immigration status in a criminal proceeding, it has been marked as requiring a two-thirds vote.

5. Argument in Support

According to the Los Angeles District Attorney's Office, a co-sponsor of this bill:

SB 836 would reenact the protections established by SB 785 and it includes an urgency clause so its provisions can take effect immediately.

The language in SB 836 is well crafted and contains appropriate exemptions when proof of a person's immigration status is an element of a claim or affirmative defense in civil matters or when a person's immigration status is an element of an offense or affirmative defense in a criminal action. Nothing in SB 836 prohibits a person or his or her attorney from voluntarily disclosing their immigration status to the court.

The protections in SB 836 are crucial to protecting public safety. Numerous studies show that undocumented immigrants are less likely to report crime and cooperate with law enforcement if they believe working with police and prosecutors will lead to deportation. In addition, research has also shown that a

community's failure to report crime leads to more victimization of that community. The involuntary disclosure of a person's immigration status in an open courtroom results in less cooperation with law enforcement, lower defendant accountability, and ultimately more crime.

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