Should a jury know a person's immigration status? Washington's high court says no with groundbreaking rule

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Washington state's Supreme Court approved a rule that makes evidence about a person's immigration status "generally inadmissible" in civil and criminal courts statewide unless lawyers establish a compelling reason to raise the issue. (AP Photo/Rachel La Corte) (Rachel La Corte/AP)

A first-of-its kind evidence rule ordered by the Washington State Supreme Court will make information about immigration status "generally inadmissible" in both criminal and civil cases, with some exceptions.

By Evan Bush
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After carpenter Alex Salas slipped from a ladder on a construction site about 15 years ago, suffering 10 fractures, he sued the site's scaffolding subcontractor because the ladder did not meet code requirements.

A jury in 2006 decided the company was negligent, but did not award Salas any money. Nearly a decade later, after appeals, a new King County jury awarded Salas $2.6 million in the case.

The two juries heard the same case — with a critical difference. The first jury knew he was in the country illegally; the second did not.

In 2006, the defense admitted evidence about Salas' immigration status. Years before his injuries, Salas' visa had expired.

His lawyers believed that information prejudiced the jury and should not have been included.

The state Supreme Court agreed in 2010, saying the danger of unfair prejudice outweighed the evidence's value, calling the lower court's decision to admit the evidence "an abuse of discretion" and giving Salas the new trial that awarded him millions.

Last Wednesday, the state Supreme Court took a unique step that proponents believe would have prevented Salas' difficulties receiving a fair trial.

The court approved a rule that makes evidence about a person's immigration status "generally inadmissible" in civil and criminal courts statewide unless lawyers establish a compelling reason to raise the issue. The rule will take effect statewide next September.

Washington is believed to be the first state in the nation to approve such a rule.

"It's very, very progressive and somewhat radical in the sense that this is the first of its kind I've seen in this country," said Ann Murphy, a Gonzaga University law professor who teaches evidence law. Murphy supported the change.

Proponents say the rule will remove barriers to justice for people without documentation, who might fear bringing a civil suit or testifying in a criminal case because of their immigration status.

It will also protect witnesses or litigants from prejudice by a jury, said Joe Morrison, an attorney with Columbia Legal Services, who helped propose the rule to the state Supreme Court.

"If you have immigration status evidence, that is such a volatile issue, especially today, that it can overtake people's views," Morrison said. Then, juries "end up having people

make decisions on an emotional reaction instead of what the court has told them the law and facts are."

David Martin, a King County deputy prosecuting attorney, said some victims of domestic violence and other crimes are often reluctant to participate as witnesses in criminal cases because a defense attorney could bring up their immigration status in public court.

"People are scared. They're scared because of what they hear coming out of the federal government," Martin said, noting that U.S. Immigration and Customs Enforcement agents had been seen at Washington courthouses, including in King County.

"Immigration does come up in criminal cases, and sometimes it's entirely appropriate that the status is examined, but what this rule says is you have to have really good reasons," he said.

But defense attorneys expressed concern about the application of the rule in criminal cases.

"The courts already have the power to preclude testimony that isn't relevant and effective," said Annie Benson, the senior directing attorney for the Washington Defender Association. "What this rule is going to do is put an added burden on defense attorneys."

To admit evidence of immigration status in criminal cases, defense lawyers will be required under the rule to write a pretrial motion and argue it during a hearing.

Benson said that could add up to extra work, particularly for public defenders working hundreds of cases each year.

Immigration status often comes up, defense lawyers said, in cases that involve U visas, which grant crime victims the ability to stay in the United States legally to help investigations or prosecutions. Prosecutors and other law-enforcement officials file paperwork to help victims obtain U visas. King County Prosecutor Dan Satterberg said his office recommends about 75 U visas a year, mostly for domestic violence and sexual assault cases.

Defense attorneys argue the accused shouldn't have to clear a legal hurdle to examine the benefit of a visa.

"If somebody is being granted a benefit in exchange for their testimony, Supreme Court case law for due process makes very clear that's relevant and admissible for impeachment," said Angus Lee, a Vancouver-area defense attorney who opposed the rule. "You're shifting the burden on the accused."

The Superior Court Judges Association also wrote to the state's high court opposing the new rule. In an interview, King County Judge Sean O'Donnell said judges recognize information about immigration status "can be highly charged evidence." But he said careful attorneys would be reticent to bring irrelevant evidence into the case for fear of appeal, and that judges could already restrict "highly prejudicial and irrelevant evidence" under current rules.

Benton County Prosecutor Andy Miller, a proponent of the rule change, said he hopes it will provide clarity throughout the state.

In a 2010 murder case, Miller said, defense attorneys questioned two women who had discovered a stabbing victim about their immigration status during a pretrial interview.

"You could tell on their faces, they were upset," he said.

Miller stepped in to tell the women they did not need to answer, he said. Later, the defense motioned to dismiss the case, alleging that Miller had interfered with a witness.

Miller said the judge ultimately dismissed the motion, but the questions — and ambiguity around whether they should be allowed — left the witnesses frightened.

"Having this rule is going to give prosecutors the ability to advise witnesses you don't have to answer these questions," Miller said.

Information from The Seattle Times archives was included in this report. Evan Bush: 206-464-2253 or ebush@seattletimes.com On Twitter @evanbush