



Equal access to justice

CALIFORNIA'S PROGRESSIVE LEGAL LANDSCAPE FOR UNDOCUMENTED IMMIGRANTS' RIGHTS IN PERSONAL-INJURY CASES

California is continually at the center stage – or, at the least is continuously in the headlines – for its equitable treatment of immigrants: documented and undocumented. It seems now more than ever that the rights of immigrants are always in flux. The right to pursue third parties for their tortious or criminal conduct is rightly enjoyed by all Californians regardless of legal status; it is canonical. However, this was not always the case, as many colleagues can recall a not-so-distant past (pre-AB 2159, Evid. Code, § 351.2, and other legislative victories for plaintiffs' side), where the value of a personal injury case could be severely impacted by the immigration status of the client.

In California, the intersection of immigration status and personal-injury law has evolved at a rapid and significant pace. It is expected that everyone should enjoy equal access to justice. Historically, however, a client's immigration status could adversely affect the outcome of personal-injury claims, particularly concerning the calculation of damages. It took court action and legislative advancements to reform the landscape to promote fairness and equality.

Every Californian deserves to be protected, enjoying unfettered and full access to seek justice and full compensation regardless of immigration status. In discovery and in law-and-

motion practice, personal-injury attorneys can prevent defendants from litigating the aggrieved party's immigration status and thereby limiting defendant's liability exposure. And there have been significant and laudable advances in this area to deter tortious conduct and offer just compensation. Personal-injury attorneys can help their clients without status in multiple ways.

Undocumented clients often face additional hurdles when seeking compensation for their injuries. Personal injury attorneys can assist by:

- **Understanding state laws protecting undocumented immigrants:** California law prohibits discrimination against

undocumented individuals in personal injury cases. Attorneys can ensure that immigration status is not used to deny or diminish their clients' claims.

- **Negotiating with insurance companies:** Insurance companies may attempt to exploit a client's undocumented status to reduce payouts. Experienced attorneys can push back against such tactics and negotiate fair settlements based on the severity of the injury and applicable laws.

- **Litigating for full compensation:** If negotiations fail, personal-injury attorneys can advocate for undocumented clients in court. They can present evidence of the client's injuries and economic losses, including lost wages, pain and suffering, and future medical expenses, without immigration status becoming a barrier.

- **Educating clients on their rights:** Many undocumented clients are unaware of their rights under California law. Attorneys can provide guidance on the protections available to them, ensuring they feel empowered to pursue justice without fear of immigration consequences.

- **Establishing trust:** Building trust is critical when working with undocumented clients. Attorneys should approach these cases with sensitivity, confidentiality, and a commitment to protecting the client's interests.

The California law

Currently, it seems almost gospel that a plaintiff in California can pursue just compensation and remedies under the law for injuries caused by the negligence of others without concern that their immigration status will be litigated or their recovery limited. As such, an undocumented individual is eligible to pursue compensation for past, current, or future medical bills for injuries, disfigurement, disability, pain and suffering, and other valuable damages calculated at the California rate. This was not always the expectation.

The seminal holding in *Rodriguez v. Kline* (1986) 186 Cal.App.3d 1145,

allowed defendants in personal-injury cases to introduce a plaintiff's immigration status as evidence. It impacted decades of jurisprudence – with real-life consequences. In most situations, it resulted in limiting recovery for future earnings based on their country of origin – not the United States. It was fundamentally unfair and discouraged the undocumented population from pursuing legitimate claims due to fear of exposure and potential deportation.

Many efforts by plaintiffs' side attorneys chipped away at *Rodriguez v. Kline*. In *Clemente v. State* (1986) 40 Cal.3d 202, the Supreme Court held that the issue of citizenship was irrelevant when ascertaining the amount of compensation. Further, the issue of a plaintiff's immigration status was held to be irrelevant in determining liability. (*Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 5460.) More importantly, the *Clemente* court recognized that litigating the issue of a plaintiff's status was "highly prejudicial" (*Clemente, supra*, 40 Cal.3d at p. 221); the *Hernandez* court found that mentioning a plaintiff's immigration status was "highly inflammatory." (*Hernandez, supra*, 109 Cal.App.4th at p. 460.)

Still, because of the inherent injustice of *Rodriguez v. Kline* (and other accepted practices and defense tactics), California enacted AB 2159, which became effective on January 1, 2017. It amended the Evidence Code by adding section 351.2, explicitly stating 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."

This pivotal amendment ensures that all plaintiffs, irrespective of their immigration status, are entitled to full compensation based on United States wage standards and medical costs. The law prohibits inquiry into a plaintiff's immigration status during litigation, thereby eliminating an, at times, insurmountable barrier that historically hindered undocumented plaintiffs from

accessing justice and fair redressing of their injuries.

But the defense won't give up

Surreptitiously, the defense litigates the issue of immigration in other ways. Usually in the discovery phase, defense counsel might inquire regarding the plaintiff's social security number and/or income tax returns. Although it may seem innocuous for most Californians, it is oppressive for undocumented plaintiffs because it, indirectly, highlights the fact they may not possess either. Plaintiffs' counsel must remain vigilant to object to such line of inquiry under long-accepted privacy protections under 45 Code of Federal Regulations section 164.508 (2007), the United States Constitution, the California Constitution, the Privacy Act of 1974, and Civil Code sections 1791.81.5 and 1798.85, and *Webb v. Standard Oil Co.* (1957) 49 Cal.2d 509; *Brown v. Superior Court* (1977) 71 Cal.App.3d 144.

Thus, with the implementation of AB 2159 in January 2017, the following key implications now exist in personal injury cases in California:

- **Equal treatment in damage calculations:** Plaintiffs can now recover damages, including lost wages and future earnings, based on prevailing United States rates, without reductions tied to their country of origin;

- **Protection from disclosure:** The prohibition of admitting or discovering a plaintiff's immigration status protects individuals from potential repercussions, such as deportation, solely based on their pursuit of legal claims;

- **Encouragement to seek legal redress:** By removing the fear associated with disclosing immigration status, undocumented individuals are more likely to assert their rights and seek compensation for injuries sustained due to another's negligence.

These legislative advancements, particularly through AB 2159, have significantly reformed the treatment of immigration status in personal injury

cases. By ensuring a plaintiff's legal status does not influence the outcome of their claim, the state upholds the principles of justice and equality, allowing all individuals to seek rightful compensation without fear or prejudice. Ultimately, the objectives of tort law are deterrence and compensation to the fullest extent possible and California is a pioneer in this regard.

How PI attorneys can assist undocumented clients

Personal-injury attorneys can offer another layer of protection for their clients without status. The current *zeitgeist* in Washington has again thrust the immigration debate squarely into the minds of Californians. It is important for personal-injury attorneys to understand they can make additional inquiries during the intake process to determine whether a client may be eligible to obtain some form of immigration protection (or status, if there is none). At the very least, an attorney can assuage their clients' fear of exposure or potential deportation.

Many tort cases can involve serious misconduct by third parties – individuals or corporate entities – that victimize plaintiffs. There are many viable scenarios where this is palpable, from an overzealous security guard exceeding lawful boundaries, to an employer systematically violating workers' rights, to a DUI driver causing a wrongful death. Evidently, these scenarios impact all victims; however, for plaintiffs without status, these scenarios can provide an added layer of protection of which lawyers should remain vigilant.

California personal-injury attorneys are uniquely positioned to provide crucial support to undocumented clients who may qualify for relief from deportation, such as a U visa. While personal-injury law and immigration law are distinct practice areas, the two can intersect in meaningful ways, especially for undocumented immigrants who are victims of qualifying crimes.

For example, a U visa is a nonimmigrant visa designed to protect

victims of certain crimes who have suffered substantial physical or mental abuse and are willing to assist law enforcement or government officials in the investigation or prosecution of the underlying criminal activity. This visa offers temporary legal status, work authorization, and a pathway to lawful permanent residency for eligible applicants.

Personal-injury attorneys often represent clients who have been victims of accidents or intentional harm or criminal conduct. If the harm involves criminal activity, such as assault, domestic violence, or other qualifying crimes, an undocumented client might be eligible for a U visa. Attorneys in this field can assist clients by:

- **Identifying qualifying crimes:** Personal-injury attorneys should familiarize themselves with the list of qualifying crimes under U visa regulations. These include, but are not limited to, domestic violence, sexual assault, and other serious offenses. If the circumstances of the injury involve criminal conduct, the attorney can flag the case for potential U visa eligibility.
- **Gathering evidence:** Attorneys can help document the client's injuries, both physical and emotional, which is critical for demonstrating substantial abuse. Medical records, police reports, and witness statements are essential pieces of evidence.
- **Referring to immigration attorneys:** While personal-injury attorneys may not be experts in immigration law, they can collaborate with or refer clients to experienced immigration attorneys who can assess U visa eligibility and assist with the application process. This interdisciplinary approach ensures clients receive comprehensive support.
- **Advocating with law enforcement:** A key requirement for a U visa application is obtaining a certification from a law enforcement agency verifying that the applicant has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of the crime. Personal-injury attorneys can assist clients

in communicating with law enforcement and securing this certification.

For undocumented clients, immigration protections such as a U visa offer several significant benefits:

- Protection from deportation.
- Legal work authorization.
- Eligibility to apply for lawful permanent residency after three years of holding a U visa.
- Derivative visas for certain family members.

Challenges and ethical considerations

While personal-injury attorneys can play a pivotal role in identifying U visa or other immigration-relief opportunities, they must tread carefully. Attorneys should avoid providing immigration advice unless they are qualified to do so. Instead, they should focus on collaborating with or referring clients to licensed immigration practitioners.

Additionally, some clients may be reluctant to pursue immigration relief due to fear of interacting with law enforcement or concerns about their immigration status. Attorneys should approach these cases with sensitivity and confidentiality, ensuring that clients fully understand their rights and options.

California personal-injury attorneys can provide invaluable assistance to undocumented clients by recognizing potential U visa eligibility and facilitating connections with immigration professionals. By adopting a collaborative and client-centered approach, attorneys can not only help clients achieve justice for their injuries but also open doors to a more secure future in the United States. In doing so, they contribute to the broader mission of justice and protection for vulnerable populations.

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