

When Is It Proper to Investigate & Raise the Issue of Immigration Status?



Today:

- Immigration issues pretrial
 - *Padilla/Sandoval*
 - ER 413 and exceptions
 - Case example provided by Sheri Oertel
- Immigration during trial
 - Juries, a case review



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It is quintessentially the duty of counsel to provide the client with advice about an issue like deportation.

Padilla v. Kentucky, 559 U.S. 356, 370–71, 130 S. Ct. 1473, 1484 (2010)

RPC 1.1: Competence

...

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

RPC 1.3: Diligence

A lawyer shall act with
reasonable diligence and
promptness in representing a
client.

RPC 8.4(g) Misconduct:

It is professional misconduct to commit a discriminatory act prohibited by state law on the basis of ~~sex~~ race, age, creed, religion, color, national origin, disability, sexual orientation, gender expression, or gender identity, honorably discharged veteran or military status, or marital status, where the act of discrimination is committed in connection with the lawyer's professional activities ...[I]t is professional misconduct to commit a discriminatory act on the basis of [above enumerated bases or characteristics.] This rule shall not limit the ability of a lawyer to accept, decline, or withdraw from the representation of a client in accordance with Rule 1.16.



...

ER 4 13

2018

In any criminal matter,
evidence of a party's
or a witness's
immigration status
shall not be
admissible unless...

Exceptions

- To show witness bias or prejudice
- If essential to proving an element of, or defense to, the crime
- Exclusion of evidence would violate defendant's constitutional rights.

More than one may apply!

- *See State v. Bedada* 13 Wash. App. 2d 185, 463 P.3d 125 (2020).



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Case Example

Sheri Oertel, WDA felony resource
attorney; former prosecutor and public
defender

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PROCEDURE

Written pretrial motion
with offer of proof
supported by affidavit



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—
Motion

Probative value of reliable,
relevant evidence outweighs
its prejudicial nature



Photo by Christophe Hautier on Unsplash

—
Determination

<https://defensenet.org/resource-category/updated-er-413-motion-and-practice-advisory/>



Juries

- *Voir Dire*
- Prosecutorial Misconduct
 - Juror Misconduct

...

State v. Zamora

Prosecutor engages in misconduct when immigration status is raised with the intent to appeal to racial bias/stereotypes

| Holding | Problem | History | RPCs |
|----------------------------------|--|--|--|
| Right to impartial jury violated | Prosecutor appeals to jurors' potential racial bias during voir dire | Court of Appeals, Div III: Improper conduct didn't implicate ethnic or racial bias | <ul style="list-style-type: none">• RPC 3.8: Special Duties of Prosecutor• RPC 8.4(g) Professional Misconduct |

RPC 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (a) Not Prosecute a case unsupported by probable cause;
- (b) Make reasonable efforts to assure that the accused has been advised of the right to counsel and has been given reasonable opportunity to obtain counsel;
- (c) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; ...
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused ...

Objectionable Topics

- Border security
- "Illegal" Immigration
- Crimes committed by undocumented immigrants



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Ibarra-Erives

“The prosecutor committed race-based misconduct when he used the term “Mexican ounce.”

An objective observer who is aware of the history of race discrimination, implicit bias and purposeful discrimination

could view the prosecutor’s use of the term as a suggestion that

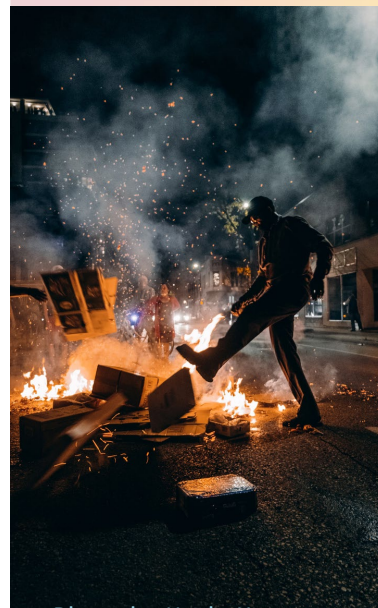
Mr. Ibarra-Erives was likely to have possessed the drugs because he speaks Spanish and appears to be Latinx.”

Holding

Prosecutor's
Closing

"Mexican
Ounce"

"flagrantly or apparently intentionally appeals to racial bias in a way that undermines the defendant's credibility or the presumption of innocence."



Test

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Peña-Rodriguez *v. Colorado*

| Juror's Statement | Washington | Holding |
|----------------------|--|--|
| Ex-law enforcement | <i>State v. Berhe</i> 193 Wn.2d 647, 662, 444 P.3d 1172, 1180 (2019). | “Where a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.” |

Crimmigration law is highly complex and ever-changing

Categorical Approach

- Elements instead of specific conduct

Courts

- Immigration Court
- Board of Immigration Appeals
- 9th Circuit & Other Circuits
- U.S. Supreme Court
- WA Supreme Court and appellate divisions

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Padilla is retroactive in
Washington to the 1980s.

351 P.3d 138 (2015)

Tsai

Deportation is
prejudicial.



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249 P.3d 1015 (2011)

Sandoval

Immigration Project

Contact us

WDAIP@defensenet.org

[Intake Form](#)



Let us help you
meet your *Padilla*
obligations!

Thank you!

Let us know if you have questions!

