



A Defending Immigrants Partnership Practice Advisory*
**DUTY OF CRIMINAL DEFENSE COUNSEL REPRESENTING
AN IMMIGRANT DEFENDANT AFTER *PADILLA V. KENTUCKY***

April 6, 2010

On March 31, the Supreme Court issued its momentous Sixth Amendment right to counsel decision in *Padilla v. Kentucky*, 599 U.S. __ (2010). The Court held that, in light of the unique severity of deportation and the reality that immigration consequences of criminal convictions are inextricably linked to the criminal proceedings, **the Sixth Amendment requires defense counsel to provide affirmative, competent advice to a noncitizen defendant regarding the immigration consequences of a guilty plea, and, absent such advice, a noncitizen may raise a claim of ineffective assistance of counsel.**

Some Key *Padilla* Take-Away Points for Criminal Defense Lawyers

- **Deportation is a “penalty,” not a “collateral consequence,” of the criminal proceeding.** The Court held that deportation is a “particularly severe ‘penalty’” and made clear that the “direct vs. collateral” distinction does not apply to immigration consequences and does not preclude ineffective assistance of counsel (IAC) claims based upon failure to provide correct advice about immigration consequences.
- **Professional standards for defense lawyers provide the guiding principles for what constitutes effective assistance of counsel.** In support of its decision, the Court relied on professional standards that generally require counsel to **determine citizenship/immigration status** of their clients and to **investigate and advise** a noncitizen client about the immigration consequences of alternative dispositions of the criminal case.
- **The Sixth Amendment requires affirmative, competent advice regarding immigration consequences; non-advice (silence) is insufficient (ineffective).** In reaching its holding, the Court expressly rejected limiting immigration-related IAC claims to cases involving misadvice. It thus made clear that a defense lawyer’s silence regarding immigration consequences of a guilty plea constitutes IAC. Even where the deportation consequences of a particular plea are unclear or uncertain, a criminal defense attorney must still advise a noncitizen client regarding the possibility of adverse immigration consequences.
- **The Court endorsed “informed consideration” of deportation consequences by both the defense and the prosecution during plea-bargaining.** The Court specifically highlighted the benefits and appropriateness of the defense and the prosecution factoring immigration consequences into plea negotiations in order to craft a conviction and sentence that reduce the likelihood of deportation while promoting the interests of justice.

What is Covered in this Practice Advisory

This advisory provides initial guidance on the duty of criminal defense counsel representing an immigrant defendant after *Padilla*. The Defending Immigrants Partnership will later provide guidance on issues not covered here, including the ability to attack a *past* conviction based on ineffective assistance under *Padilla*.

- I. **Summary & Key Points of the *Padilla* Decision for Defense Lawyers** (pp. 2-4)
- II. **Brief Review of Select Defense Lawyer Professional Standards Cited by the Court** (pp. 4-6)
 - Duty to inquire about citizenship/immigration status at initial interview stage
 - Duty to investigate and advise about immigration consequences of plea alternatives
 - Duty to investigate and advise about immigration consequences of sentencing alternatives

Appendix A – **Immigration Consequences of Criminal Convictions Summary Checklist** (starting point for inquiry)
Appendix B – **Resources for Criminal Defense Lawyers** (more extensive national, regional and state resources)

I. **Summary & Key Points of the *Padilla* Decision for Defense Lawyers**

A. **Summary**

Background. In *Padilla v. Kentucky*, the petitioner was a lawful permanent resident immigrant who faced deportation after pleading guilty in a Kentucky court to the transportation of a large amount of marijuana in his tractor-trailer. In a post-conviction proceeding, Mr. Padilla claimed that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he “did not have to worry about immigration status since he had been in the country so long.” Mr. Padilla stated that he relied on his counsel’s erroneous advice when he pleaded guilty to the drug charges that made his deportation virtually mandatory.

The Kentucky Supreme Court’s Ruling. The Kentucky Supreme Court denied Mr. Padilla post-conviction relief based on a holding that the Sixth Amendment’s guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a “collateral” consequence of his conviction.¹

The U.S. Supreme Court’s Response. The U.S. Supreme Court disagreed with the Kentucky Supreme Court and agreed with Mr. Padilla that “constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation.” *Padilla*, slip op. at 2. The Court observed that “[t]he landscape of federal immigration law has changed dramatically over the last 90 years.” *Id.* at 2. The Court stated:

While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The “drastic measure” of deportation or removal . . . is now virtually inevitable for a vast number of noncitizens convicted of crimes.

Id. at 2 (citations omitted).

Based on these changes, the Court concluded that “accurate legal advice for noncitizens accused of crimes has never been more important” and that “deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.” *Id.* at 6.

In Mr. Padilla’s case, the Court found that the removal consequences for his conviction were clear, and that he had sufficiently alleged constitutional deficiency to satisfy the first prong of the *Strickland* test – that his representation had fallen below an “objective standard of reasonableness.”²

The Supreme Court’s Holding in *Padilla*: Sixth Amendment Requires Immigration Advice. The Court held that, for Sixth Amendment purposes, defense counsel must inform a noncitizen client whether his or her plea carries a risk of deportation. The Court stated: “Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.” *Id.* at 17.

B. **Key Points For Defense Lawyers**

1. Deportation is a “penalty”, not a “collateral consequence”, of the criminal proceeding.

With respect to the distinction drawn by the Kentucky Supreme Court between direct and collateral consequences of a criminal conviction, the Court noted that it has never applied such a distinction to define the scope of the constitutionally “reasonable professional assistance” required under *Strickland v. Washington*, 466

The Court acknowledged that immigration law can be complex, and that there will be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The Court stated that, when the deportation consequences of a particular plea are unclear or uncertain, “a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.” *Id.* at 11-12. But the Court then went on to say that “when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.” *Id.* at 12. Whether or not the consequences are clear or unclear, however, the Court made clear that the governing test is the *Strickland* test of whether counsel’s representation “fell below an objective standard of reasonableness,” and that “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Id.* at 9 (quoting *Strickland*, 466 U.S. at 688). Under those norms, “[i]t is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so ‘clearly satisfies the first prong of the *Strickland* analysis.’” *Id.* at 14 (citation omitted).

4. The Court endorsed “informed consideration” of deportation consequences by both the defense and the prosecution during plea-bargaining.

The Court recognized that “informed consideration” of immigration consequences are a legitimate part of the plea-bargaining process, both on the part of the defense and the prosecution. The Court stated:

[I]nformed consideration of possible deportation can only benefit both the State and the noncitizen defendants during the plea bargaining process. . . . By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. . . . Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty

Id. at 16.

II. Brief Review of Select Defense Lawyer Professional Standards Cited by the Court

In support of its holding that defense counsel’s failure to inform a noncitizen client that his or her plea carries a risk of deportation constitutes ineffective assistance of counsel for Sixth Amendment purposes, the Court cited professional standards that it described as “valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law.” *Padilla*, slip op. at 9. The Court cited, among such standards, the National Legal Aid and Defender Association (NLADA) Performance Guidelines for Criminal Representation (1995) (hereinafter, “NLADA Guidelines”), and the American Bar Association (ABA) Standards for Criminal Justice, Pleas of Guilty (3d ed. 1999) (hereinafter, “ABA Pleas of Guilty Standards”).

In order to assist defense counsel seeking guidance on how to comply with their legal and ethical duties to noncitizen defendants, this section of the Practice Advisory will highlight some of the NLADA and ABA standards recognized by the Supreme Court as reflecting the prevailing professional norms for defense lawyer representation of noncitizen clients. While these standards provide that competent defense counsel must take immigration consequences into account at all stages of the process, this section will focus in particular on defense lawyer responsibilities at the plea bargaining stage, the stage of representation at issue in the *Padilla* case.

Duty to inquire about citizenship/immigration status at initial interview stage:

Defense lawyer professional standards generally recognize that proper representation begins with a firm understanding of the client’s individual situation and overall objectives, including with respect to immigration status. For example, the ABA Pleas of Guilty Standards commentary urges counsel to “interview the client to

determine what collateral consequences are likely to be important to a client given the client's particular personal circumstances and the charges the client faces." *Id.* cmt. at 127. It then notes that "it may well be that many clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction." *Id.*

In order to comply with a defense lawyer's professional responsibilities, counsel should determine the immigration status of every client at the *initial* interview. See NLADA Guideline 2.2(b)(2)(A). Without knowledge that the client is a noncitizen, the lawyer obviously cannot fulfill his or her responsibilities—recognized by the Supreme Court and these professional standards (see "Duty to investigate and advise about immigration consequences of plea alternatives" and "Duty to investigate and advise about immigration consequences of sentencing alternatives" below)—to advise about immigration consequences. Moreover, merely knowing that your client is a noncitizen may not be enough: while the degree of certainty of the advice may vary depending on how settled the consequences are under immigration law, it is often not possible to know whether the consequences will be certain or uncertain without knowing a client's *specific* immigration status. Thus, it is necessary to identify a client's specific status (whether lawful permanent resident, refugee or asylee, temporary visitor, undocumented, etc.) in order to ensure the ability to provide correct advice later about the immigration consequences of a particular plea/sentence. See *State v. Paredes*, 136 N.M. 533, 539 (2004) ("criminal defense attorneys are obligated to determine the immigration status of their clients").

Duty to investigate and advise about immigration consequences of plea alternatives:

At the plea bargaining stage, NLADA Guideline 6.2(a) specifies that as part of an "overall negotiation plan" prior to plea discussions, counsel should make sure the client is fully aware of not only the maximum term of imprisonment but also a number of additional possible consequences of conviction, including "deportation"; Guideline 6.3(a) requires that counsel explain to the client "the full content" of any "agreement," including "the advantages and disadvantages and potential consequences"; and Guideline 6.4(a) requires that prior to entry of the plea, counsel make certain the client "fully and completely" understands "the maximum punishment, sanctions, and other consequences" of the plea. Again, while the advice may vary depending on the certainty of the consequences, investigation based on the client's specific immigration status is necessary in order to be able to provide correct advice about the certainty of the immigration consequences of a plea.

The ABA Standards set forth similar responsibilities. ABA Pleas of Guilty Standard 14-3.2(f) provides: "To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea." With respect specifically to immigration consequences, the ABA emphasizes that "counsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client." *Id.* cmt. at 127. The commentary urges counsel to be "active, rather than passive, taking the initiative to learn about rules in this area rather than waiting for questions from the defendant." *Id.* cmt. at 126-27.

The fact that many states³ require court advisals regarding potential immigration consequences of a guilty plea does not obviate the need for defense counsel to investigate and advise the defendant. The ABA's commentary to ABA Pleas of Guilty Standard 14-3.2 states that the court's "inquiry is not, of course, any substitute for advice by counsel," because:

The court's warning comes just before the plea is taken, and may not afford time for mature reflection. The defendant cannot, without risk of making damaging admissions, discuss candidly with the court the questions he or she may have. Moreover, there are relevant considerations which will not be covered by the judge in his or her admonition. A defendant needs to know, for example, the probability of conviction in the event of trial. Because this requires a careful evaluation of problems of proof and of possible defenses, few defendants can make this appraisal without the aid of counsel.

Id. See also ABA Pleas of Guilty Standard 14-3.2(f) cmt. at 126 ("[O]nly defense counsel is in a position to ensure that the defendant is aware of the full range of consequences that may apply in his or her case.").

Defense counsel should be aware that prosecutors also have a responsibility to consider deportation and other so-called "collateral" consequences in plea negotiations. Prosecutors are not charged merely with the obligation to seek the maximum punishment in all cases, but with the broader obligation to "see that justice is

accomplished.” National District Attorneys Association, *National Prosecution Standards* § 1.1 (2d ed. 1991). Prosecutors are thus trained to take these collateral consequences into account during the course of plea bargaining. *E.g.* U.S. Dep’t of Justice, *United States Attorneys Manual, Principles of Federal Prosecution*, § 9-27.420(A) (1997) (in determining whether to enter into a plea agreement, “the attorney for the government should weigh *all relevant considerations*, including . . . [t]he probable sentence *or other consequences* if the defendant is convicted”) (emphasis added). These prosecutor responsibilities can be cited whenever a prosecutor claims that he or she cannot consider immigration consequences because to do so would give an unfair advantage to noncitizen defendants.

Duty to investigate and advise about immigration consequences of sentencing alternatives:

At the sentencing stage, NLADA Guideline 8.2(b) requires that counsel be “familiar with direct and collateral consequences of the sentence and judgment, including . . . deportation”; and *id.* 8.3(a) requires the client be informed of “the likely and possible consequences of sentencing alternatives.” For example, some immigration consequences are triggered by the length of any prison sentence. In some cases, reducing a prison sentence by one day can make a huge difference in the immigration consequences triggered.

For resources for defense lawyers on the immigration consequences of criminal cases, see attached Appendices:

Appendix A – Immigration Consequences of Criminal Convictions Summary Checklist (starting point for inquiry)

Appendix B – Resources for Criminal Defense Lawyers (more extensive national, regional and state resources for defense lawyers)

ENDNOTES:

* This advisory was authored by Manuel D. Vargas of the Immigrant Defense Project for the Defending Immigrants Partnership with the input and collaboration of the Immigrant Legal Resource Center, the National Immigration Project of the National Lawyers Guild, and the Washington Defender Association’s Immigration Project.

¹ Over the years, a number of courts have dismissed ineffective assistance of counsel claims based on failure to give advice on immigration consequences under the “collateral consequences” rule. *See, e.g., People v. Ford*, 86 N.Y.2d 397 (1995). Other courts — particularly since the harsh immigration law amendments of 1996 — have rejected this rule. *See, e.g., State v. Nunez-Valdez*, 200 N.J. 129, 138 (2009) (“[T]he traditional dichotomy that turns on whether consequences of a plea are penal or collateral is not relevant to our decision here.”).

² The Court remanded Mr. Padilla’s case to the Kentucky courts for further proceedings on whether he can satisfy *Strickland*’s second prong—prejudice as a result of his constitutionally deficient counsel.

³ Thirty jurisdictions including the District of Columbia and Puerto Rico have statutes, rules, or standard plea forms that require a defendant to receive notice of potential immigration consequences before the court will accept his guilty plea.

Immigrant Defense Project

Immigration Consequences of Convictions Summary Checklist*

GROUND OF DEPORTABILITY (apply to lawfully admitted noncitizens, such as a lawful permanent resident (LPR)—greencard holder)	GROUND OF INADMISSIBILITY (apply to noncitizens seeking lawful admission, including LPRs who travel out of US)	INELIGIBILITY FOR US CITIZENSHIP
Aggravated Felony Conviction ➤ <i>Consequences</i> (in addition to deportability): <ul style="list-style-type: none"> ◆ Ineligibility for most waivers of removal ◆ Ineligibility for voluntary departure ◆ Permanent inadmissibility after removal ◆ Subjects client to up to 20 years of prison if s/he illegally reenters the US after removal ➤ <i>Crimes covered</i> (possibly even if not a felony): <ul style="list-style-type: none"> ◆ Murder ◆ Rape ◆ Sexual Abuse of a Minor ◆ Drug Trafficking (may include, whether felony or misdemeanor, any sale or intent to sell offense, second or subsequent possession offense, or possession of more than 5 grams of crack or any amount of flunitrazepam) ◆ Firearm Trafficking ◆ Crime of Violence + 1 year sentence** ◆ Theft or Burglary + 1 year sentence** ◆ Fraud or tax evasion + loss to victim(s) > \$10,000 ◆ Prostitution business offenses ◆ Commercial bribery, counterfeiting, or forgery + 1 year sentence** ◆ Obstruction of justice or perjury + 1 year sentence** ◆ Certain bail-jumping offenses ◆ Various federal offenses and possibly state analogues (money laundering, various federal firearms offenses, alien smuggling, failure to register as sex offender, etc.) ◆ Attempt or conspiracy to commit any of the above 	Conviction or <i>admitted commission</i> of a Controlled Substance Offense , or DHS has reason to believe individual is a drug trafficker ➤ No 212(h) waiver possibility (except for a single offense of simple possession of 30g or less of marijuana) Conviction or <i>admitted commission</i> of a Crime Involving Moral Turpitude (CIMT) ➤ Crimes in this category cover a broad range of crimes, including: <ul style="list-style-type: none"> ◆ Crimes with an <i>intent to steal or defraud</i> as an element (e.g., theft, forgery) ◆ Crimes in which <i>bodily harm</i> is caused or threatened by an intentional act, or <i>serious bodily harm</i> is caused or threatened by a reckless act (e.g., murder, rape, some manslaughter/assault crimes) ◆ Most sex offenses ➤ <i>Petty Offense Exception</i> —for one CIMT if the client has no other CIMT + the offense is not punishable > 1 year (e.g., in New York can't be a felony) + does not involve a prison sentence > 6 months Prostitution and Commercialized Vice Conviction of 2 or more offenses of any type + aggregate prison sentence of 5 years	Conviction or admission of the following crimes bars a finding of good moral character for up to 5 years: <ul style="list-style-type: none"> ➤ Controlled Substance Offense (unless single offense of simple possession of 30g or less of marijuana) ➤ Crime Involving Moral Turpitude (unless single CIMT and the offense is not punishable > 1 year (e.g., in New York, not a felony) + does not involve a prison sentence > 6 months) ➤ 2 or more offenses of any type + aggregate prison sentence of 5 years ➤ 2 gambling offenses ➤ Confinement to a jail for an aggregate period of 180 days Aggravated felony conviction on or after Nov. 29, 1990 (and murder conviction at any time) <i>permanently</i> bars a finding of moral character and thus citizenship eligibility
Controlled Substance Conviction ➤ EXCEPT a single offense of simple possession of 30g or less of marijuana	CONVICTION DEFINED A formal judgment of guilt of the noncitizen entered by a court or, if adjudication of guilt has been withheld, where: <ul style="list-style-type: none"> (i) a judge or jury has found the noncitizen guilty or the noncitizen has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, AND (ii) the judge has ordered some form of punishment, penalty, or restraint on the noncitizen's liberty to be imposed. THUS: <ul style="list-style-type: none"> ➤ A court-ordered drug treatment or domestic violence counseling alternative to incarceration disposition IS a conviction for immigration purposes if a guilty plea is taken (even if the guilty plea is or might later be vacated) ➤ A deferred adjudication disposition without a guilty plea (e.g., NY ACD) is NOT a conviction ➤ A youthful offender adjudication (e.g., NY YO) is NOT a conviction 	
Crime Involving Moral Turpitude (CIMT) Conviction ➤ For crimes included, see Grounds of Inadmissibility ➤ One CIMT committed within 5 years of admission into the US and for which a sentence of 1 year or longer may be imposed (e.g., in New York, may be a Class A misdemeanor) ➤ Two CIMTs committed at any time “not arising out of a single scheme”		
Firearm or Destructive Device Conviction		
Domestic Violence Conviction or other domestic offenses, including: <ul style="list-style-type: none"> ➤ Crime of Domestic Violence ➤ Stalking ➤ Child abuse, neglect or abandonment ➤ Violation of order of protection (criminal or civil) 		
INELIGIBILITY FOR LPR CANCELLATION OF REMOVAL		
<ul style="list-style-type: none"> ➤ Aggravated felony conviction ➤ Offense covered under Ground of Inadmissibility when committed within the first 7 years of residence after admission in the United States 		
INELIGIBILITY FOR ASYLUM OR WITHHOLDING OF REMOVAL BASED ON THREAT TO LIFE OR FREEDOM IN COUNTRY OF REMOVAL		
“Particularly serious crimes” make noncitizens ineligible for asylum and withholding. They include: <ul style="list-style-type: none"> ➤ Aggravated felonies <ul style="list-style-type: none"> ◆ All will bar asylum ◆ Aggravated felonies with aggregate 5 year sentence of imprisonment will bar withholding ◆ Aggravated felonies involving unlawful trafficking in controlled substances will presumptively bar withholding ➤ Other serious crimes—no statutory definition (for sample case law determination, see Appendix F) 		

*For the most up-to-date version of this checklist, please visit us at <http://www.immigrantdefenseproject.org>.

**The 1-year requirement refers to an actual or suspended prison sentence of 1 year or more. [A New York straight probation or conditional discharge without a suspended sentence is not considered a part of the prison sentence for immigration purposes.]

Immigrant Defense Project

Suggested Approaches for Representing a Noncitizen in a Criminal Case*

Below are suggested approaches for criminal defense lawyers in planning a negotiating strategy to avoid negative immigration consequences for their noncitizen clients. The selected approach may depend very much on the particular immigration status of the particular client. For further information on how to determine your client's immigration status, refer to Chapter 2 of our manual, *Representing Noncitizen Criminal Defendants in New York* (4th ed., 2006).

For ideas on how to accomplish any of the below goals, see Chapter 5 of our manual, which includes specific strategies relating to charges of the following offenses:

- ◆ Drug offense (§5.4)
- ◆ Violent offense, including murder, rape, or other sex offense, assault, criminal mischief or robbery (§5.5)
- ◆ Property offense, including theft, burglary or fraud offense (§5.6)
- ◆ Firearm offense (§5.7)

1. If your client is a **LAWFUL PERMANENT RESIDENT**:

- First and foremost, try to avoid a disposition that triggers deportability (§3.2.B)
- Second, try to avoid a disposition that triggers inadmissibility if your client was arrested returning from a trip abroad or if your client may travel abroad in the future (§§3.2.C and E(1)).
- If you cannot avoid deportability or inadmissibility, but your client has resided in the United States for more than seven years (or, in some cases, will have seven years before being placed in removal proceedings), try at least to avoid conviction of an “aggravated felony.” This may preserve possible eligibility for either the relief of cancellation of removal or the so-called 212(h) waiver of inadmissibility (§§3.2.D(1) and (2)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid conviction of a “particularly serious crime” in order to preserve possible eligibility for the relief of withholding of removal (§3.4.C(2)).
- If your client will be able to avoid removal, your client may also wish that you seek a disposition of the criminal case that will not bar the finding of good moral character necessary for citizenship (§3.2.E(2)).

2. If your client is a **REFUGEE** or **PERSON GRANTED ASYLUM**:

- First and foremost, try to avoid a disposition that triggers inadmissibility (§§3.3.B and D(1)).
- If you cannot do that, but your client has been physically present in the United States for at least one year, try at least to avoid a disposition relating to illicit trafficking in drugs or a violent or dangerous crime in order to preserve eligibility for a special waiver of inadmissibility for refugees and asylees (§3.3.D(1)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid a conviction of a “particularly serious crime” in order to preserve eligibility for the relief of withholding of removal (§3.3.D(2)).

3. If your client is **ANY OTHER NONCITIZEN** who might be eligible now or in the future for **LPR status, asylum, or other relief**:

IF your client has some prospect of becoming a lawful permanent resident based on having a U.S. citizen or lawful permanent resident spouse, parent, or child, or having an employer sponsor; being in foster care status; or being a national of a certain designated country:

- First and foremost, try to avoid a disposition that triggers inadmissibility (§3.4.B(1)).
- If you cannot do that, but your client may be able to show extreme hardship to a citizen or lawful resident spouse, parent, or child, try at least to avoid a controlled substance disposition to preserve possible eligibility for the so-called 212(h) waiver of inadmissibility (§§3.4.B(2),(3) and(4)).
- If you cannot avoid inadmissibility but your client happens to be a national of Cambodia, Estonia, Hungary, Laos, Latvia, Lithuania, Poland, the former Soviet Union, or Vietnam and eligible for special relief for certain such nationals, try to avoid a disposition as an illicit trafficker in drugs in order to preserve possible eligibility for a special waiver of inadmissibility for such individuals (§3.4.B(5)).

IF your client has a fear of persecution in the country of removal, or is a national of a certain designated country to which the United States has a temporary policy (**TPS**) of not removing individuals based on conditions in that country:

- First and foremost, try to avoid any disposition that might constitute conviction of a “particularly serious crime” (deemed here to include any aggravated felony), or a violent or dangerous crime, in order to preserve eligibility for asylum (§3.4.C(1)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid conviction of a “particularly serious crime” (deemed here to include an aggravated felony with a prison sentence of at least five years), or an aggravated felony involving unlawful trafficking in a controlled substance (regardless of sentence), in order to preserve eligibility for the relief of withholding of removal (§3.4.C(2)).
- In addition, if your client is a national of any country for which the United States has a temporary policy of not removing individuals based on conditions in that country, try to avoid a disposition that causes ineligibility for such temporary protection (TPS) from removal (§§3.4.C(4) and (5)).

*References above are to sections of our manual.

Appendix B – Resources for Criminal Defense Lawyers

This Appendix lists and describes some of the resources available to assist defense lawyers in complying with their ethical duties to investigate and give correct advice on the immigration consequences of criminal convictions. This section will cover the following resources:

1. Protocol “how-to” guide for public defense offices seeking to develop an in-house immigrant service plan;
2. Outside expert training and consultation services available to other defense provider offices and attorneys;
3. National books and practice aids;
4. Federal system, regional, or state-specific resources.

1. Protocol “how-to” guide for public defense offices seeking to develop an in-house immigrant service plan

Many public defender organizations have established immigrant service plans in order to comply with their professional responsibilities towards their non-citizen defendant clients. Some defender offices maintain in-house immigration expertise with attorneys on staff trained as immigration experts. For example, The Legal Aid Society of the City of New York, which oversees public defender services in four of New York City’s five boroughs, has an immigration unit that counsels attorneys in the organization’s criminal division. Other public defender organizations consult with outside experts. For example, several county public defender offices in California contract with the Immigrant Legal Resource Center to provide expert assistance to public defenders in their county offices. Other public defender organizations have found yet other ways to address this need.

For guidance on how a public defender office can get started implementing an immigration service plan, and how an office with limited resources can phase in such a plan under realistic financial constraints, defender offices may refer to *Protocol for the Development of a Public Defender Immigration Service Plan* (May 2009), written by Cardozo Law School Assistant Clinical Law Professor Peter L. Markowitz and published by the Immigrant Defense Project (IDP) and the New York State Defenders Association (NYSDA). (*This is available at <http://www.immigrantdefenseproject.org/webPages/crimJustice.htm>*).

This publication surveys the various approaches that defender organizations have taken, discusses considerations distinguishing those approaches, provides contact information for key people in each organization surveyed to consult with on the different approaches adopted, and includes the following appendices:

- Sample immigration consultation referral form
- Sample pre-plea advisal and advocacy documents
- Sample post-plea advisal and advocacy letters
- Sample criminal-immigration practice updates
- Sample follow-up immigration interview sheet
- Sample new attorney training outline
- Sample language access policy

2. Outside expert training and consultation services available to other defense provider offices and attorneys

For those criminal defense offices and individual practitioners who do not have access to in-house immigration experts, a wide array of organizations and networks has emerged in the past two decades to provide training and immigration assistance to public and private criminal defense attorneys regarding the immigration consequences of criminal convictions.

Some of the principal national immigration organizations with expertise on criminal/immigration issues (see organizations listed below) have worked together along with the National Legal Aid and Defender Association in a collaboration called the **Defending Immigrants Partnership** (www.defendingimmigrants.org), which coordinates on a national level the necessary collaboration between public defense counsel and immigration law experts to ensure that indigent non-citizen defendants are provided effective criminal defense counsel to avoid or minimize the immigration consequences of their criminal dispositions.

In addition to its national-level coordination activities, the Partnership offers many other services. For example, the Partnership coordinates and participates in trainings at both the national and the regional levels — including, since 2002, some 220 training sessions for about 10,500 people. In addition, the Partnership provides free resources directly to criminal defense attorneys through its website at www.defendingimmigrants.org. That website contains an extensive resource library of materials, including a free national training manual for the representation of non-citizen criminal defendants, see Defending Immigrants Partnership, *Representing Noncitizen Defendants: A National Guide* (2008), as well as jurisdiction-specific guides for Arizona, California, Connecticut, Florida, Illinois, Indiana, Maryland, Massachusetts, Nevada, New Jersey, New York, New Mexico, North Carolina, Oregon, Texas, Vermont, Virginia, and Washington. The website also contains various quick-reference guides, charts, and outlines, national training powerpoint presentations, several taped webcastings, a list of upcoming trainings, and relevant news items and reports. **Website: www.defendingimmigrants.org.**

- DIP partner **Immigrant Defense Project (IDP)** is a New York-based immigrant advocacy organization that provides criminal defense lawyers with training, legal support and guidance on criminal/immigration law issues, including a free nationally-available hotline. IDP also has trained dozens of in-house immigrant defense experts at local defender organizations in New York, New Jersey, Pennsylvania, and other states. In addition, IDP maintains an extensive series of publications aimed at criminal defense practitioners. For example, visitors to the IDP's online resource page can find a free two-page reference guide summarizing criminal offenses with immigration consequences (see Appendix A attached). The IDP website also contains free publications focusing on other aspects of immigration law relevant to criminal defenders, such as aggravated felony and other crime-related immigration relief bars. In addition, IDP publishes a treatise aimed specifically at New York practitioners, *Representing Immigrant Defendants in New York* (4th ed. 2006). **Telephone: 212-725-6422. Website: www.immigrantdefenseproject.org.**
- DIP partner **Immigrant Legal Resource Center (ILRC)** is a San Francisco-based immigrant advocacy organization that provides legal trainings, educational materials, and a nationwide service called "Attorney of the Day" that offers consultations on immigration law to attorneys, non-profit organizations, criminal defenders, and others assisting immigrants, including consultation on the immigration consequences of criminal convictions. ILRC's consultation services are available for a fee (reduced for public defenders), which can be in the form of an hourly rate or via an ongoing contract. ILRC provides in house trainings for California public defender offices, and many offices contract with the ILRC to answer their questions on the immigration consequences of crimes. ILRC also provides immigration technical assistance on California Public Defender Association's statewide listserve, with about 5000 members, and maintains its own list serve of over 50 in-house immigration experts in defender offices throughout California to provide ongoing support, updates, and technical assistance. In addition, ILRC provides support to in-house experts in Arizona, Nevada, and Oregon. ILRC writes criminal immigration related practice advisories and reference guides for defenders which are posted on its website and widely disseminated, and is the author of a widely-used treatise for defense attorneys, *Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws* (10th ed. 2009). **Telephone: 415-255-9499. Website: www.ilrc.org.**

- DIP partner **National Immigration Project** of the National Lawyers Guild (NIP/NLG) is a national immigrant advocacy membership organization with offices in Boston, Massachusetts that provides many types of assistance to criminal defense practitioners, including direct technical assistance to practitioners who need advice with respect to a particular case. These services are available free of charge and may be used by practitioners anywhere in the nation. NIP/NLG also provide trainings in the form of CLE seminars for defense lawyers, and is also responsible for publishing *Immigration Law and Crimes* (2009), the leading treatise on the relationship between immigration law and the criminal justice system, which is updated twice yearly and is also available on Westlaw. **Telephone: 617-227-9727. Website: www.nationalimmigrationproject.org.**

For other organizations and networks that provide training and consultation services in specific states or regions of the country, see section (4) below entitled “Federal System, Regional, or State-Specific Resources.”

3. National Books and Practice Aids

- ***Immigration Consequences of Convictions Checklist*** (Immigrant Defense Project, 2008), 2-page summary, attached to this practice advisory, that many criminal defenders find useful as an in-court quick reference guide to spot problems requiring further investigation.
- ***Representing Noncitizen Criminal Defendants: A National Guide*** (Defending Immigrants Partnership, 2008), available for free downloading at <http://defendingimmigrationlaw.com>.
- ***Aggravated Felonies: Instant Access to All Cases Defining Aggravated Felonies*** (2006), by Norton Tooby & Joseph J. Rollin, available for order at <http://criminalandimmigrationlaw.com>.
- ***Criminal Defense of Immigrants*** (4th ed., 2007, updated monthly online), by Norton Tooby & Joseph J. Rollin, available for order at <http://www.criminalandimmigrationlaw.com>.
- ***The Criminal Lawyer’s Guide to immigration Law: Questions and Answers*** (American Bar Association, 2001), by Robert James McWhirter, available for order at <http://www.abanet.org>.
- ***Immigration Consequences of Criminal Activity*** (4th ed., 2009), by Mary E. Kramer, available for order at <http://www.ailapubs.org>.
- ***Immigration Consequences of Criminal Convictions***, by Tova Indritz and Jorge Baron, in ***Cultural Issues in Criminal Defense*** (Linda Friedman Ramirez ed., 2d ed., 2007), available for order at <http://www.jurispub.com>.
- ***Immigration Law and Crimes*** (2009), by Dan Kesselbrenner and Lory Rosenberg, available for order at: <http://west.thompson.com>.
- ***Practice Advisory: Recent Developments on the Categorical Approach: Tips for Criminal Defense Lawyers*** (2009), by Isaac Wheeler and Heidi Altman, available for free downloading at <http://www.immigrantdefenseproject.org/webPages/practiceTips.htm>.
- ***Safe Havens: How to Identify and Construct Non-Deportable Offenses*** (2005), by Norton Tooby & Joseph J. Rollin, available for order at <http://www.criminalandimmigrationlaw.com>.
- ***Tips on How to Work With an Immigration Lawyer to Best Protect Your Non-Citizen Defendant Client*** (2004), by Manuel D. Vargas, available for free downloading at <http://www.immigrantdefenseproject.org/webPages/crimJustice.htm>.
- ***Tooby’s Crimes of Moral Turpitude: The Complete Guide*** (2008), by Norton Tooby, Jennifer Foster, & Joseph J. Rollin, available for order at <http://www.criminalandimmigrationlaw.com>.
- ***Tooby’s Guide to Criminal Immigration Law: How Criminal and Immigration Counsel Can Work Together to Protect Immigration Status in Criminal Cases*** (2008), by Norton Tooby, available for free downloading at <http://www.criminalandimmigrationlaw.com>.

4. Federal system, regional, or state-specific resources

Federal System:

- Dan Kesselbrenner & Sandy Lin, *Selected Immigration Consequences of Certain Federal Offenses* (National Immigration Project, 2010), available at www.defendingimmigrants.org.

Regional resources:

Ninth Circuit Court of Appeals region

- Brady, Tooby, Mehr, Junck, *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* (formerly *California Criminal Law and Immigration*) (2009), available at www.ilrc.org.

Seventh Circuit Court of Appeals region

- Maria Baldini-Poterman, *Defending Non-Citizens in Illinois, Indiana and Wisconsin* (Heartland Alliance's National Immigrant Justice Center, 2009), available at www.immigrantjustice.org.

State-Specific Resources:

Arizona

- In 2007, the Arizona Defending Immigrants Partnership was launched to provide information and written resources to Arizona criminal defense attorneys on the immigration consequences of criminal convictions. Housed at the Florence Immigrant and Refugee Rights Project (FIRRP) and funded by the Arizona Foundation for Legal Services and Education, the partnership is run by Legal Director Kara Hartzler, who provides support, individual consultations, and training to Arizona criminal defense attorneys and other key court officials in their representation of noncitizens. Telephone: (520) 868-0191.
- Kathy Brady, Kara Hartzler, *et al.*, *Quick Reference Chart & Annotations for Determining Immigration Consequences of Selected Arizona Offenses* (2009), available at www.ilrc.org and www.defendingimmigrants.org.
- Kara Hartzler, *Immigration Consequences of Your Client's Criminal Case* (2008), Powerpoint presentation available at www.defendingimmigrants.org.
- Brady *et al.*, *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* (formerly *California Criminal Law and Immigration*) (2009), available at www.ilrc.org.

California

- The ILRC coordinates the California Defending Immigrants Partnership to provide public defenders in California with the critical resources and training they need on the immigration consequences of crimes. In particular, the ILRC provides mentorship of in-house experts in defender offices across the state, coordination and monitoring of a statewide interactive listserv of in-house defender experts, technical assistance on immigration related questions posted on California Public Defender Association's Claranet statewide listserv, ongoing training of county public defender offices, and written resources. The ILRC also provides technical assistance to several county defender offices by contract. A comprehensive list and description of these and other criminal immigration law resources for criminal defenders in California is provided at www.ilrc.org.
- Brady *et al.*, *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* (formerly *California Criminal Law and Immigration*) (2009), available at www.ilrc.org.
- Katherine Brady, *Quick Reference Chart to Determining Selected Immigration Consequences to Select*

California Offenses (2010), available at www.ilrc.org.

- Katherine Brady, *Effect of Selected Drug Pleas After Lopez v. Gonzales*, a quick reference chart on the immigration consequences of drug pleas for criminal defenders in the Ninth Circuit (2007), available at www.ilrc.org.
- *Immigration Criminal Law Resources for California Criminal Defenders*, available at www.ilrc.org.
- *Tooby's California Post-Conviction Relief for Immigrants* (2009), available for order at <http://www.criminalandimmigrationlaw.com>.
- The Immigrant Rights Clinic at the University of California at Davis Law School provides limited, but free consultation to public defender offices that have limited immigration related resources. Contact Raha Jorjani at rjorjani@ucdavis.edu.
- In Los Angeles, the office of the Los Angeles Public Defender offers free consultation through Deputy Public Defender Graciela Martinez. She also regularly presents trainings on this issue to indigent defenders and works with in-house defender experts in the Southern California region. She can be reached at gmartinez@lacopubdef.org.

Colorado

- Hans Meyer, *Plea & Sentencing Strategy Sheets for Colorado Felony Offenses & Misdemeanor Offenses* (Colo. State Public Defender 2009). Contact Hans Meyer at hans@coloradoimmigrant.org.

Connecticut

- Jorge L. Baron, *A Brief Guide to Representing Non-Citizen Criminal Defendants in Connecticut* (2007), available at www.defendingimmigrants.org or www.immigrantdefenseproject.org.
- Elisa L. Villa, *Immigration Issues in State Criminal Court: Effectively Dealing with Judges, Prosecutors, and Others* (Conn. Bar Inst., Inc., 2007).

District of Columbia

- Gwendolyn Washington, *PDS Immigrant Defense Project's Quick Reference Sheet* (Public Def. Serv., 2008).

Florida

- *Quick Reference Guide to the Basic Immigration Consequences of Select Florida Crimes* (Fla. Imm. Advocacy Ctr. 2003), available at www.defendingimmigrants.org.

Illinois

- The Heartland Alliance's National Immigrant Justice Center (NIJC) offers no-cost trainings and consultation to criminal defense attorneys representing non-citizens, and also publishes manuals designed for criminal defense attorneys who defend non-citizens in criminal proceedings.
- Maria Baldini-Poterman, *Defending Non-Citizens in Illinois, Indiana and Wisconsin* (Heartland Alliance's National Immigrant Justice Center, 2009), available at www.immigrantjustice.org.
- *Selected Immigration Consequences of Certain Illinois Offenses* (National Immigration Project, 2003), available at www.defendingimmigrants.org.

Indiana

- Maria Baldini-Poterman, *Defending Non-Citizens in Illinois, Indiana and Wisconsin* (Heartland Alliance's National Immigrant Justice Center, 2009), available at www.immigrantjustice.org.
- *Immigration Consequences of Criminal Convictions* (Indiana Public Defender Council, 2007), available at <http://www.in.gov/ipdc/general/manuals.html>.

Iowa

- Tom Goodman, *Immigration Consequences of Iowa Criminal Convictions Reference Chart*.

Maryland

- *Abbreviated Chart for Criminal Defense Practitioners of the Immigration Consequences of Criminal Convictions Under Maryland State Law* (Maryland Office of the Public Defender & University of Maryland School of Law Clinical Office, 2008).

Massachusetts

- Dan Kesselbrenner & Wendy Wayne, *Selected Immigration Consequences of Certain Massachusetts Offenses* (National Immigration Project, 2006), available at www.defendingimmigrants.org.
- Wendy Wayne, *Five Things You Must Know When Representing Immigrant Clients* (2008).

Michigan

- David Koelsch, *Immigration Consequences of Criminal Convictions (Michigan Offenses)*, U. Det. Mercy School of Law (2008), available at <http://www.michiganlegalaid.org>.

Minnesota

- Maria Baldini-Potermin, *Defending Non-Citizens in Minnesota Courts: A Practical Guide to Immigration Law and Client Cases*, 17 Law & Ineq. 567 (1999).

Nevada

- The ILRC and University of Nevada, Las Vegas Thomas & Mack Legal Clinic, William S. Boyd School of Law (UNLV) provide written resources, training, limited consultation, and support of in-house defender experts in Nevada public defense offices.
- The ILRC and UNLV are finalizing in 2010 portions of *Immigration Consequences of Crime: A Guide to Representing Non-Citizen Criminal Defendants in Nevada*, including a practice advisory on the immigration consequences and defense arguments to pleas to Nevada sexual offenses and the immigration consequences of Nevada drug offenses. They will be posted at www.ilrc.org and www.defendingimmigrants.org.

New Jersey

- The IDP, Legal Services of New Jersey, Rutgers Law School-Camden and the Camden Center for Social Justice collaborate with the New Jersey Office of Public Defender to provide written resources, trainings and consultations to New Jersey criminal defense lawyers who represent non-citizens.
- Joanne Gottesman, *Quick Reference Chart for Determining the Immigration Consequences of Selected New Jersey Criminal Offenses* (2008), available at www.defendingimmigrants.org or www.immigrantdefenseproject.org.

New Mexico

- The New Mexico Criminal Defense Lawyers Association (NMCDLA) assists defenders in that state concerning immigration issues and has presented several continuing legal education programs in various locations of the state on the immigration consequences of criminal convictions and the duty of criminal defense lawyers when the client is not a U.S. citizen. NMCDLA regularly publishes a newsletter in which one ongoing column in each issue is dedicated to immigration consequences.
- Jacqueline Cooper, *Reference Chart for Determining Immigration Consequences of Selected New Mexico Criminal Offenses*, New Mexico Criminal Defense Lawyers Association (July 2005), available at www.defendingimmigrants.org.

New York

- The IDP and the New York State Defenders Association Criminal Defense Immigration Project collaborate with New York City indigent criminal defense service providers and upstate New York public defender offices to provide written resources, trainings and consultations to New York criminal defense lawyers who represent non-citizens. Additional information on IDP's services and written resources is available at www.immigrantdefenseproject.org.
- Manuel D. Vargas, *Representing Immigrant Defendants in New York* (4th ed. 2006), available at www.immigrantdefenseproject.org.
- *Quick Reference Chart for New York Offenses* (Immigrant Defense Project, 2006), available at www.defendingimmigrants.org or www.immigrantdefenseproject.org.

North Carolina

- Sejal Zota & John Rubin, *Immigration Consequences of a Criminal Conviction in North Carolina* (Office of Indigent Defense Services, 2008).

Oregon

- Steve Manning, *Wikipedia Practice Advisories on the Immigration Consequences of Oregon Criminal Offenses* (Oregon Chapter of American Immigration Lawyers Association and Oregon Criminal Defense Lawyers Association, 2009), available at <http://www.ailaoregon.com>.

Pennsylvania

- *A Brief Guide to Representing Noncitizen Criminal Defendants in Pennsylvania*, (Defender Association of Philadelphia, 2010), soon to be available at www.immigrantdefenseproject.org.

Tennessee

- Michael C. Holley, *Guide to the Basic Immigration Consequences of Select Tennessee Offenses* (2008).
- Michael C. Holley, *Immigration Consequences: How to Advise Your Client* (Tennessee Association of Criminal Defense Law).

Texas

- *Immigration Consequences of Selected Texas Offenses: A Quick Reference Chart* (2004-2006), available at www.defendingimmigrants.org.

Vermont

- Rebecca Turner, *A Brief Guide to Representing Non-Citizen Criminal Defendants in Vermont* (2005)
- Rebecca Turner, *Immigration Consequences of Select Vermont Criminal Offenses Reference Chart* (2006), available at www.defendingimmigrants.org.

Virginia

- Mary Holper, *Reference Guide and Chart for Immigration Consequences of Select Virginia Criminal Offenses* (2007), available at www.defendingimmigrants.org.

Washington

- The Washington Defender Organization (WDA) Immigration Project provides written resources and offers case-by-case technical assistance and ongoing training and education to criminal defenders, prosecutors, judges and other entities within the criminal justice system. Go to: www.defensenet.org/immigration-project

- Ann Benson and Jonathan Moore, *Quick Reference Chart for Determining Immigration Consequences of Selected Washington State Offenses* (Washington Defender Association's Immigration Project, 2009), available at www.defendingimmigrants.org and <http://www.defensenet.org/immigration-project/immigration-resources>.
- *Representing Immigrant Defendants: A Quick Reference Guide to Key Concepts and Strategies* (WDA Immigration Project, 2008), available at <http://www.defensenet.org/immigration-project/immigration-resources>.
- Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* (formerly *California Criminal Law and Immigration*) (2009), available at www.ilrc.org.

Wisconsin

- Maria Baldini-Poterman, *Defending Non-Citizens in Illinois, Indiana and Wisconsin* (Heartland Alliance's National Immigrant Justice Center, 2009), available at www.immigrantjustice.org.
- Wisconsin State Public Defender, Quick Reference Chart – Immigration Consequences of Select Wisconsin Criminal Statutes.