

Providing legal support to attorneys who provide mandated representation to noncitizens in the 7th and 8th Judicial Districts of New York. Funded by the NYS Office of Indigent Legal Services (through Erie County).

Immigration Issues for the Noncitizen Defendant

Contact Information

Welcome to our third issue of the Western New York Immigration Assistance Center newsletter. As you may already know, we've been funded by the New York State Office of Indigent Legal Services to assist you in your representation of noncitizens accused of crimes or facing findings in Family Court following the Supreme Court ruling in *Padilla v. Kentucky*, 559 U.S. 356 (2010).

Criminal defense attorneys are now required to specifically advise noncitizen clients as to the potential immigration consequences of a criminal conviction before taking a plea. Our Center was established so that we can share our knowledge of immigration law with public defenders and 18b providers to help you determine the immigration consequences of any particular case you may be handling. There is no fee for our services.

Call us. We want to hear from you. In the 8th Judicial District, contact attorney Sophie Feal at 716.847.0662 x 314 or sfeal@ecbavlp.com. In the 7th, contact attorney Wedade Abdallah at 585.295.6066 or wabdallah@lasroc.org.

Upcoming CLE Trainings

SAVE THE DATE: November 18, 2016 from 10:00 a.m. to 12:00 p.m. in the Sun Room of the Bar Association of Erie County, we will have our first CLE directed exclusively at those of you who appear in Family Court to cover the unique immigration issues relevant to your practice and representation of noncitizens. All those who offer mandated representation are welcome and the CLE will be free. We hope to send out a flyer soon with registration information. If you know someone interested in this program who is not yet on our email list, have them email their contact information to mvaleri@ecbavlp.com.

In addition, all NYS public defenders and assigned counsel attorneys are invited to attend the upcoming CLE trainings on "crim-imm" issues. **To register, please email your name, address and affiliation to mvaleri@ecbavlp.com.** These trainings are free of charge and provide you with two hours of CLE credit.

- **September 16th** in the third floor Jury Room of the Niagara County Courthouse, Lockport from 1:00 p.m.—3:00 p.m.
- **September 23rd** at the Sequestered Tavern in Seneca Falls from 12:00 p.m.—3:00 p.m. (Lunch provided courtesy of Cayuga County).
- **September 30th** at Jamestown Community College sponsored by the Cattaraugus County Public Defender's Office from 10:00 a.m. to 12:00 p.m.



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- Mitigation of Criminal and Immigration Consequences for Survivors of Human Trafficking

WNY IMMIGRATION ASSISTANCE CENTER

A joint collaboration between the Erie County Bar Association Volunteer Lawyers Project, Inc. and The Legal Aid Society of Rochester, New York.



Treatment Courts as a Means of Limiting Immigration Consequences

By SOPHIE FEAL, ESQ., Director of Immigration Program, ECBA Volunteer Lawyers Project, Inc. and WEDADE ABDALLAH, ESQ., The Legal Aid Society of Rochester, New York

As defense lawyers undoubtedly know already, treatment courts are ideal ways by which a defendant can avoid a conviction. As such, proceeding in a treatment court may be particularly helpful to a non-citizen defendant who is concerned about the immigration consequences of a conviction. However, it is critical that defense counsel understand some of the limitations of these courts for the non-citizen.

Firstly, proceeding in any treatment court assumes that the participant wants to engage in court-ordered treatment and is able to do so. This requires participants to have health insurance, either private insurance or Medicaid, for example. The undocumented will most likely have no access to health insurance. They are ineligible for Medicaid, ineligible for benefits under the Affordable Care Act, and due to their undocumented status rarely obtain employment that includes private health insurance. As such, they wouldn't meet a required threshold for participation in such treatment courts. A lawful permanent resident (LPR) may also have limited access to public health insurance (though NYS benefits are more generous than federal benefits for this group), although they are eligible for insurance under the ACA. If a client is not covered by insurance, court counselors may help participants engage in treatment programs with income based payment requirements. In such cases, defense counsel will have to work with the courts and counselors to overcome the financial barriers to participation faced by non-citizen clients.

Secondly, treatment courts, including the Judicial Diversion Program¹, generally require that a plea be entered prior to participation. Once there is a plea of guilty, the court imposes the treatment, which under U.S. immigration law constitutes a "restraint on liberty."² Hence, the noncitizen defendant has a conviction under immigration law even if the treatment court later allows withdrawal of the plea and dismissal of the charges, or withdrawal of plea and reduction to lesser, non-

removable, offense. This is so because under immigration law, a conviction still exists if expungement or vacatur is done under a rehabilitative statute, or solely for the purpose of ameliorating immigration consequences (vs. one done on account of a constitutional defect in the underlying conviction). As such, it is important that defense counsel negotiate participation without a plea *up front*. In some instances, this may require the agreement of the Assistant District Attorney assigned to the case.

The Judicial Diversion Program differs from other treatment courts because it provides defense counsel with the ability to negotiate the terms of participation directly with the court. Therefore, participation with or without a plea does not require consent of the District Attorney. CPL 216.40(4)(b) allows a court to determine that a plea of guilty is not required "based on a finding of exceptional circumstances." Exceptional circumstances exist when the guilty plea is likely to result in "severe collateral consequences." At least two NYS courts have held that deportation is such an exceptional circumstance. *See, People v. Brignolle*, 41 Misc.3d 949 (2013); *People v. Kollie*, 38 Misc. 3d 865 (2013).

If a plea of guilty is required, there may be other options available. The first would be to enter a plea without immigration consequences. The second may be to negotiate a contract where the original plea is vacated and replaced with a final disposition that carries no immigration consequences. While the second option may not be ideal because a plea has still been entered, it is not impossible that immigration authorities will not act immediately to place that person in custody, but will wait until the final outcome, which would be a non-deportable offense if the defendant fully cooperates with the terms of treatment.

With careful negotiations, treatment courts can be accessible to non-citizen clients as well. Defense counsel may utilize the Immigration Assistance Center to craft proper pleas and negotiate contracts that will minimize the immigration consequences faced by non-citizens seeking to participate in these programs.

Footnotes

¹JDP is a drug treatment program for felony offenders who face non-violent charges, and who also abuse alcohol and/or drugs (CPL 216.00).

²The definition of conviction under immigration law is: a formal judgment of guilt entered by a court, or where an adjudication of guilt has been withheld, a judge or jury has found guilt, or a plea of guilt or nolo contendere has been entered, or sufficient facts to warrant a finding of guilt have been submitted, and a judge has ordered some form of punishment, penalty or restraint on liberty. Immigration and Nationality Act (INA) (a)(48)(A); 8 U.S.C. 1101(a)(48)(A).