

WESTERN NEW YORK IMMIGRATION ASSISTANCE CENTER

We are funded by the New York State Office of Indigent Legal Services (through Erie County) 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), which requires criminal defense attorneys 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.

March 2017
Volume 2, Issue 3

Immigration Issues for the Noncitizen Defendant

We have started scheduling our second round of CLEs for the Public Defender Offices and Assigned Counsel in the 7th and 8th Judicial Districts. This year's CLEs will focus on criminal convictions and family law findings that may affect naturalization and other benefits available to non-citizens, the grounds of inadmissibility, and an ethics component about the duty to advise non-citizen defendants. We will also explain and answer questions about the recent Executive Orders on immigration. We hope to see you soon. In the meantime, please feel free to call or email us for technical assistance.

Contact Information

In the 8th Judicial District:

SOPHIE FEAL, Director of the Immigration Program at ECBA Volunteer Lawyers Project, Inc., 716.847.0662 x 314 or sfeal@ecbavlp.com

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In the 7th Judicial District:

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Upcoming CLE Training

April 14, 2017 from 10:00 a.m. to 12:00 p.m. in the Grand Jury Room at the County Courts Facility, 1 West Main Street, Batavia, New York for public defenders and assigned counsel in Genesee, Steuben, Livingston and Wyoming counties. The CLE is free. To register, email your contact information to mvaleri@ecbavlp.com.



In this issue

Ethical Obligations of the Criminal Defense Attorney ... 2



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

ETHICAL OBLIGATIONS OF THE CRIMINAL DEFENSE ATTORNEY

By WEDADE ABDALLAH, Esq., Immigration Program Director of The Legal Aid Society of Rochester, New York

In our experience, a non-citizen client may place greater weight on avoiding exile from the United States than on avoiding any particular sentence in a criminal matter. Therefore, when representing a non-citizen, counsel must consider both the immigration and criminal consequences of a conviction.

In *Padilla v. Kentucky*, 559 U.S. 356 (2010), the U.S. Supreme Court ruled that the Sixth Amendment requires defense counsel to advise noncitizen clients about the immigration consequences of a guilty plea. Failure to properly advise could result in a finding that the attorney was ineffective.

If an attorney does not advise a client of the immigration consequences of a conviction, the client may be permitted to vacate his plea based upon a claim of ineffective assistance of counsel. A grant of this post-conviction remedy requires proof that counsel did not advise the client of the immigration consequences of a conviction, and that the client suffered prejudice as a result of counsel's constitutionally ineffective performance. *People v. McDonald*, 1 NY3d 109 (2003). Typically, prejudice requires a showing that the client would not have accepted the plea if he had been properly advised.

As attorneys, we know there are no guarantees a client will prevail on a post-conviction challenge. A client could lose his appeal even if he was improperly advised. That is why it is important for counsel to ascertain a client's immigration status up front, and give proper advice at the trial level.

The Importance of Plea Negotiations

Depending on the merits of a case, negotiating a plea that does not carry an immigration consequence may be your client's best option, though it is not always possible. In 2010, the Supreme Court decided two cases which held that the Sixth Amendment right to counsel applies to the plea negotiation process and held that prejudicial error can result from ineffective plea advice, *Missouri v. Frye*, 566 U.S. 133 (2012) and *Lafler v. Cooper*, 566 U.S. 156 (2012). In *Frye*, the Court held that plea bargaining is a defining feature of our criminal justice system and for many defendants, the most critical time period in the course of a criminal matter. In *Padilla*, the Supreme Court suggested that an attorney, "may be able to plea bargain creatively" with the prosecutor in order to craft a conviction and sentence that avoids the likelihood of immigration consequences. *Padilla*, 559 U.S. at 373.

These decisions direct counsel to take into account a defendant's immigration status when entering into plea negotiations with a prosecutor. This does not mean

that an attorney must achieve a disposition that will keep their client from suffering immigration consequences. Rather, they advise counsel to consider these factors during negotiations.

What's at Stake?

Even when it is not possible to avoid immigration consequences, it is still important to prepare the client for what lies ahead. Knowing what the immigration consequences are will help your client prepare for the challenges of litigation in the immigration context.

Once a client is convicted and his criminal sentence concludes, he may be transferred directly into immigration custody if he has entered a plea to a removable offense. If he was not properly advised, this may be the first time that the client realizes that his conviction carries immigration consequences.

In this circumstance, it is possible that a client may never have the opportunity to challenge his conviction. Many non-citizens convicted of crimes are subject to removal from the United States and detained by immigration until the conclusion of their immigration proceedings. They are not entitled to counsel at government expense in immigration court, and may not have the financial resources to hire an attorney. Representation by non-profits such as LAS and VLP, is limited due to our resources. Without the benefit of immigration counsel, an immigration case may not be vetted for post-conviction relief. A client could be ordered removed from the United States, without the ability to mount a defense. This means that criminal defense counsel may be the only thing standing between a non-citizen defendant and removal.

What You Can Do — Steps to Ensure Effective Representation

Ask every client where they were born;

If your client was not born in the United States, consult with an immigration attorney at the Immigration Assistance Center. We can help you ascertain your client's immigration status and the consequences of a conviction;

After consulting with immigration counsel, try to negotiate a plea that does not carry immigration consequences;

Advise your client of the immigration consequences of the conviction.

If you have a non-citizen client and would like to discuss their criminal matter, please feel free to contact us at the numbers listed on the front of this newsletter.