

**WESTERN NEW YORK IMMIGRATION
ASSISTANCE CENTER**

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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.

Immigration Issues for the Noncitizen Defendant

ICE Issues New Detainer Policy (eff. 04/02/2017)

ICE, Mar. 24, 2017. "ICE places detainers on aliens who have been arrested on local criminal charges and for whom ICE possesses probable cause to believe that they are removable from the United States, so that ICE can take custody of the alien when he or she is released from local custody. When law enforcement agencies fail to honor immigration detainers and release serious criminal offenders, it undermines ICE's ability to protect public safety and carry out its mission.

The new detainer form (I-247A) was created by ICE, and its implementation on April 2, 2017, will fulfill the requirement of Secretary Kelly's February 20, 2017, memo, "Enforcement of the Immigrations Laws to Serve the national Interest" to "eliminate the existing detainer forms and replace them with a new form to more effectively communicate with recipient law enforcement agencies."

<https://www.ice.gov/detainer-policy>

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

Understanding and
Managing the Criminal
Court Record 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.

UNDERSTANDING AND MANAGING THE CRIMINAL COURT RECORD

By **DANIEL E. JACKSON**, Immigration Attorney at the Erie County Bar Association Volunteer Lawyers Project, Inc.

As we have highlighted in our previous newsletters, the immigration consequences of criminal cases can often far outweigh those of the underlying proceedings. In accordance with counsel's duty to properly advise on immigration consequences under *Padilla v. Kentucky*, 130 S. Ct 1473 (2010), it is important to know and distinguish what parts of the record can be used against your client in later immigration proceedings.

The best approach for your client will vary greatly depending on their unique circumstances; there is no one set of advice for all cases. For some, the more vague the record, the better. For others, it is essential to explicitly spell out the allegations and the full nature of the conduct resulting in conviction.

On this basis, it is always wise to consult an immigration attorney at the Immigration Assistance Center from the outset of the case. They can help you to understand the needs of your client's particular circumstances in immigration law.

What Can Be Used to Prove a Criminal Conviction?

In most cases, it is the plea, not the conduct that counts. In deciding whether to deport someone, the immigration court does not look at the defendant's conduct, but rather at the elements of the offense as defined by statute and case law, and in some cases additional information that appears in the reviewable record of conviction.

The following documents form the reviewable record of conviction:

- The statute of conviction;
- The indictment or information;
- The plea, judgement or verdict;
- The sentence;
- Transcript from court proceedings;
- Any documents stipulated to that establish element of crime.

The full list can be found at 8 C.F.R. § 1003.41.

Matters Outside the Record of Proceedings:

Evidence of a Domestic Violence Relationship: An immigration court can review all reliable evidence outside of the record to establish relationship for DV ground of removal, *Matter of Estrada*, 26 I. & N. Dec. 749.

Evidence of loss in a fraud or deceit crime: an immigration court can review restitution orders, plea agreements to determine amount of loss to victim, *Nijhavan v. Holder*, 129 S. Ct. 2294.

Always Avoid Admitting These In The Record

While each case is different, some facts are always detrimental to have in any part of the record. These include, but are not limited to:

Your client's immigration status. In certain circumstances, what you or your client says on the record in state court

proceedings may be the only evidence of their immigration status (or lack thereof) called evidence of "alienage". As a general rule, alienage should never be freely admitted on the state court record – even if asked by the judge. Instead, such matters should be discussed off the record.

Violence. Where violence is not an element of the offense charged, never admit to actual violence, causing injury, or intent to injure – even in exchange for a lenient plea (without speaking to an immigration attorney).

Guns. To avoid a deportable firearms offense, do not admit to carrying, using, etc. a firearm or bomb. Instead, admit to another weapon such as a knife, an unspecified "weapon," or no weapon, depending on the elements of the offense.

Minor Victim. In a plea to an age-neutral offense, do not admit that the victim was under age

Domestic Relationship. In a crime that does or could involve violence, avoid admission that the victim and defendant have any domestic relationship — including simply living at the same address.

Drugs. In any controlled substance offense other than simple possession of marijuana, try to plead to an unspecified "controlled substance" rather than, e.g., heroin. If the offense charged does not have an illegal drug as an element, do not mention one in the record.

Sex. Avoid admission of lewdness, prostitution, or sexual intent where those are not elements of the offense.

OTHER TIPS

Collateral Documents. Where an agreeable plea is offered and documents such as the police report or pre-sentence report contain negative information, do not allow these to be admitted into the record. Instead, either seek to have them removed from the record, or if you cannot, speak to one of our attorneys.

Conclusion

If your client cannot confirm they were born in the United States, consult with an immigration attorney at the Immigration Assistance Center as early in the case as possible.

While we have provided an overview of what can be used in immigration court to prove the existence of a conviction, this is not the only way your client may get in trouble. Depending on their circumstances, immigration authorities do not always need to prove the existence of a conviction in order to inflict adverse immigration consequences – an admission may be enough.

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