

TIPS FOR ATTORNEYS DEFENDING NONCITIZENS
IN CRIMINAL PROCEEDINGS AND
HOW TO PREPARE THEM IN A TRUMP ADMINISTRATION

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Representing noncitizens has always required a mindful devotion to consequences beyond the regular considerations of a criminal practice. While citizens worry about incarceration and their loss of certain constitutionally protected rights, for a noncitizen it can mean a life of exile and a loss of everything they consider valuable. In some instances, deportation can lead to not only a loss of family, but also a loss of life. In the Trump era, these stakes have become even more important and as defense counsel, not only are you now required to meet your obligations regarding immigration consequences, but, now, more than ever, you must help noncitizen clients facing criminal charges understand what they must do to be prepared even before a criminal conviction.

Under the Trump enforcement actions, anyone who is undocumented, or a lawful permanent resident with any contact with law enforcement may now find themselves at an increased risk. Defense counsel are often on the frontlines of being able to advise noncitizens on steps they can take to be ready before they find themselves face to face with ICE. Along with cornerstone instruction such as sign nothing and say nothing there are now a whole host of things that defense counsel need to instruct clients regarding.

What can you tell noncitizens to help them know how to prepare?

Organize personal documents

- ❖ Keep original identity & personal documents in a safe place.
- ❖ Make and store copies where someone can access them if client is detained.
- ❖ Gather immigration and criminal history documents. If do not have these documents, do court searches, FOIA requests and background checks.
 - ❖ *Immigration documents: any applications submitted to immigration or any documents showing A# (alien number)*
 - ❖ *Criminal documents: certificates of disposition from courts and/or rap sheet*

Encourage them to get screened for potential relief

- ❖ Make sure to use a competent attorney not a notario or someone who promises something too good to be true.
- ❖ Advise clients if hiring a lawyer to always have a signed contract and make sure to review the document in their strongest language.
- ❖ Encourage clients to make sure they have a copy of the signed contract.
- ❖ Encourage clients not to pay in cash because if they are scammed, no way to get remedy.

Plan for medical and financial needs

- ❖ Advise clients to write down crucial medical information including contact information for doctors and any medications.
- ❖ Advise clients to identify someone they trust and arrange for them to have access to medical information
 - ❖ Sign HIPAA forms
 - ❖ Sign medical POA, if needed
- ❖ Advise clients to make decisions about their finances
 - ❖ Have money set aside to pay an immigration bond and someone who is able to access that money to pay the bond
 - ❖ POA for financial decisions
 - ❖ A bank card that you can take with you if you are removed.

Plan for childcare needs

- ❖ Advise clients to write down crucial contact information about childcare
- ❖ Identify someone who can care for children if they are detained.
- ❖ Execute POA to make sure that person agrees to act as a caretaker and has the following information:
 - ❖ School location and contact information
 - ❖ Any medical conditions the child has and how to address their needs,
 - ❖ Emergency contact information for other loved ones
- ❖ Put important documents for each child in a safe place
 - ❖ medical records
 - ❖ school records,
 - ❖ birth certificate
 - ❖ any legal agreements
 - ❖ passports

Information Clients should have on them or have access to always:

- ❖ Medical information: doctors and medications
- ❖ Childcare information: school information and who to call for childcare
 - ❖ Contact information for loved ones
- ❖ Contact information for their Embassy/Consulates
 - ❖ Contact information for their lawyers

Under the new enforcement priorities, even if the individual is charged with an offense, they are considered an enforcement priority. No longer is it safe to assume that ICE will not detain someone who is simply charged, has simply been arrested with no charges, or has a pending criminal case. The new policies make clear that ICE will no longer use their discretion to prioritize only criminal aliens or those with prior removal orders. Instead, now, ICE has taken the position that anyone who is removable is a priority.

What defense counsel need to know about immigration consequence?

Defending non-US citizens in criminal proceedings adds a level of complexity to the analysis of what the best options are for your client when an acquittal is unlikely. In some cases, a plea deal that might be the best choice for a US citizen client could be devastating to a noncitizen's immigration prospects. It is important to consult an expert on the immigration consequences of criminal convictions before advising your noncitizen criminal client of the best course. This not only helps protect your client, but also protects you from ineffective assistance of counsel claims under *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010). The below tips, along with the list of questions to ask your noncitizen client, will help you effectively defend your criminal clients against potential immigration consequences.

Keep in Mind

- Under *Padilla v. Kentucky*, defense attorney has the duty to advise a criminal client of not only whether a plea carries the *risk* of deportation, but also of the “clear” immigration consequences of the plea. 130 S.Ct. at 1483.
- The list of criminal grounds that make a noncitizen inadmissible (which can apply to people already present in the U.S.) is found at Immigration & Nationality Act (“INA”) § 212(a)(2), 8 USC § 1182(a)(2). The list of criminal grounds that make a noncitizen deportable is found at INA § 237(a)(2), 8 USC § 1227(a)(2).
 - Included on the latter list are “aggravated felonies”, which are then defined at INA § 101(a)(43), 8 USC § 1101(a)(43).
 - WARNING: Even a misdemeanor can constitute an aggravated felony in some cases.
- A plea offer that ensures your client gets out of criminal custody the fastest, or that comes with the fewest criminal history consequences, could still potentially make your client deportable, and could subject client to mandatory immigration custody (i.e. no bond). See INA § 236(c), 8 USC § 1226(c).
- Some criminal dispositions that do not always constitute a conviction for criminal purposes are still considered convictions for immigration purposes. INA definition of “conviction” is found at INA § 101(a)(48)(A), 8 USC § 1101(48)(A).
 - MO and KS municipal court adjudications are treated as convictions for immigration purposes (even though incorrect).
 - SIS in Missouri is also treated as a conviction, even though may be incorrect. BUT suspending the imposition of sentence *without* placing the person on probation under RSMo § 557.011.2(3) may cure this.
 - Even some diversions are treated as convictions if there is an outright stipulation to the facts as alleged. (Try amending to “if I were to violate the terms of this diversion agreement, *then* I would agree to stipulate to the facts as alleged...” instead.)
- When in doubt: Consult a competent immigration attorney with “crImmigration”

experience! But before calling the attorney, ask your client the below questions:

Questions to Ask Your Noncitizen Client

[be prepared to give the answers to these questions to the immigration attorney you consult]

- What country are you from?
- DOB & how old are you?
- Do you have any immigration status (or “papers”) in US?
 - If so, what status? When did you get it?
 - Are you still in status, or is visa/status expired?
- Do you have an Alien Number (“A number”)? [The A number starts with letter “A”, usually followed by 9 numerical digits with dashes, e.g.: A201-555-555.] If yes, what is your A#?
- If no status, have you/someone filed an application to get you permanent residency or other status?
 - If so, what status applying for? At what stage are you in the application?
- When did you last enter the US? (try to get month and year)
 - Enter with visa?
 - If no, what was manner of entry? (ask for facts, not legal conclusions: Sneak across the border? Show up at checkpoint and ask to be let in? Enter in someone’s vehicle? If so, was driver of vehicle questioned by border patrol?)
 - Was this most recent entry also your first time entering the US?
 - If no, how many times have you left and come back?
 - How old were you the first time you came to US?
 - Each time you came to the US, did you enter with a visa?
 - If no visa, what was manner of entry? (see above)
- Have you ever been deported before?
- Have you ever been granted voluntary departure before?
- Have high school diploma or GED?
 - If not, currently in school or working on diploma/GED?
- Are either of your parents or any grandparents US citizens? If yes, since when?
- Married or in relationship? If yes, spouse/significant other have lawful status?
 - If no marriage certificate, make note if could be possible common law marriage (KS)
- Have kids? How Many? Ages? Any of them have lawful status? (if yes, what status?)
- Have you ever been accused of committing a crime before now? Ever been given a

ticket? Ever been handcuffed? Ever been in the back of a police car?

- If yes, for what, and what was result? (make it clear you want to know about everything, *even if charges were dismissed or if they've already paid for everything and/or they think it's not on their record*. Ask specifically about DUIs and traffic tickets [clients often “forget” to mention them], as well as misdemeanors & felonies)
- Have you, your spouse, parents, or children ever been the *victim* of a crime here in the US?
- If so, what was the crime, and did you cooperate with police/prosecutors?