

ETHICAL OBLIGATIONS WHEN REPRESENTING IMMIGRANT CLIENTS

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ETHICAL DUTIES

- 1) Confidentiality regarding client's immigration status
- 2) Work with an interpreter
- 3) Consult an immigration advisor
- 4) Advise your client of the potential outcomes of his charges and potential plea bargains / sentencing

“WHAT IS YOUR CLIENT’S STATUS?”

Reasons to tell your PA / the Court	Reasons NOT to tell the PA or Court up front
<ul style="list-style-type: none">- Trying to negotiate a plea bargain that will allow your client to remain in the U.S.- Trying to negotiate a plea bargain that will reduce the amount of time your client has to serve before facing the immigration court and deportation- If the victim in a domestic or assault case is also an immigrant, you could ask whether the victim is receiving a U-visa certification for their assistance in the prosecution of your client.	<ul style="list-style-type: none">- May reduce the likelihood of a bond reduction- May trigger the prosecutor to call ICE and have a detainer placed on your client.- Probation officers also are common reporters to ICE.

I am NOT recommending you keep this information from the Court indefinitely. In felony pleas, the Judge may have additional colloquy questions regarding the immigration advisements our non-citizen clients have received.

USE AN INTERPRETER: FOR YOU AND IN COURT

- Hire an interpreter for your client meetings, jail visits, etc., if there's ANY doubt about your client's ability to communicate in English.
 - Have the police reports interpreted for your client or read to him. Depending on your client's background, his reading level may not be very high. And he may never have learned to read in English.
- Make sure you ask the Court for an interpreter for your client's court proceedings.
 - **"It is a manifest injustice to permit a defendant to plead guilty and be sentenced if, because of a language barrier, he cannot understand the proceeding."** State v. Sultan, 14 S.W.3d 96 (Mo. App. E.D. 2000).
 - Keep in mind that the court's interpreter has a duty to the COURT, not a duty of confidentiality to you and your client. While the interpreters are often willing to interpret for you and your client before and during proceedings, having your own interpreter present (especially if you think issues are going to arise) is a better idea.

IMMIGRATION ADVISEMENTS

- Fill out immigration intake – as completely as you can
- Send it to me or Amy Commean (Jackson)
- Contact us as early as possible
- Give us your client's next court date, any deadlines on the plea deals, and how eager your client is to resolve the case.
- Keep us informed of any plea offers.

PADILLA V. KY: **WHAT DO WE NEED TO TELL OUR CLIENTS?**

- *Padilla v. KY*, 2010 US Supreme Court:
 - *Criminal defense attorneys must advise noncitizen clients about the deportation risks of a guilty plea*
- If law is unambiguous, attorneys must advise their criminal clients if deportation will result from a conviction.
- If immigration consequences are unclear or uncertain, attorneys must advise that deportation “may” result
- Attorneys **MUST** give their clients some advice about deportation

HOW DOES A *PADILLA* ADVISEMENT LOOK?

- Is your client deportable or inadmissible?
 - If so, tell him.
- If deportable or inadmissible, does he have relief?
 - If so, how can you craft dispositions that keep him eligible for that relief?
 - If that's impossible, make sure the client KNOWS that what they're pleading to will make them deportable or inadmissible, meaning ICE will get them, they will have no relief (defense) in immigration court, and they will be deported with no ability to come back.

CLIENT #1

- Born abroad to married parents
- Moved with parents to US as child (8 years old)
- Parents remained married until mother's death
- Mother passed away before client turned 18
- Father naturalized before client turned 18



What is Client #1's status?

CLIENT #1 IS A US CITIZEN!

- Needs an immigration attorney to file N-600 with proper documentation to receive Certificate of Citizenship.
- ICE hold can be lifted, as it was in the case I worked on. I sent ICE all her documents establishing that she was a citizen, and her ICE officer lifted the hold so that she was released from jail upon pleading to probation.

WHAT DOES THAT MEAN FOR THE CRIMINAL CASE?

- There should be no immigration consequences for the client. Client is a US citizen, who can only have her citizenship taken away if it was obtained by fraud.

CLIENT #2

- Has copy of expired green card
- Charged with multiple counts of burglary 2nd and stealing

What is Client #2's status?

CLIENT #2 IS A LAWFUL PERMANENT RESIDENT

- Has copy of expired green card
- Charged with multiple counts of burglary 2nd and stealing

What is Client #2's status?

Client #2 is a Lawful Permanent Resident

- Also known as a “LPR” and “green card holder”
- Important: Green cards may expire, but person only loses LPR status if an immigration judge takes away the status.
 - Conditional permanent resident is different, so if got green card based on marriage, then talk to an immigration advisor
- A person with an expired green card is still a lawful permanent resident. (But to get an ID, driver's license, etc, client needs to apply for a new card IF no convictions which will trigger removal.)

WHAT ARE YOUR DUTIES TO AND CONCERNS FOR CLIENT #2?

- What else we know: (unconditional) Green cards are good for ten years. So client qualifies for cancellation of removal for lawful permanent residents:

Been present for > 7 years + been LPR for > 5 years +

NO AGGRAVATED FELONY CONVICTIONS = eligible for LPR
cancellation

- IF your charge is not an aggravated felony (and will not become one if sentenced to more than a year), then advise your client whether the charge will make them deportable, and tell them they should still be eligible for LPR cancellation (and they need an immigration lawyer asap).

WHAT CHARGES ARE AGGRAVATED FELONIES?

- Aggravated felonies all on their own: Murder - Rape - Sexual abuse of a minor - Drug trafficking offenses (including sale and poss w/ intent to sell) - Firearms trafficking (and possibly other firearms offenses) - Attempt to Commit OR conspiracy to Commit an Agg Fel - Others not listed here but listed in INA 101(a)(43)
- Agg felonies IF sentenced to one year or more: Burglary - Forgery - Receipt of stolen property - Theft (including Robbery) - Bribery of witness - Counterfeiting - Using or creating false documents - Others not listed here but found in INA 101(a)(43)
- Crime of violence agg felonies: An offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, OR any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense + sentence of one year or greater (whether suspended or imposed)

CLIENT #3

- Lawful permanent resident
- Has had a green card for 15 years

What are the immigration concerns for Client #3 charged with:

DWI – Chronic Offender (C felony)

- Should NOT be placed into removal proceedings; is not CIMT or other ground of deportability
- If placed into removal, is NOT an aggravated felony, so still eligible for LPR cancellation
- Also will need to rehab (CHOICES, inpatient treatment, etc.) to show immigration judge he is not inadmissible for being a habitual drunkard.

Possession of a controlled substance (D felony)

- Is a ground of deportability, so will be placed into removal proceedings
- NOT an aggravated felony, so still eligible for LPR cancellation
- Needs to prove worthy of discretionary cancellation grant
- Attend rehab, have plan for relapse prevention, and talk to immigration advisor or attorney before entering Drug Courts.

WHAT MAKES A CLIENT DEPORTABLE?

- Applies to those who were lawfully admitted to the US (even if their lawful status has expired). Usually means had a visa at some point but either 1) overstayed its expiration date, or 2) became LPR but now criminal convictions are causing potential loss of that status
- These convictions render someone deportable:
 - Aggravated felony conviction
 - Crime involving moral turpitude (one or two, depending on when committed)
 - Controlled substance conviction
 - Firearms conviction
 - Domestic violence / stalking / child abuse conviction
 - Violation of order of protection

CLIENT #4

- Born in Mexico.
- Parents brought to U.S. at age 9.
- Entered without inspection.
- Graduated high school.

What is Client #4's status?

CLIENT #4

- Born in Mexico.
- Parents brought to U.S. at age 9.
- Entered without inspection.
- Graduated high school.

What is Client #4's status?

Client #4 is undocumented.

BUT he could have DACA (Deferred Action for Childhood Arrivals).

Important to conduct thorough intake because “entered without papers” isn’t always the end of the story.

WHAT ARE YOUR DUTIES TO AND CONCERNS FOR CLIENT #4?

- Seems like everyone who is undocumented is being deported. HOWEVER, all hope is not lost for many of our undocumented clients.
 - Client #4 was a DACA recipient, whose awesome PD negotiated for him a deferred prosecution agreement (with no admission of guilt).
 - DACA recipients cannot have a felony conviction, or be convicted of a “significant misdemeanor,” defined as: DWI, domestic assault, and any misdemeanor for which he was sentenced to 90 days or more in jail.

LEARN YOUR CLIENT'S STATUS AND FIND OUT HOW YOU CAN HELP.
I AM CONSISTENTLY AMAZED BY THE OUTCOMES OUR ATTORNEYS
NEGOTIATE.

DUTIES TO AN UNDOCUMENTED CLIENT

- Client #4, if undocumented, could be facing an ICE hold and removal proceedings
 - 1) for having entered without inspection (most common), or
 - 2) for being a LPR who travelled outside the country and tried to come back in after a conviction which made him inadmissible.
- Screen the client for relief options:
 - Cancellation of removal for non-permanent residents: present in the US continuously for 10 + years before the offense date, with US citizen spouse, parents or children under 21 who would suffer “exceptional and extremely unusual” hardship if client was deported. IF it appears your client could qualify, talk to immigration advisor about client’s criminal history and current charges.
 - Adjustment of status with waivers: if client has US citizen spouse, talk to immigration advisor.
 - Asylum / Withholding of removal / CAT Protection: does client fear returning home?
 - VAWA: if client has US citizen / LPR spouse and has been abused by that spouse, talk to immigration advisor and to immigration attorneys for client.
- You’re not expected to tell client what exactly they’re eligible for and how they could get it. But your job of identifying immigration consequences becomes easier when you have an idea of what relief is and isn’t available to your client.

UNDOCUMENTED CLIENTS ARE NOW ENFORCEMENT PRIORITIES

- For having entered without inspection, a person is inadmissible if they have never gotten asylum or some other status once in the U.S.
- This administration's enforcement priorities are to pick up EVERYONE who is undocumented
 - Undocumented individuals with no criminal history are no longer safe from ICE as they were under the previous administration.
- This means your undocumented clients, even with no criminal history, are in danger of being flagged by court staff, jail staff, or probation officers and having ICE called on them.

WHAT MAKES A CLIENT INADMISSIBLE?

Undocumented clients who aren't put into removal proceedings JUST for being undocumented become inadmissible with convictions for:

- Crime Involving Moral Turpitude
 - Generally requires *INTENT* to cause great bodily harm, defraud, or permanently deprive an owner of property, or in some cases to act with lewd intent or recklessness.
 - Examples: Forgery, stealing, tampering 1st, possibly DWR/S, other crimes with “intent” elements
- Controlled substance offense
- Multiple convictions (two or more) with aggregate sentences of five years or more

CLIENT #5

- Undocumented
- Charged with stealing (class A misdemeanor)
- No other criminal history

Client #5 is inadmissible for committing a CIMT.

But is there relief for him?

CLIENT #5: PETTY OFFENSE EXCEPTION

- Undocumented
- Charged with stealing (class A misdemeanor)
- No other criminal history

Client #5 is inadmissible for committing a CIMT.

But is there relief for him?

YES.

Individuals who commit ONE CIMT,
for which the maximum punishment is one year or less in jail, and
who are sentenced to 6 months or less in jail,
are given a pass with the “petty offense exception.”
ICE will not charge them as being removable for this one conviction.

* Petty offense exception does not waive inadmissibility for drug convictions. *

CLIENT #6

- Undocumented
- Charged with stealing (class A misdemeanor)
- Age 17 when crime committed
- No other criminal history

Client #6 is inadmissible for committing a CIMT.

But is there relief for him?

CLIENT #6: YOUTHFUL OFFENDER EXCEPTION

- Undocumented
- Charged with stealing (class A misdemeanor)
- Age 17 when crime committed
- No other criminal history

Client #6 is inadmissible for committing a CIMT.

But is there relief for him?

YES, the Youthful Offender Exception

For an undocumented individual, charged as an adult with one CIMT.

Waives this CIMT ground of inadmissibility, so long as they don't end up in immigration court for five years after the conviction.

CLIENT #7

- From Nigeria
- Lawful permanent resident
- Charged with multiple counts of forgery
- PD asked PA for 364 day SES, with up to four counts stacked (consecutive)
- PA refused. Client was advised of the PA's offer and his options of trial, pursuant or open plea.
- Client was advised of risk of deportation if convicted of aggravated felonies and given sentence of more than one year.
- Client chose open plea.
- PD called immigration advisor as witness to testify at sentencing.
- Judge gave client 4 year back-up on each count, but suspended the execution of the sentences.

Unfortunately we can't always get the outcome we hope for.

CLIENT #8

When there are no good options...

- Undocumented client, came to US as an adult
- No parents, spouse or children in US
- No fear of returning to home country
- Charged with forcible rape and forcible sodomy
- Victim & family come to deposition, testify credibly, already have U visa (no apparent motive to lie)
- Client wants to return to home country as quickly as possible. Understands he may not be able to return to the US, and is ok with that.
- Negotiated plea to lesser charge (not dangerous felony).
- Advised client he was pleading guilty to aggravated felonies and would not be able to return to the US

PLEAS WHICH ARE MOST HELPFUL

Not this!	Instead, plead to THIS
Possession of marijuana under 35 grams	Write on the plea forms UNDER 30 GRAMS
Unlawful possession of drug Paraphernalia	Ok so long as you do not specify the drug if there's any residue found
Burglary 2 nd	Trespass
Tampering 1 st	Tampering 2 nd
DWS / DWR	OWL / NOL = No intent element
Assaults	Charging language should read reckless, not intentional. If felony assault, see if you can get 364 days to avoid Agg Fel COV

SAFER SENTENCES

- LESS THAN 90 DAYS IN JAIL: For someone with no real criminal history who may be DACA or DAPA eligible
- LESS THAN 180 DAYS IN JAIL: For someone who is facing misdemeanor stealing (or other CIMT) and it's his 1st offense
- LESS THAN ONE YEAR IN JAIL: To avoid making certain crimes into aggravated felonies
- LESS THAN 5 YEARS IN PRISON: For someone with two or more convictions (need aggregate sentences of less than 5 years)
- SIS = CONVICTION for immigration purposes. Do NOT tell your client that *because they get an SIS, they're safe with immigration.*

DOMESTIC SITUATIONS (INCLUDING VOP, AGG STALKING)

- Domestic Assault charges:
 - Plead to regular assault, preferably reckless.
 - No domestic label or qualifier on the charge or in the indictment or information your client pleads to.
 - Eliminate the relationship between the parties from the complaint / information.
 - IF plead to Assault 2, get a sentence under one year if possible.
- Violation of an order of protection is a problematic charge for someone in immigration court. See if you can get the charge changed to something like trespass if that will fit your facts.
- Aggravated stalking and harassment charges also are not looked upon favorably in immigration court.

BEST ADVICE FOR ETHICAL REPRESENTATION OF IMMIGRANTS

- Gather as much information as possible about your client's background.
- Once client is fully aware of charges and possible outcomes, work with client to identify their goals.
 - Client 1: Get out of jail and have ICE hold eliminated. Criminal outcome won't affect her status.
 - Client 2: Avoid aggravated felony convictions and get sentence with rehab options (Choices) so can show immigration court his rehabilitation.
 - Client 3: Avoid imprisonment of five years or more (aggregate). Avoid agg felonies.
 - Client 4: Keep his DACA (or DACA / DAPA eligibility) by no significant misdemeanors and no felonies
 - Client 5: Misdemeanor conviction with sentence (suspended or imposed) of less than 180 days
 - Client 6: Misdemeanor conviction, avoid ICE for five years.
 - Client 7: Main goal was probation but wanted to try and avoid aggravated felony
 - Client 8: Get deported as quickly as possible so serve as little time as possible

BEST ADVICE FOR ETHICAL REPRESENTATION OF IMMIGRANTS

- Once your client's goals are identified, work with immigration advisor to figure out if goals are achievable, and if so, how.
- Negotiate for your client.
- Make sure client has read or heard and understood all discovery.
- Once you have plea offer (or no plea offer), lay out the immigration consequences for client.
- When your client is fully advised, the decision on how to proceed is theirs.
- Document the advice you gave your client and keep any documentation from immigration advisor in your file.
- Help client find immigration attorneys or non-profits, and if the client asks, check with immigration advisor for what will happen to them next.

QUESTIONS?

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Office contact info in database

Be persistent and always
provide me with your timeline.

