OVERVIEW OF IMMIGRATION CONSEQUENCES ANALYSIS

May 2015

Padilla v. Kentucky: Defense counsel is constitutionally obligated to provide affirmative, correct advice about immigration consequences to noncitizen defendants

Failure to provide advice + prejudice is ineffective assistance of counsel

Cannot remain silent

Objectives

1. How to effectively represent noncitizen clients
2. How to determine and advise clients of immigration consequences
3. How to avoid adverse immigration outcomes
Three steps to advising your client

- Step 1 – Investigate Facts
  - Determine client’s immigration status
  - Get criminal record

- Step 2 – Analyze key consequences
  1. Is there a conviction?
  2. Does the offense fall into a ground of removal?

- Step 3 – Advise client and determine priorities; defend against the immigration consequences

STEP 1: INVESTIGATE THE FACTS

Investigate the Facts

- Use a Questionnaire (sample in materials)
- Immigration status (what, when)
- Criminal history (everything, including low-level, vacatur, sealed)
- Family ties
Is Your Client a US Citizen?

How can you tell?

a) Accent
b) Color of skin
c) Knowledge of baseball
d) By asking her

Who are U.S. citizens?

- Born in US + territories
  - Puerto Rico, U.S. Virgin Islands, Guam, or American Samoa and Swains Island
- "Acquired" citizenship from USC parent
- Naturalized
- "Derived" citizenship from a naturalized parent

Sample Questions

1. Where were you born?
   - US Citizen or national if born in US or US territories including Puerto Rico, U.S. Virgin Islands, Guam, or American Samoa and Swains Island
2. Are you a U.S. citizen?
   - If yes, when and how did you become a citizen? Do you have a US passport?
3. Were your parents or grandparents born in the U.S.? Did they ever become U.S. citizens? (If yes, may be a U.S. citizen, get assistance)
What is your client’s particular status?

- Lawful permanent resident status
- Refugee and asylee status
- Individuals with temporary status – nonimmigrants, TPS
- Individuals with no status – undocumented, visa overstays

➢ All non-USC’s can be deported – easily -- for the wrong criminal conviction.

Persons unlawfully present

- Can be removed because of lack of status
- Must be eligible for lawful status or relief from removal to remain legally in the US
  - e.g., VAWA or U Visa if there is DV; Non-LPR cancellation (based on long period in the country and other equities)
- Certain convictions can make things worse

Does Client Have Prior Convictions?
STEP 2: DETERMINE THE IMMIGRATION CONSEQUENCES

Is there a conviction for immigration purposes?

Conviction defined

- A formal judgment of guilt
- or where no formal finding of guilt:
  - If defendant pleads guilty, no contest, or has admitted sufficient facts to warrant a finding of guilt,
  - The judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty.
Are PJC's a conviction?

- If costs imposed, may count as conviction
- Court costs = punishment
  

- If you can get PJC with no costs, might not count as conviction.

Deferred prosecutions are often convictions

- Almost always require some restriction on liberty
- Usually require admission
- Usually signed by judge

**Strategy:** try to get non-admission deferral, or don’t have judge sign (“back-of-the-shuck” deferral)

AOC-CR-610, "admission of responsibility" should be merely evidentiary stipulation but will be treated by ICE as admission.

- See if you can get DA to agree not to check box.
## Drug treatment court

Probably a conviction if D is required to:

1. admit facts in court or plead guilty, and
2. sentenced by court to program or other conditions

## Juvenile Dispositions

- A juvenile court disposition is not a conviction for immigration purposes.  

- A conviction of a minor in adult court is a conviction for purposes of removal.

- However, for DACA USCIS will consider juvenile convictions as discretionary factor.

## Expungements are

- Do not work for immigration—still a conviction  

- Often just make it impossible to get records required to submit to USCIS.

- If Client wants expungement for job, recommend getting several certified copies of pleading and disposition prior to entry of expungement
Vacated convictions work . . . *Except* when reason is to avoid immigration consequences

- The court order should reflect that judgment was vacated for cause (statutory or constitutional violation, or other illegality) and not merely to avoid immigration consequences.

  *Matter of Pickering, 23 I&N Dec. 621 (BIA 2003)*

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**Problems**

Do the following constitute convictions for immig purposes?

1. Your client gets a PIC on misdemeanor charges. Court costs are imposed.

2. Your client makes a written admission of guilt for the prosecutor’s file and completes an anger management program. In exchange, the prosecutor dismisses the charges.


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**Step 2 Continued:**

Does the offense fall within a ground of removal?
Sources of Law

- Immigration and Nationality Act (INA), 8 USC 1101, et seq
- Federal regulations, title 8 of CFR
- Administrative Agency decisions, Board of Immigration Appeals (BIA), http://www.justice.gov/eoir/vll/libindex.html
- 4th and 11th Circuits: law of venue of removal proceedings
- US Supreme Court

Overview of Immigration Consequences

- Aggravated Felonies, 8 USC 1101(a)(43)
  - “The death knell”
- Deportation Grounds, 8 USC 1227(a)
  - “Lose lawful status you already have”
- Inadmissibility Grounds, 8 USC 1182(a)
  - “Can’t get new lawful status or admission”
- Relief Requirements –
  - Bars to eligibility for asylum, cancellation, etc., inadmissibility or other bars

Deportation Grounds, 8 USC 1227(a)

- Generally apply only if lawfully admitted
- Being deportable means that an LPR, for example, can be put in removal proceedings, lose her lawful status, and be removed from US (unless granted relief)
- Generally does not apply to undocumented person that has never been admitted
  - Exception: applicant for non-LPR cancellation can be barred by deportable conviction
Criminal Grounds of Deportability

- Aggravated felony conviction
- Drug conviction
  - Except simple possession 30 grams marijuana
- Crimes involving Moral Turpitude conviction
  - 1 within 5 years of admission + potential sentence of 1 year or more
  - 2 any time after admission “not arising out of a single scheme”
- Firearm or destructive device conviction
- Crime of domestic violence or stalking conviction
- Child abuse, neglect, or abandonment conviction
- Violation of order of protection - civil or criminal finding

Inadmissibility Grounds, 8 USC 1182(a) – Can’t get lawful status or come into the US

- Apply to individuals seeking admission or green card. E.g.:
  - Foreign national applies for H1-B visa, but has cocaine conviction. Will be denied admission to US because inadmissible
- Undocumented person applies for green card through spouse, but has a conviction that makes her inadmissible. Will be denied green card (unless eligible for a waiver)
- LPR has conviction that makes her inadmissible, but not deportable. ICE CANNOT place her in removal proceedings if she stays in U.S.
  - But she cannot leave U.S. [otherwise denied admission on return]
  - Delays applying for naturalization because it is a GMC requirement

Criminal Grounds of Inadmissibility

- Controlled substance offense - conviction or admission
- “Reason to believe” drug trafficker
- Crime involving moral turpitude (CIMT) - conviction or admission
  - Petty offense exception: for 1 CIMT if max possible sentence one year or less imprisonment + actual 6 months or less
- Prostitution or commercialized vice
- 2 or more offenses + aggregate sentence of 5+ years
Grounds of Inadmissibility & Deportability

<table>
<thead>
<tr>
<th>Inadmissibility (8 USC 1182)</th>
<th>Deportability (8 USC 1227)</th>
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<tbody>
<tr>
<td>Crimes involving moral</td>
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<td>turpitude</td>
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<td>Controlled Substance</td>
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<td>Offense</td>
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<td>Prostitution related</td>
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<td>offenses</td>
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<td>Conviction of multiple</td>
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<td>offenses (5 years or more)</td>
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<td></td>
<td>Firearms offenses</td>
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<td>Domestic Violence offenses</td>
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<td>Aggravated Felonies</td>
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Problems: Deportable and Inadmissible

1. LPR Ali is inadmissible but not deportable, for a conviction from 20 years ago. Can he:
   - Be stripped of LPR status if he remains in the U.S.?
   - Travel outside the U.S. and safely return?

2. LPR Barbara is deportable but not inadmissible. Can she:
   - Be stripped of LPR status and removed if she remains in the U.S.?
   - Safely apply for naturalization?
   - Safely renew her 10-yr green card?
Aggravated Felonies - 8 USC 1101(a)(43)

- Should be avoided - kiss of death
- May include misdemeanors
- Most severe immigration consequences
  - Bars most forms of relief from removal (asylum, cancellation of removal, naturalization)
  - Permanently barred from entering the U.S. legally
  - Barred from voluntary departure
  - Enhanced prison sentence for illegal reentry

Common Aggravated Felonies

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<tr>
<th>regardless of sentence</th>
<th>triggered by one year sentence</th>
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<tr>
<td>Murder</td>
<td>Theft</td>
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<td>Rape</td>
<td>Receipt of Stolen Property</td>
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<td>Sexual Abuse of a Minor</td>
<td>Burglary</td>
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<td>Drug Trafficking</td>
<td>Crime of Violence, per 18 USC 16</td>
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<tr>
<td>Child Pornography</td>
<td>Perjury</td>
</tr>
<tr>
<td>Firearm trafficking</td>
<td>Forgery</td>
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<tr>
<td>Deceit or Fraud where loss to victim exceeds $10,000</td>
<td>Obstruction of Justice</td>
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</tbody>
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**Aggravated felony triggered by a one-year sentence**

The sentence includes any period of incarceration ordered, regardless of suspension. 8 USC § 1101(a)(48)(B).
- Includes suspended sentence
- Even if D is released prior to serving the maximum term
- Good news: NC misdemeanors will generally not trigger 1 year AF because max punishment is less
Problems – T or F

1. Client is sentenced to 9 months min and 11 months max on a theft offense. He is convicted of an aggravated felony.

2. Client is sentenced to 8 months min and 10 months max on two counts of burglary, to run consecutively. He is not convicted of an aggravated felony.

3. Client is sentenced to a suspended sentence of 10 months min and 12 months max on a forgery offense. He is convicted of an aggravated felony.

STEP 3: ADVISING YOUR CLIENT AND DETERMINING PRIORITIES

Remember to advise your client

CAUTION

If plea makes client deportable, you must provide specific, correct advice! It is not sufficient to say you "might" be deported

☐ Are alternative dispositions available that avoid deportability, inadmissibility, or bars to relief from removal?
What are your client’s goals?

- Avoid consequences that trigger deportation
- Immigration consequences not a priority
- Minimize jail time

Criminal defense goals for an LPR

1. Avoid an aggravated felony conviction.
   - Causes deportability with almost no possible relief; bars even voluntary departure
2. Avoid any other deportable conviction
   - LPR can be placed in removal proceedings, but might qualify for discretionary relief
3. Avoid inadmissible conviction, or avoid travel outside the U.S.

Defense goals for undocumented client

1. Avoid aggravated felony conviction.
   - This bars most forms of relief, including voluntary departure and may trigger immediate removal without a hearing
2. Avoid inadmissible conviction, or any conviction that is a bar to specific relief for which s/he may be eligible.
3. If client is planning to apply for non-LPR, VAWA or NACARA cancellation, avoid deportable conviction.
Defense goals for client who will be ordered removed

- E.g., undocumented with no relief; deportable LPR with no waiver; most immigrants with prior removal/deportation
- Avoid contact with DHS. If possible, avoid jail time
  - Avoid future contacts with DHS [travel, arrests, naturalization, green card renewal]
- Warn of federal criminal penalties for illegal re-entry following removal and avoid convictions (such as agg fels) that will enhance re-entry sentences

Resources

- Immigration Consequences Manual (but needs to be updated)
- Resources at http://defendingimmigrants.org/
- Contact Sejal Zota at sejal@nipnlgl.org
- Contact other consulting immigration attorneys