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Neil is a 24-year old lawful permanent resident of the United States. Born in Pakistan, Neil came to the U.S. when he was 6 years old, but has not yet become a U.S. citizen. His mother, father, two sisters, brother, and several cousins all live in the U.S. Neil is a graduate of community college and employed as an auto mechanic. After being taunted with racial slurs and threatened by some former customers, Neil purchases a gun for his safety. One night as he is driving home from work, Neil is stopped by a police officer for reckless driving—for passing a car in a no pass zone with the vehicle lights cut off. The officer searches Neil's car and finds the gun Neil recently purchased. Neil is charged with reckless driving and carrying a concealed gun. The prosecutor will dismiss the charge of reckless driving if Neil pleads guilty to the gun charge. Neil's attorney tells him that a reckless driving conviction could result in a suspension of his driver's license based on his driving record, so Neil takes the deal. A few years later, Neil decides to become a citizen. After filing his citizenship application, Neil is notified by immigration officials that deportation proceedings are being initiated against him for a conviction of a firearm offense. His criminal lawyer was unaware that a misdemeanor firearm offense could lead to Neil's deportation, and did not discuss these consequences with him. Had Neil negotiated a plea to the reckless driving offense rather than the carrying a concealed gun charge, or had he gone to trial and been acquitted, he would not be facing deportation today. He also might have succeeded in his application to become a U.S. citizen.

1.1

Purpose of Manual

Most criminal defense attorneys are now aware that noncitizens may face severe immigration consequences as a result of a criminal conviction. The complex interrelationship between federal immigration law and state criminal law has made it difficult, however, for defense counsel to advise clients about the impact that a particular conviction will have on their immigration status.

The purpose of this manual is to help defense counsel understand this highly technical field so that they will be in a better position to advise their noncitizen clients of the possible immigration consequences of the criminal case.

This manual presents the law of immigration consequences as well as options that may assist clients in reducing or eliminating those consequences. The manual does not purport to provide specific legal advice in individual cases. Defense counsel and their clients should seek advice from an immigration attorney as necessary.

1.2

Role of Defense Counsel

A. Practice Standards and Cases Recognize Defense Counsel's Role

A growing number of practice standards recognize that criminal defense counsel's role includes investigating and advising noncitizen clients about the potential immigration consequences of a criminal case. The standards of the American Bar Association (ABA) were revised in 1999 to recognize that defense counsel has an obligation to investigate and advise clients of potential immigration consequences. *See* ABA Standards for Criminal Justice, Pleas of Guilty, Standard 14-3.2(f) (3d ed. 1999) ("To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea."); Commentary to Standard 14-3.2(f) ("it may well be that many clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of conviction"), posted at www.abanet.org/crimjust/standards/pleasofguilty.pdf; *see also* National Legal Aid and Defender Association (NLADA) Performance Guidelines for Criminal Defense Representation, Performance Guideline 6.2(a)(3) (1995) (citing the duty of defense counsel in the plea bargaining process to "be fully aware of . . . consequences of conviction such as deportation . . ."), posted at www.nlada.org/Defender/Defender_Standards/Performance_Guidelines#sixtwo.

The Performance Guidelines of the North Carolina Office of Indigent Defense Services (IDS) also call for counsel to discuss with the client the possibility of deportation and other effects on immigration status. *See* IDS Performance Guidelines for Indigent Defense Representation in Non-Capital Criminal Cases at the Trial Level, Guideline 8.2(b) (2004), posted at www.ncids.org.

In addition, a number of state and federal courts, including the U.S. Supreme Court, have recognized the need for criminal defense counsel to advise clients about immigration consequences. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 322–23 & nn.48, 50 (2001) (citing ABA standards with approval, court states that “competent defense counsel” would have advised the petitioner at the time of the plea of the importance of preserving his eligibility for relief from deportation); *State v. Paradox*, 101 P.3d 799, 801 (New Mexico 2004) (holding that a criminal defendant’s attorney has “an affirmative duty to determine [the client’s] immigration status and provide him with specific advice regarding the impact a guilty plea would have on his immigration status”).

B. More Noncitizen Clients May Face Adverse Immigration Consequences

There are several factors that have increased the need for criminal defense counsel to understand and advise clients about potential immigration consequences. Defense counsel will simply see more noncitizen clients. According to the 1990–2000 census, North Carolina experienced a percentage increase in foreign-born persons of 274%.

Federal immigration law has also become more restrictive during the last decade, making it more likely that defense counsel will need to advise criminal defendants about the possibility of deportation or other adverse immigration consequences. Deportation of noncitizens on the basis of criminal conduct is not new. The federal government has deported individuals on the basis of criminal convictions since the 1800s. With the passage of major immigration legislation in 1996, however, Congress significantly expanded the number and type of criminal convictions that render a noncitizen subject to deportation and eliminated many defenses.

The federal government has also devoted increased resources to enforcing the immigration laws. For example, in 1995, the federal government deported 33,842 individuals based on criminal status. By 2005, the number of individuals deported on the basis of criminal status had risen to 89,406.

Enforcement of the federal immigration laws is also occurring at the local level in a number of states. G.S. 128-1.1(c1) authorizes local law enforcement agencies in North Carolina to work with federal authorities to remove noncitizens if the agency has entered into a specific agreement with federal authorities. *See* INA § 287(g), 8 U.S.C. § 1357(g). To date, the North Carolina counties of Mecklenburg, Gaston, Alamance, and Cabarrus have entered into such agreements with the federal government.

The more restrictive nature of immigration law and its increased enforcement make it increasingly likely that a noncitizen charged with criminal conduct may face deportation.

C. Defense Counsel Should Advise Noncitizen Clients of Potential Immigration Consequences Because No One Else Will

Defense counsel should also advise clients of the potential immigration consequences of the criminal case because they are likely the only actors in the system who will do so. G.S. 15A-1022 requires judges to provide a general advisement to a defendant before accepting a guilty plea, warning the defendant that the conviction may carry adverse immigration

consequences. The judge is not required to explain the particular immigration consequences to the defendant. Indigent clients are usually not in a position to hire separate immigration counsel to obtain the advice they need about the consequences of the criminal case. Further, indigent persons do not have the right to appointed counsel in any immigration proceedings.

D. Defense Counsel Should Advise Noncitizen Clients of Potential Immigration Consequences Because of the Significance of the Consequences

Defense counsel should consider immigration consequences in every case involving a noncitizen client because of the potential severity of the consequences. Deportation is often automatic; certain convictions do not allow the immigration judge to provide any relief or leniency in the immigration proceedings, regardless of the client's equities. A noncitizen client may be subject to automatic deportation even if he or she has been in this country since an early age, has been a lawful permanent resident (i.e., is a "green card" holder), has assimilated completely into American society, and has no prior convictions. Thus, by the time the client gets to immigration court, the consequences may be set in stone. Even if the client has access to one, an immigration lawyer may be unable to mitigate the impact of the criminal disposition. For many, the adverse immigration effects of a criminal case may be far more important than the sentence imposed in the underlying criminal case.

A criminal conviction can also result in adverse immigration consequences other than deportation. A conviction can disqualify a person from legalizing his or her status, from becoming a U.S. citizen, from obtaining a grant of asylum, and from raising various defenses against deportation.

Some attorneys assume that only felony offenses carry immigration consequences, but a person can be deported for relatively minor misdemeanor offenses, such as shoplifting or carrying a concealed gun. Sometimes it is possible for a client to avoid the adverse consequence by accepting a plea to a different violation, to a lesser included or related offense, or to the offense as charged but with a shorter sentence.

1.3

How to Use This Manual

The body of law relevant to understanding the immigration consequences of a criminal case is complex and has become increasingly so in recent years. This manual attempts to organize and present this area of immigration law in an accessible way for North Carolina criminal defense attorneys representing noncitizen clients.

Chapter 2, Determining Your Client's Citizenship and Immigration Status, explains how to determine whether a particular client is a noncitizen and thus subject to the immigration laws. Once you have determined that a client is a noncitizen, Chapter 2 helps you determine the client's particular immigration status. Knowing your client's particular status is necessary to understanding the possible immigration consequences of the criminal case.

Chapter 3, Criminal Grounds of Removal, presents detailed information about the types and categories of crimes that can result in adverse immigration consequences. This information is essential to determining whether the proposed disposition carries immigration consequences.

Chapter 4, Conviction and Sentence for Immigration Purposes, analyzes whether various North Carolina dispositions are considered convictions for immigration law purposes. Chapter 4 also describes what constitutes a sentence for immigration law purposes. This information is likewise relevant to determining whether the proposed disposition in your case carries immigration consequences.

Chapter 5, Determining Possible Immigration Consequences Based on Your Client's Immigration Status, lays out the possible immigration consequences of the criminal case based on your client's particular immigration status. This chapter analyzes the consequences separately for lawful permanent residents, refugees, asylees, individuals with temporary status, and noncitizens without status.

Chapter 6, Options for Minimizing Adverse Immigration Consequences, suggests options for avoiding or mitigating adverse immigration consequences in certain criminal cases.

Chapter 7 describes procedures and practices related to removal, and *Chapter 8* discusses post-conviction issues pertaining to noncitizen clients.

Appendix A: Selected Immigration Consequences of North Carolina Offenses is a chart of immigration consequences of various North Carolina offenses. *Appendix B* is a list of immigration resources in North Carolina.

1.4

Important Terminology Used in This Manual

A. Noncitizen

The manual uses the term “noncitizen” to refer broadly to any individual who is not a citizen of the United States and who is therefore subject to potential immigration consequences as a result of criminal conviction. The term includes lawful permanent residents, refugees, asylees, temporary visa holders, and undocumented persons. These categories are described in more detail in Chapter 2.

B. Removal

Removal is the deportation or expulsion of a noncitizen from the United States. Prior to 1996, immigration law provided for two types of processes to eject noncitizens from the U.S.: “deportation” and “exclusion.” Laws passed in 1996 ended the distinction and created a single process called removal (so that an individual is technically “removed” rather than “deported”). All immigration court proceedings that began on or after April 1, 1997, are called “removal” proceedings. Noncitizens can be removed from the U.S. because of certain criminal convictions. Removal and other adverse immigration consequences are described in more detail in Chapter 3.

C. Conviction (for Immigration Purposes)

Immigration law defines “conviction” broadly. State law does not determine whether a state disposition will be considered a conviction for immigration law purposes. Chapter 4 discusses the immigration law definition of the term.

D. Immigration and Nationality Act

The Immigration and Nationality Act (INA) is the immigration statute. It is codified in Chapter 8 of the United States Code, and it establishes the basic structure of U.S. immigration law, including admission, exclusion, and naturalization. Section 212 of the INA, codified at 8 U.S.C. § 1182, enumerates the grounds of admissibility of noncitizens into the U.S. Section 237 of the INA, codified at 8 U.S.C. § 1227, enumerates the grounds of deportability of noncitizens from the U.S. When citing to the INA, this manual refers both to the pertinent INA section (e.g., INA § 212) and the codified section (e.g., 8 U.S.C. § 1182).

E. Department of Homeland Security

The Homeland Security Act of 2002 abolished the Immigration and Naturalization Service (INS) and created the Department of Homeland Security (DHS). The regulation and enforcement of immigration laws were placed under three new bureaus under DHS—U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS), described below.

U.S. Immigration and Customs Enforcement (ICE). This branch of DHS is responsible for the detention and removal of noncitizens. ICE issues detainers (warrants) on noncitizens in jails and prisons and issues summonses for removal hearings. This is the branch of the Department of Homeland Security that defense attorneys and noncitizen defendants are most likely to deal with.

U.S. Customs and Border Protection (CBP). This branch of DHS conducts border inspections at ports of entry into the U.S., including airports, seaports, and U.S. checkpoints. “Inspection” refers to inspection of travel documents from other countries, fingerprinting, and searches of persons and belongings.

U.S. Citizenship and Immigration Services (USCIS). This branch of DHS has jurisdiction over the adjudication of applications for an immigration benefit, such as a visa, naturalization, asylum, and modification (called adjustment) of immigration status.

F. Immigration Court

Removal proceedings are normally held in immigration court, which is an administrative court of the Department of Justice, Executive Office for Immigration Review. *See* INA § 240, 8 U.S.C. § 1229a. As part of the Department of Justice, immigration court is independent of the Department of Homeland Security. An individual placed into removal proceedings has a right to an attorney, but at his or her own expense because such

proceedings have been designated as civil, not criminal, in nature. Such an individual also has a right to present any evidence on his or her own behalf, a right to cross-examine government witnesses and documents, and a right to appeal.

Either party can appeal the decision of the immigration judge to the Board of Immigration Appeals (BIA), an administrative court in Falls Church, Virginia. The noncitizen can appeal the decision of the BIA to the federal court of appeals in which the immigration court physically sits.

There is currently no immigration court in North Carolina. Removal proceedings for noncitizens residing in North Carolina are generally held in Atlanta. Removal hearings for a small number of individuals serving long sentences in North Carolina correctional facilities take place in Central Prison in Raleigh. An immigration court will be established in Charlotte, North Carolina some time in 2008. A case arising out of the Atlanta immigration court would be reviewed by the Eleventh Circuit Court of Appeals, and a case arising out of the future Charlotte immigration court or Central Prison will be reviewed by the Fourth Circuit Court of Appeals.

