

## CHAPTER 6:

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The immigration consequences of conviction can be severe and can extend to a large number of criminal dispositions. In some cases, however, your client may be able to avoid these

adverse immigration consequences or at least minimize them so that he or she remains eligible for immigration relief from removal.

This chapter presents options for minimizing adverse immigration consequences in the criminal case. Section 6.1 describes approaches that are generally applicable regardless of the specific type of case. Whether that approach is feasible will depend, of course, on the circumstances of the case. The remaining sections are broken down by specific categories of offenses and discuss potential options applicable to that offense type. Bear in mind that the following options are not case-specific—they are not a substitute for individualized research or consultation with an immigration attorney.

## 6.1

### General Rules

#### A. Offenses That Do Not Carry Adverse Immigration Consequences

If your client pleads guilty or is found guilty, the most favorable result for the client from an immigration standpoint is a plea and sentence to an offense that does not fall within a crime-based ground of removal (deportability or inadmissibility) or that does not bar immigration relief from removal. For example, if a number of different offenses are charged, it may be possible to identify a charge with less serious immigration consequences. In other cases, it may be possible to negotiate a plea to a lesser included offense, or a related offense, that does not contain an element triggering deportability or inadmissibility.

For example, the offense of felony breaking and entering is a crime involving moral turpitude (CMT). A conviction for the lesser included offense of misdemeanor breaking and entering is not a CMT because the offense does not contain an intent to commit a felony or larceny. *See Matter of M*, 2 I&N Dec. 721 (BIA 1946); *Matter of G*, 1 I&N Dec. 403 (BIA 1943).

To determine whether an offense and its lesser included and related offenses carry adverse immigration consequences, *see* Appendix A, Selected Immigration Consequences of North Carolina Offenses. You should also contact an immigration attorney if you need assistance in a particular case.

#### B. Deferred Prosecution

A deferred prosecution may or may not constitute a conviction depending on the structure of the agreement. *See supra* 4.1C (discussion of when a deferred prosecution should not constitute a conviction). Certain deferrals may be a favorable option from an immigration standpoint.

#### C. Record of Conviction

To determine whether an individual is removable based on a conviction, the immigration court examines the elements of the statute violated, not the individual's conduct. If the statute is broad enough to include offenses that carry an immigration penalty and offenses

that do not, then the immigration court is allowed to examine the record of conviction to determine the offense for which the defendant was convicted. *See supra* § 3.5A (describing documents comprising record of conviction). If the record of conviction does not establish all of the elements necessary for a deportable offense, the noncitizen should not be found deportable.

The immigration court may look beyond the record of conviction to determine aspects of the crime that have been found as going beyond the elements of the offense, such as the amount of loss (aggravated felony triggered by a loss exceeding \$10,000), the age of the victim in sex offenses (sexual abuse of minor aggravated felony), and the relationship between the parties in assault cases (crimes of domestic violence). *See Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007) (holding that the immigration court may rely on evidence outside of the record of conviction to determine whether amount of loss to the victim exceeded \$10,000 in an offense involving fraud or deceit).

The plea proceedings are considered a part of the record of conviction. In North Carolina, there is generally no transcription of the plea proceedings in district court. The record of conviction in district court is generally composed of the charging document (e.g., warrant), any judgment, and any other documents in the shuck. In superior court, plea proceedings are recorded and, thus, are part of the record of conviction in felony cases and misdemeanors appealed for trial de novo. There is also usually a written transcript of plea in superior court.

If during the plea colloquy in superior court the prosecutor's factual proffer includes allegations that are broader than needed to establish the basis for the plea and that are disputed by the client, defense counsel should consider contesting them. The additional allegations may trigger adverse immigration consequences. Defense counsel may also consider contesting allegations that relate only to a charge that is being dismissed. To contest the allegations, counsel can simply state his or her disagreement with the particular aspects of the proffer when asked by the judge to stipulate to the prosecutor's recitation of facts. Counsel need not present evidence or call witnesses.

For example, in a case in which the defendant is charged with second degree burglary and pleads guilty to felony breaking and entering, the prosecutor may read from the police report and recite allegations that establish not only breaking and entering but also potentially burglary in the second degree. When asked by the judge whether the client stipulates to those facts, defense counsel can contest the burglary allegations by responding that the defendant does not admit to conduct related to burglary, but admits to the breaking and entering.

#### **D. Pleading Not Guilty**

If the proposed plea carries adverse immigration consequences, your client may decide to plead not guilty. Even if a plea offer appears favorable in terms of the criminal consequences, the client may decide that the immigration consequences are a more important consideration. In those cases, you need to consider litigating possible suppression issues and other pretrial motions as appropriate. The client may want to take the case to trial to seek acquittal of all charges or at least of charges that carry immigration penalties.

### E. Post-Conviction Relief

If a defendant has a final judgment of conviction that carries adverse immigration consequences, he or she may consider filing a motion to vacate the conviction or sentence, if warranted. For example, if trial counsel misadvised the defendant of the immigration consequences of the conviction and the defendant relied on that information in deciding to plead guilty, the defendant may have grounds to file a post-conviction motion based on ineffective assistance of counsel. *See* Chapter 8 for options relating to post-conviction relief.

## 6.2 Cases Involving Aggravated Felonies

A conviction of an aggravated felony carries the most severe immigration consequences, including mandatory deportation in most cases, mandatory detention during removal proceedings, a permanent bar from future immigration to the U.S., and a jail sentence of up to twenty years if the individual illegally reenters the U.S. after deportation.

The following options may not eliminate all the grounds of deportability or inadmissibility, but they may avoid the more severe immigration consequences of an aggravated felony conviction.

### A. Aggravated Felonies Triggered by a One Year Term of Imprisonment

To constitute an aggravated felony, many offenses must be accompanied by a one year sentence of imprisonment (actual or suspended) or more. The principal offenses in this category are:

- Theft offenses
- Burglary and felony breaking and entering
- “Crimes of violence” as defined under immigration law, such as certain intentional assault offenses and sexual assault offenses
- Forgery and counterfeiting offenses
- Obstruction of justice offenses

A complete description of those offenses is in § 3.3A *supra*.

**Maximum Sentence of Less Than 12 months.** For offenses in this category, a maximum sentence of imprisonment of less than 12 months, active or suspended, will not constitute an aggravated felony. Thus, if a person is convicted of second-degree burglary (a Class G felony) and receives a sentence of 9 months minimum and 11 months maximum (active or suspended), he or she would not be subject to the immigration consequences associated with this category of aggravated felony. Defense counsel should regard a sentence of 10 months minimum and 12 months maximum, however, as triggering this category of aggravated felony on the ground that the maximum sentence is one year. *But see supra* § 4.3C n.1 (discussing possible argument that such a sentence might be construed as 360 days and not a sentence of one year).

***Consecutive Sentences with Individual Counts of Less Than 12 months.*** As long as no individual count results in a maximum sentence of 12 months or longer, a total term of imprisonment (active or suspended) of 12 months or more will not trigger these aggravated felony grounds. For example, if your client is sentenced to 16 months minimum and 20 months maximum on one count of second-degree burglary, he or she will have an aggravated felony conviction. However, if he or she is sentenced to 8 months minimum and 10 months maximum on two counts of burglary, to run consecutively, he or she will not have an aggravated felony conviction.

***Shorter Active Sentence vs. Longer Suspended Sentence.*** A conviction with an active sentence carrying a maximum term of less than 12 months would not constitute an aggravated felony in this category, while a suspended sentence carrying a maximum term of 12 months or longer would. Thus, if a person accepted a plea to an active sentence of 9 months minimum and 11 months maximum for second-degree burglary, instead of a suspended sentence of 13 months minimum and 16 months maximum, the person would not have an aggravated felony conviction in this category. Of course, the decision to do active time instead of a suspended sentence rests with the client based on the client's view of his or her circumstances and priorities.

#### **B. Aggravated Felonies Triggered by More Than a \$10,000 Loss**

The convictions listed below will be considered an aggravated felony if the amount of loss is more than \$10,000:

- Crimes involving fraud or deceit with a loss to the victim of more than \$10,000
- Money laundering involving more than \$10,000
- Tax evasion with a loss to the government of more than \$10,000

The Board of Immigration Appeals has held that the amount of loss is generally not an element of the fraud-related offenses listed above and, thus, may be proven by evidence outside the record of conviction. *See Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007). If the plea agreement indicates the crime involves a loss of \$10,000 or less, this category of aggravated felony should probably not apply.

A conviction of multiple counts of fraud, each carrying a loss of less than \$10,000 but with an aggregate loss of more than \$10,000, may qualify as an aggravated felony. *Cf. Khalayleh v. INS*, 287 F.3d 978 (10th Cir. 2002) (indictment alleged "single scheme to defraud" and therefore proper loss calculation included losses from all four counts, which totaled more than \$10,000).

#### **C. Crime of Violence Aggravated Felony**

A crime of violence as defined in 18 U.S.C. § 16, plus a maximum sentence of imprisonment (active or suspended) of one year or longer, will be considered an aggravated felony offense. Offenses considered to be crimes of violence generally include sexual assaults, intentional assaults, kidnappings, robberies, and burglaries. For a discussion of the definition of crime of violence, *see supra* § 3.3B.

A crime that penalizes negligent or accidental conduct is not considered a crime of violence under immigration law and therefore is not an aggravated felony. Consequently, a conviction of an offense such as felony serious injury by vehicle under G.S. 20-141.4(a3) or felony death by vehicle under G.S. 20-141.4(a1) should not be considered a crime of violence aggravated felony even if the defendant receives a sentence of imprisonment of twelve months or more.

It is unclear whether a state offense that requires proof of reckless use of force qualifies as a crime of violence. Such an offense will probably not be considered a crime of violence in a court under the jurisdiction of the Fourth Circuit, such as the future immigration court in Charlotte. *See supra* § 3.3B (discussion of whether reckless crimes constitute a crime of violence).

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**Practice Note:** A crime of violence aggravated felony does not cover any misdemeanor assault convictions because under North Carolina sentencing law the maximum sentence for a misdemeanor is 150 days.

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## 6.3 Cases Involving Drugs

Any violation of law relating to a controlled substance will subject your noncitizen client to removal based on controlled substance grounds (with the exception discussed *infra* § 6.3A). Certain drug offenses may also be considered aggravated felonies and carry additional adverse immigration consequences.

In many cases, the consequences of a drug conviction are worse from a noncitizen client's perspective than other criminal-based grounds of removal (except for aggravated felonies). Specifically, drug offenses will likely render an LPR client deportable and ineligible for certain forms of relief. Drug offenses will likely render non-LPR clients inadmissible and permanently bar them from acquiring LPR status. If your client is charged with a drug offense, the following options may mitigate these immigration consequences or at least the additional consequences of an aggravated felony drug conviction.

### A. Possession of 30 Grams or Less of Marijuana

A conviction of possession of 30 grams or less of marijuana, although a drug offense, is exempt from many immigration consequences if the defendant has no prior drug convictions. An LPR will avoid deportability (but not inadmissibility after traveling abroad). A non-LPR will be inadmissible, but he or she will not necessarily be barred from adjusting to LPR status in the future because this ground of inadmissibility can be waived by the immigration court. If your client is pleading guilty to a Class 1 misdemeanor possession of marijuana (which covers quantities of more and less than 30 grams), you should document in the record of conviction that the quantity involved is 30 grams or less, if applicable. It is important to do so in case your client is deemed inadmissible and needs to apply for a waiver of the conviction. *See supra* § 3.5C (describing noncitizen's burden of establishing right to relief from removal).

## B. Simple Possession of a Controlled Substance

A conviction of possession of a controlled substance with intent to manufacture, sell, or deliver constitutes a drug trafficking aggravated felony and triggers the severe consequences associated with aggravated felonies.

If a defendant has no prior drug convictions, a conviction of simple possession of a controlled substance (with the exception of possession of more than five grams of crack cocaine and any amount of flunitrazepam, commonly known as the date rape drug) is not considered a drug-trafficking aggravated felony. *See supra* § 3.3B (discussing offenses that do not constitute a drug trafficking aggravated felony). While such a conviction will still have adverse immigration consequences as a conviction related to a controlled substance, it will not have the more severe consequences associated with an aggravated felony conviction. The difference in consequences may be particularly significant to an LPR client. *See supra* § 5.1B (discussing consequences of aggravated felony conviction for LPR clients).

## C. Accessory after the Fact

The offense of accessory after the fact to a drug offense (under G.S. 14-7) is not considered a drug offense and thus does not trigger the immigration consequences associated with a drug offense. *See Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997). An accessory after the fact conviction is considered an “obstruction of justice offense,” however. *See id.* Thus, if accompanied by a one-year term of imprisonment (active or suspended) or more, an accessory after the fact conviction will constitute an aggravated felony. An accessory after the fact offense is generally punishable two classes lower than the principal offense under North Carolina’s structured sentencing scheme.

This rule does not apply to the offenses of attempt, conspiracy, and accessory before the fact to a drug offense, which are drug offenses.

## D. Non-Drug Charges

Accompanying non-drug charges may have less serious or no adverse immigration consequences and may be an appropriate basis for a plea agreement. For assistance in determining whether accompanying charges may carry adverse immigration consequences, *see* Appendix A, Selected Immigration Consequences of North Carolina Offenses, or contact an immigration attorney.

## E. Admissions Involving Drugs

Admissions about drugs during the course of criminal proceedings may result in adverse immigration consequences, even when there is no conviction. For example, an admission of drug use on the record in court may be used to demonstrate drug addiction or drug abuse, a basis for deportation. *See supra* § 3.3D (discussion of drug addiction and drug abuse ground of deportability). Such an admission in drug treatment court could result in adverse immigration consequences. For more information about drug treatment court, *see supra* § 4.2B.

## 6.4

### Cases Involving Crimes Involving Moral Turpitude

There is no statutory definition for the immigration term “crime involving moral turpitude” (CMT). CMT determinations have generally been based on case law and are thus subject to the interpretation of an immigration judge.

A conviction for a CMT may render your client deportable or inadmissible. The following options may mitigate the immigration consequences that stem from a CMT offense.

#### A. Offense That Is Not a Crime Involving Moral Turpitude

Some of the offenses charged, their lesser included offenses, or related offenses may not be CMT offenses and may not have immigration consequences. For example, the offense of assault with a deadly weapon is likely a CMT, but the offense of simple assault is not. Other examples of crimes not involving moral turpitude include misdemeanor breaking and entering, carrying a concealed weapon, trespass, unauthorized use of a vehicle, drunk and disruptive, and disorderly conduct.

An impaired driving conviction under North Carolina law may constitute a CMT offense depending on the presence of aggravating factors. An impaired driving offense with no aggravating factors is not a CMT. An impaired driving conviction with an aggravating factor of driving with a revoked license is possibly a CMT offense. An impaired driving conviction with other aggravating factors is probably not a CMT. For a further discussion, *see supra* § 3.3C.

For assistance in determining whether an offense is considered a CMT, *see* Appendix A, Selected Immigration Consequences of North Carolina Offenses, or contact an immigration attorney.

#### B. One Misdemeanor CMT

If a noncitizen defendant has no prior CMT convictions and is convicted of only one non-DWI misdemeanor CMT, he or she avoids all adverse immigration consequences (including inadmissibility, deportability, and bar to naturalization), as long as the offense does not fall within another ground of removal (such as a domestic violence offense). *See supra* § 3.3C (CMT deportation grounds for noncitizen admitted for less than five years); § 3.4B (petty offense exception to inadmissibility); § 5.1E (petty offense exception for naturalization purposes). This approach is specific to North Carolina because under North Carolina’s structured sentencing law the maximum sentence for a misdemeanor is 150 days. It is not clear whether a DWI, if a CMT, would satisfy the exceptions based on sentence length (*see supra* § 4.3D for discussion of potential sentence).

#### C. One Felony CMT for Noncitizen Admitted to the U.S. for More Than Five Years

If your client was lawfully admitted to the U.S. more than five years ago and has no prior CMT convictions, he or she is not deportable if convicted of only one felony CMT or multiple CMTs arising out of the same transaction. *See supra* § 3.3C (discussion of CMT

deportation grounds for noncitizen admitted for more than five years). However, the felony CMT must not fall within another ground of removal, such as felony larceny with a sentence of imprisonment of one year or more, which constitutes an aggravated felony conviction.

## 6.5 Cases Involving Firearms

Offenses in which the use of a firearm is an essential element will render your lawfully-admitted client deportable based on the firearm ground of deportability. Offenses containing a general weapon element (such as armed robbery) will also render your lawfully-admitted client deportable on this ground if the record of conviction establishes that the weapon involved was a firearm. *See supra* § 3.3E (discussion of what constitutes a firearm). Certain firearm offenses may also be considered aggravated felonies and carry additional adverse immigration consequences.

There is no firearm ground of inadmissibility. If, however, the firearm-related offense constitutes a crime involving moral turpitude, which is one of the crimes of inadmissibility, the offense would render the person inadmissible. For example, an offense involving the sale of a firearm is probably a crime involving moral turpitude.

If your client is charged with a firearm offense, the following options may eliminate the immigration consequences or at least the added consequences of an aggravated felony firearm conviction.

### A. Weapons Offenses That Do Not Specifically Involve a Firearm

If a noncitizen is convicted of an offense containing a general weapon element, and the elements of the offense or the record of conviction do not establish that the weapon is a firearm, the offense does not qualify as a firearm offense for immigration purposes.

### B. Non-Aggravated Felony

A firearm offense can be considered an aggravated felony on three different grounds. First, certain offenses involving sale or delivery of firearms may be deemed a firearm trafficking offense. Second, specific firearm offenses, such as possession of a machine gun and possession of a firearm by a felon, are considered aggravated felonies because similar federal offenses have been designated as aggravated felonies in the immigration statute. Third, any firearm offense might be considered a “crime of violence” aggravated felony if accompanied by a sentence of imprisonment (active or suspended) of one year or longer.

A non-aggravated felony firearm conviction will still have adverse immigration consequences as a firearm-related offense, but it will not have the more severe consequences associated with an aggravated felony conviction.

For assistance in determining whether a firearm-related offense may be considered an aggravated felony, *see* Appendix A, Selected Immigration Consequences of North Carolina Offenses, or contact an immigration attorney.

### C. Accessory after the Fact

The offense of accessory after the fact to a firearm offense (under G.S. 14-7) is probably not a firearm offense and thus probably does not trigger the immigration consequences associated with a firearm offense. *Cf. Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997) (holding that federal accessory after the fact offense under 18 U.S.C. § 3 insufficiently relates to a controlled substance offense because it is not an inchoate crime, but a crime separate and apart from the underlying crime). An accessory after the fact conviction is considered an “obstruction of justice offense,” however, and is considered an aggravated felony offense if accompanied by a one-year term of imprisonment (active or suspended) or more. An accessory after the fact offense is generally punishable two classes lower than the principal offense under structured sentencing.

This rule does not apply to the offenses of attempt, conspiracy, and accessory before the fact to a firearm offense, which are firearm offenses.

## 6.6 Cases Involving Domestic Violence

Domestic violence offenses may make your lawfully admitted client deportable based on the domestic violence ground of deportability. The elements of the offense must establish that the offense is a “crime of violence” as defined in 18 U.S.C. § 16. *See supra* § 3.3B (definition of crime of violence). The offense also must be against a person in a domestic relationship with the defendant. *See supra* § 3.3F (discussing required relationship). Actual or potential length of sentence of imprisonment is irrelevant for the domestic violence ground of deportability.

There is no domestic violence ground of inadmissibility. If, however, the domestic violence offense constitutes a crime involving moral turpitude, which is one of the grounds of inadmissibility, the offense would render the person inadmissible. For example, the offense of assault in the presence of a minor on someone with whom the defendant has a personal relationship under G.S. 14-33(d) is probably both a crime of domestic violence and a crime involving moral turpitude.

If your client is charged with a domestic violence offense, the following options may mitigate the adverse immigration consequences.

### A. Offense That Is Not a Crime of Violence

Some of the offenses charged, their lesser included offenses, or related offenses may not be considered a “crime of violence.” For example, a conviction of domestic criminal trespass is generally not considered a “crime of violence” and therefore is not a crime of domestic violence for immigration purposes. However, the same sort of conduct may result in adverse immigration consequences if the defendant is convicted of violating a protective order based on that conduct. *See supra* § 3.3F (violation of certain portions of domestic violence protective order is ground of deportability).

There is an argument that assault on a female does not satisfy the “crime of violence” definition. Assault on a female has been alleged as a crime of domestic violence in immigration court, but a number of noncitizens have successfully argued that it does not satisfy the “crime of violence” definition.

For assistance in determining whether an offense is considered a crime of domestic violence, *see* Appendix A, Selected Immigration Consequences of North Carolina Offenses, or contact an immigration attorney.

#### **B. Offense That Is Not Against a Person**

A crime of domestic violence must be against a person, not property. Thus, a conviction of an offense involving the destruction of property should not be considered a crime of domestic violence (although if the court finds a violation of certain portions of a protective order in the process, the conduct would be a ground of deportability, as discussed *supra* § 3.3F).

