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Don't Gamble With the Future: Immigration Consequences of Drug Convictions

"[A]s a matter of federal law, deportation is an integral part — indeed, sometimes the most important part — of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."¹

The gravity of drug crimes weighs heavily on a client's immigration status. Controlled substance offenses have far-reaching effects that render a noncitizen deportable and ineligible for certain immigration relief. The consequences are vast — drug violations may torpedo a person's chances of obtaining a visa, a green card, citizenship, and just about any other immigration benefit. More importantly, a drug conviction can effectively banish a person from the United States without regard to any rehabilitation or family ties. In some cases, deportation is tantamount to a death sentence as deported individuals face persecution upon returning home. Noncitizen clients and defense counsel must therefore take even the slightest drug-related charge very seriously, as it could have a

devastating impact on a defendant's immigration status, family, and life.

But it should be noted that drug offenses do not have the same effect on every noncitizen. The federal immigration statute, the Immigration and Nationality Act (INA), creates a scheme in which there are two sets of lists enumerating conduct — including drug-related offenses — that either make a person deportable² or inadmissible,³ or both. The exact same drug offense will have different effects depending on the noncitizen's current immigration status, and whether one is fighting deportation or seeking affirmative relief.

The complexity of immigration law, however, does not mean criminal defense practitioners should shy away from it or remain silent when advising a client about a guilty plea. In fact, defense counsel has a duty to advise his or her client of immigration consequences stemming from the alleged offenses. Giving the wrong advice, or providing no advice at all, may constitute ineffective assistance of counsel. In *Padilla v. Kentucky*,⁴ the Supreme Court stated, "It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so 'clearly satisfies the first prong of the *Strickland* analysis.'"⁵

Criminal defense attorneys are not expected to become experts in immigration law. But they are uniquely situated to aid their clients in avoiding convictions that could have severe immigration consequences. If the client waits to consult with an immigration attorney after the conviction is final, the options are almost always limited by the time the defendant enters deportation proceedings.

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This article gives practical advice on when and how a criminal defense attorney should get an immigration attorney involved, identifies common immigration consequences brought on when a noncitizen defendant faces a drug conviction, and discusses strategies to eliminate or mitigate those risks.

I. Practical Tips for Having an Immigration-Informed Defense

The most basic point here is to know the client and his or her immigration status. Being a lawful permanent resident is not the same as being a U.S. citizen. “Permanent” does not mean permanent in immigration law; while lawful permanent residents possess relatively strong protections, they may lose their legal status at any time based on crimes. And the same protections afforded to green-card holders might not be available to nonimmigrants⁶ or undocumented immigrants. To add a layer of complexity, there are two different sets of rules — one enumerating various deportation grounds due to criminal activity and the other containing a broad list of immigration disqualifications. Picking the right set of rules will help form the correct strategy to keep the client from being deported.

Thus, it is important to identify the client’s status from the beginning. Ask for documentary proof as some people misunderstand their status. Do not make assumptions based on skin color or absence of an accent. A Jamaican citizen of ours with a very common English last name and no foreign accent was pressured into accepting a plea deal for possessing a small amount of cocaine in her friend’s car. She was not a U.S. citizen, but her court-assigned attorney assumed she was and never asked about her immigration status. The resulting conviction has now jeopardized her immigration status and could lead to her physical removal to a country she is not familiar with, away from her family and real home. It turns out there were other avenues that her defense attorney could have pursued to avoid this dilemma.

How does counsel find out a client’s immigration status in the first place? Make it a standard question at intake.⁷ Adding questions about where they were born can help identify noncitizens and their particular immigration status with follow-up questions about whether they have ever applied for a green card, naturalization, or other immigration benefit. Learning that a

client has a green card might change the strategy on how to proceed.

Ask noncitizen clients about whether they have ever been deported or whether they have ever been placed in deportation proceedings. They might not be risking much if they have been deported already. If they are confused or unsure, referring them to a knowledgeable immigration attorney can help sort it out.

Sending a client off with only a general instruction to find an immigration lawyer is not advisable, as the client may struggle to locate a knowledgeable attorney. Develop and update a referral list of reputable immigration attorneys who work specifically in deportation and the intersection of immigration and criminal law (known as “crimmigration”). Consulting an employment-based immigration attorney, for example, might not be productive and could end in frustration because that person would typically not have the necessary knowledge to advise on criminal immigration penalties.

An immigration attorney’s advice on an upcoming plea may depend on the client’s previous criminal history. Provide the immigration attorney with complete court and police records relating to the present charge and previous offenses, if available. Having this information readily available for review will be helpful to assess the immigration situation and could influence how the client responds to a criminal charge. If the client has a prior conviction, a subsequent criminal charge could render a noncitizen deportable or ineligible for relief, however minor it may seem. In some cases, a client’s prior conduct already renders the client deportable. If the client’s criminal history already includes an “aggravated felony” conviction, for example, efforts to structure a plea to simple possession would probably make no difference. In such cases, it may be worth prioritizing criminal and penal considerations over immigration penalties.

If a client is not barred from immigration relief based on previous offenses, communicate with the immigration attorney to discuss possible alternate pleas in the instant case. It is always advisable to get a pending criminal case dismissed, but it is not always possible. Creativity in constructing pleas can pay off later in immigration court. Immigration attorneys may be able to suggest immigration-neutral offenses, but it is best to discuss available alternate pleas with an immigration attor-

ney, as he or she will usually not have the same breadth and depth of knowledge of criminal law as a defense lawyer.

Avoid last minute requests for immigration advice. Immigration attorneys are very much on the hook with criminal defense lawyers for giving wrong advice. Immigration attorneys must investigate the case and review the client’s background carefully. Thorough and recent research of pertinent case law is required in all cases. Routine pleas that were previously safe are not guaranteed to stay that way as criminal statutes and court precedents change over time.

Finally, cooperation with an immigration attorney will be most effective if the criminal defense lawyer has a basic understanding of the types of immigration consequences that may result and how to avoid or mitigate them. The rest of this article will give that overview, focusing on the effects of drug offenses on noncitizens.

II. Drug-Based Deportability and Inadmissibility

Deportable Grounds

The INA — the bible for immigration lawyers — lists various drug-related crimes and conduct that serve as the legal basis for deportation in federal immigration proceedings.⁸ These are known as the grounds of removability. They generally apply to foreign nationals who currently have legal status in the United States (e.g., lawful permanent residents) or are presently residing in the country after having entered the United States with permission. These groups normally have more protections against deportation than undocumented individuals who are fighting removal or individuals seeking admission into the United States. Notably, the U.S. Department of Homeland Security (DHS) has the burden to establish by “clear and convincing evidence” that a noncitizen is deportable based on a removal ground.⁹

The INA contains varying penalties for controlled-substance offenses depending on a person’s immigration status. These offenses include simple possession and possession of drug paraphernalia. The immigration consequences of a drug conviction are particularly harsh, except for a single marijuana-possession offense involving 30 grams or less (which is seen less frequently nowadays).

A state conviction of any drug offense can render a noncitizen

Suggested Immigration-Related Questions for Client Intake

Ask the client the following questions:

❖ Were you born in the United States?

If yes, then there are no immigration consequences because the client is a U.S. citizen with the extremely rare exception of children born to certain foreign diplomats.

❖ What is your nationality/country of citizenship?

❖ Are you a naturalized U.S. citizen?

Note: Naturalized citizens are generally protected from immigration consequences, but de-naturalization is possible in some cases if citizenship was obtained through fraud such as failing to disclose criminal activities that occurred prior to naturalization.

❖ Have you ever had, or do you now have, any immigration legal status, including:

❖ Lawful Permanent Resident (LPR), aka "green card"?

- Can be deportable from the United States for controlled substance offenses other than a single offense of simple possession of marijuana.
- Can be inadmissible for controlled substance offenses if they travel abroad after the offense.
- Drug trafficking convictions could be an aggravated felony and result in mandatory detention and deportation.
- Does not matter how long they have lived here or had a green card.

❖ Temporary Protected Status (TPS)?

- Can be prevented from getting a green card based upon a controlled substance offense.
- Can lose TPS status if convicted of any felony or two or more misdemeanors.
- Can lose TPS status for a drug offense.

❖ Deferred Action for Childhood Arrivals (DACA)?

- Can be prevented from getting a green card based upon a controlled substance offense.
- Can lose DACA status for a DWI/DUI.
- Can lose DACA status for a drug trafficking offense.
- Can lose DACA status for certain misdemeanor offenses.

❖ Asylee or applicant for asylum?

- Drug trafficking can be an aggravated felony and lose asylum status or eligibility for asylum.

❖ Non-immigrant Visa (Ex: F-1 student visa, H1B work visa)

- Can be deportable for a drug offense.
- Visas are typically canceled when arrested for DWI/DUI or drug offense.
- Can be inadmissible for drug offense when they travel abroad.

Note: Some people are unclear about their immigration status. Ask to see documentary proof of immigration status.

Ex: I-551 card "green card," work permit, or visa.

❖ Any prior arrests or convictions anywhere in the world?

❖ Have you ever been arrested or detained by immigration officers?

❖ Have you ever been deported from the United States?

❖ When was the last time you entered the United States? And under what status?

❖ Do you have a parent, spouse, or child in the United States that has any legal status?

If yes, list all such persons:

❖ Do you have an alien registration number (also known as the "A-number")?

If yes, what is it?

Note: The A-number helps track down a person's immigration history or immigration agency file.

It can be found on a person's green card or work permit.

❖ Do you have an immigration attorney?

If yes, what is the attorney's contact information?

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