CONTINUING LEGAL EDUCATION

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REPRESENTING IMMIGRANT CLIENTS: ETHICS AND PRACTICE

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APPELLATE DIVISION, FIRST DEPARTMENT
AND
THE ASSIGNED COUNSEL PLAN, FIRST JUDICIAL DEPARTMENT

Representing Immigrant Clients: Ethics and Practice

April 3, 2014

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Immigrant Defense Project

IDP IMMIGRANT DEFENSE PROJECT

Unit 1:

Continuing Obligations of Defense Attorneys under *Padilla*

Dawn Seibert, Staff Attorney
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Obligations

- During the criminal case: Defined by *Padilla* and subsequent New York case law (*Peque*)
- After the criminal case: When defense attorney's conduct is the subject of a 440 motion – defined by ethical rules

During the Criminal Case

- *People v. Chacko*, 99 A.D.3d 527 (1st Dep't 2012)
- *People v. Picca*, 97 A.D.3d 170 (2d Dep't 2012)

Duties of Counsel under *Padilla*

#1 Ask defendant where s/he was born
#2 Provide clear advice regarding immigration consequences
#3 Attempt to negotiate immigration-safer plea
#4 Must do #1 - #3 even if defendant is otherwise removable

Must Ask Defendant: "Where Were You Born?"

Per *Picca*, to hold otherwise would:

- Undermine the protection that the *Padilla* Court sought to provide to noncitizen defendants
- Lead to the absurd result that only defendants who understand that criminal convictions can affect their immigration status would be advised of that fact

What is "clear" advice?

- Courts evaluate on a case-by-case basis
- General rule: best assessment of risk of immigration consequences after reasonable investigation and research

Duty to Negotiate - *Chacko*

If immigration consequences had been factored into the plea bargaining process, counsel might have been able to negotiate a different plea agreement that would not have resulted in automatic deportation.

Defendants w/o lawful status?

- *Padilla* applies
  - *Picca*: *Padilla* applies to defendant with independent ground of removability
  - *People v. Burgos*, 37 Misc.3d 394 (Sup. Ct., NY County 2012)

Removable, but eligible for relief

Padilla applies:

- *People v. Jaikaran*, 2007QN0340015 (Crim. Ct., Queens Cty, May 16, 2012) (Zoll, J.)

Norms continue to evolve

- *People v. Gasperd*, 33 Misc.3d 1228(a) (Kings Sup. Ct. Dec. 2, 2011):
  - As defense counsel become more familiar with the intricacies of immigration law, it can be anticipated that more sophisticated advice and representation in this area will become the rule.

Obligations After the Criminal Case

What should a defense attorney do when his/her conduct is the subject of a 440 motion?

Malpractice liability?

- Don't worry about it!!!
  - *Britt v. Legal Aid Society*, 95 N.Y.2d 443 (2000)
    - Plaintiff must allege his innocence or a colorable claim of innocence of the underlying offense
    - Criminal defendants must free themselves of the conviction
    - Criminal proceeding must be terminated without a conviction

Relevant Ethical Rules

- 1.6(b)(5) – Duty of Confidentiality
  - May reveal confidential information to extent lawyer reasonably believes **necessary** to defend against an accusation or wrongful conduct
- 1.9(c)(2) – Duties to Former Clients
  - Duty of confidentiality, same as for current client
- 1.16(3) – Duties upon Termination of Representation
  - Must give client all papers to which entitled

Privilege ≠ Confidentiality

NY Rule of Professional Conduct, Rule 1.6 (cmt.)

- Attorney-client privilege is testimonial in nature
- Confidentiality duty applies not only to matters communicated in confidence by the client, which are protected by the attorney-client privilege, but also to all information gained during and relating to the representation, whatever its source; it applies in all settings and at all times.

What to do...

- Provide complete file
- Discuss allegations with defendant/attorney
- Provide affidavit describing relevant aspects of representation
- If contacted by DA, send sample letter
- If subpoenaed to testify, assert colorable claims of privilege and confidentiality to the extent not waived – let the judge decide

Why the client gets the file...

Upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including . . . delivering to the client all papers and property to which the client is entitled. NY Rule of Professional Conduct 1.16(e)

What is the "file"?

- Includes "work product"
  - NY Ethics Opinion 766, TOPIC: DISPOSITION OF FILES OF FORMER CLIENT OVERRULES: N.Y. STATE 398 (1975) (Sept. 10, 2003)
  - *Sage Realty v. Proskauer*, 91 N.Y.2d 30 (1997) - Adopts "majority view" in which client is presumptively accorded full access to the attorney's file.
  - File is client's "property"

Why cooperate?

- Cooperation will likely eliminate possible IAC claims as you tell the 440 attorney why you did what you did
- Better to explain actions in a thoughtfully drafted affidavit than on cross-exam
- Less likely to draw conduct complaint if maintain LOYALTY to client

Why not disclose to DA?

- Privilege waiver does not allow out of court disclosures
- Scope of privilege waiver unclear – limited to allegations in 440 motion
- May reveal confidential information **only** to extent lawyer reasonably believes **necessary** to defend against an accusation of wrongful conduct

ABA Ethics Opinion 10-456

(July 2010)

- "[I]t will be extremely difficult for defense counsel to conclude that there is a reasonable need in self-defense to disclose client confidences to the prosecutor outside any court-supervised setting."

What is "reasonably necessary"?

- Conservative approach is to let court decide what unauthorized disclosures are allowed
- Was the disclosure "reasonably necessary" if:
  - 440 motion is denied on the pleadings?
  - DA consents to plea vacatur?
  - Judge might have held disclosure protected by confidentiality?

If you decide to disclose...

Disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose.
NY Rule 1.6(b)(5)(cmt.)

NY Rule 1.6(b)(5)(cmt.) (cont.)

If the disclosure will be made in connection with an adjudicative proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know the information, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

Impact of *People v. Peque* on Criminal Defense Practice

Prior to *Peque* – NYCPL 220.50(7)

"[I[f the defendant is not a citizen of the United States, the defendant's plea of guilty and the court's acceptance thereof may result in the defendant's deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States."

People v. Peque, 22 N.Y.3d 168 (2013)

NYCPL 220.50(7)

=

Due Process

Judge's *Peque* Obligations

- "[M]ust inform the defendant that, if the defendant is not a citizen of this country, he or she may be deported as a result of this plea"

Danger of *Peque*:

- May make PCR unattainable even if atty advice deficient. *See* C.J. Lippman's dissent
- May prompt judges to ask about immigration status or substance of *Padilla* advice.

Take-Away Points

- *Padilla* is primary!
- You can protect your client.
- *Peque* does not require inquiry re: citizenship
- "Will be deported" warning does not comport with *Peque*

Padilla Duty is Primary

- Defendant entitled to rely on attorney's advice as to whether plea is advisable
- Given blind
- Too little, too late
- Cannot cure prejudice from failure to negotiate

Secondary role of court notification

To prompt the conversation between defendant and attorney about immigration consequences, as required by *Padilla*

How to Protect Client

"I have advised my client regarding all relevant attendant/immigration consequences, and he is taking the plea in reliance on my advice"

Inquiry into Citizenship

- *Peque* specifically avoids requiring this
- Not relevant to taking of the plea
- Jeopardizes atty-client confidences
- Assert 5th A: alienage is element of certain federal offenses (incl. failure to notify of address change; illegal entry)
- Risks being under-inclusive
- May trigger immigration consequences

"Will be deported"

- Might be inaccurate
- May cause defendant to reject favorable plea

Impact of *Chaidez* on 440 motions

Padilla Retroactivity - Federal

- *Chaidez v. United States*, 133 S.Ct 1103 (2013)
  - Only explicitly governs federal criminal cases
  - Didn't touch the substance of *Padilla:* Referenced 1968 ABA standard requiring advice about deportation
  - Left question of state retroactivity open

NY Court of Appeals

- *People v. Baret*, 99 A.D.3d 408 (1st Dep't 2012)
  - Oral argument - May 1, 2014
  - IDP *amici* brief:

http://immigrantdefenseproject.org/criminal-defense/padilla-pcr

Hurrah for Massachusetts!!!

- *Commonwealth v. Sylvain*, 466 Mass. 422 (2013)
  - Applies *Teague* but rejects USSCT's expansive definition of "new" rule
  - Narrower definition - "new" rule only if "not dictated by precedent"

What is "non-final" for *Padilla* claims?

- *People v. Varenga*, 2014 WL 840928 (App. Div. 2d Dep't Mar. 5, 2014)
  - Judgments entered on or after March 1, 2009

Questions?

Unit 2: Effective Representation of Noncitizens

Isaac Wheeler, Legal Director
Immigrant Defense Project

Why this matters

- *Padilla* says you must
- You may be the last lawyer
- There are ways to avoid detention and deportation!!

Unit Goals

- Best practices for integrating immigration advisal
- Quick overview of immigration status
- Basic issue-spotting
- Detainer practice

The crim-imm intersection

Status
and/or
Convictions
+
Detection
=
Deportation

"Secure Communities"

- Fingerprint record check at central booking
- Detainer lodged on:
  - Undocumented or
  - Lawful residents with deportable convictions
  - People with outstanding orders of removal
- Shifts emphasis from getting out of DOC custody to resolving the case properly to avoid ICE detainer being honored by DOC

Steps to Effective Representation

Step one

- Ask every client: "Where were you born"
  - No "profiling"
  - Don't ask for legal conclusions
  - Don't wait until client offers information
  - Establish trust before asking

Types of immigration status

- U.S. Citizen:
  - Birth; naturalization; automatic derivation/acquisition

- Lawful Permanent Resident ("green card")
- Nonimmigrant (tourist, student, business professional, seasonal worker)
- Asylee/refugee
- TPS, DACA, other deferred action; withholding grantee; post-final order

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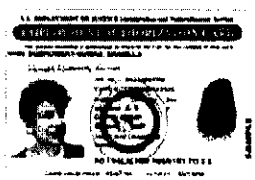
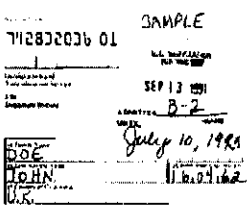
- Overstay
- Entered Without Inspection ("EWI")

Work authorization



- Work authorization ("permiso") is <u>not</u> an immigration status
- Usually evidence of pending application or deferred action
- The category code reflects the reason it was issued. See 8 C.F.R. § 274a.12.

Nonimmigrants and Expiration of Authorized Stay



- A visa permits the holder to board a flight to the U.S.
- On arrival, BCP decides whether to admit and issues an I-94 authorizing stay
- Do not confuse <u>visa</u> expiration date with end of authorized period of stay

Step two

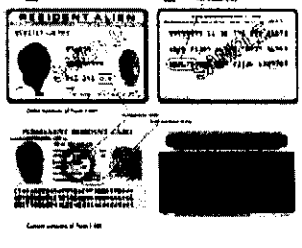
- Gather information
- Freeze the status quo:
  - Clients with detainer: Advise not to pay bail until full immigration advisal; request non-nominal bail
  - Out clients: Warn client about traveling outside of the US or renewing green card while case is pending

Step two, cont'd:

Gather info on <u>all</u> prior charges and dispositions

- Felony, misdemeanor, violations/municipal
- Diversion, drug court, deferred prosecutions & judgments, juvenile dispos
- Exact penal statute, including subsection
- Sentence (including suspended sentence), probation, anger management, anything else ordered by court
- Amount of restitution

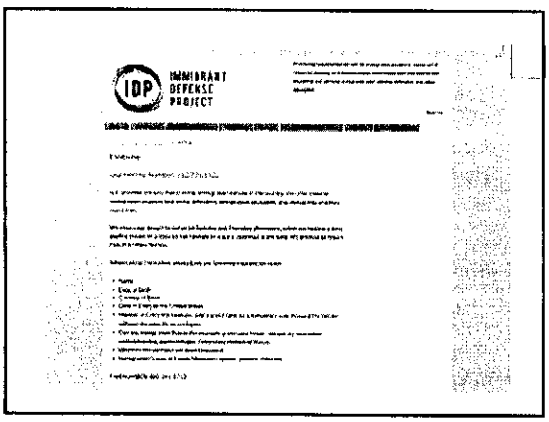
LPR: Determining First Lawful Admission Date



- Consular processing: Green card will reflect date of first lawful entry.
- Adjustment of status: client may have had earlier lawful admission

Step three

- Call for crim-imm consult ASAP
  - 18(b) program referrals: Sadie Casamenti (212) 788-9882
  - IDP hotline (212) 725-6422



Step four

- Consult with client
  - Are safe haven pleas/sentence acceptable to client?
  - What is client willing to trade for immigration-neutral resolution?

Client's Goal Spectrum

- Preserve ability to travel or naturalize
- Avoid consequences that trigger deportation
- Preserve eligibility to ask immigration judge to get or keep lawful immigration status
- Preserve eligibility to obtain future immigration benefit
- Avoid ICE detection
- Immigration consequences not a priority
- Quicker deportation *if* that means less time in prison

Step five

- Negotiate in light of crim-imm goals
- Proceed toward trial in the absence of an immigration-neutral plea
- If unable to negotiate completely safe plea, mitigate immigration damage (manage the record; preserve relief from removal)

Select Issues in Effective Crim-Imm Practice

Deportability v. Inadmissibility

INA § 237, 8 U.S.C. § 1227 INA § 212, 8 U.S.C. § 1182

- *Technically*:
  - deportability applies to those lawfully admitted (LPRs, NIVs, refugees)
  - inadmissibility applies to those seeking lawful admission
- *Practically*:
  - each set of rules, or both, may apply to the same person in various situations

"Conviction" definition

- Deportability usually requires "conviction"
  - INA § 101(a)(48), 8 U.S.C. § 1101(a)(48)
- A conviction is:
  - A formal judgment of guilt entered by a court ***or***
  - Where adjudication of guilt has been withheld,
    - Δ admits facts sufficient to warrant a finding of guilt ***and***
    - Court has ordered some form of punishment, penalty, or restraint on liberty.
- Caselaw: "conviction" requires more than proof by preponderance

NY -specific dispositions

- Violation is a conviction
- Judicial diversion is a conviction (usually)
  - Seek pre-plea diversion, N.Y. Crim. Proc. Art. 216
- YO is not a conviction
- Family offense is not a conviction
- ACD is not a conviction

Categories of removable offenses

- Use your Quick Reference Guide and seek further information!
  - Crimes involving moral turpitude
  - Drug offenses (including marijuana!)
  - Firearms offenses
  - Crimes of domestic violence
  - Crimes of stalking
  - Crimes of child abuse/neglect/abandonment
  - [Certain specific federal crimes]

Removable offenses, cont'd:

- Aggravated felony:
  Deportation is a near certainty
  - Loss of lawful permanent residency
  - Permanent ineligibility for citizenship
  - Mandatory detention without bond
  - Permanent bar to return after deportation
  - Enhanced penalty for illegal re-entry
  - Cuts off virtually all defenses to removal

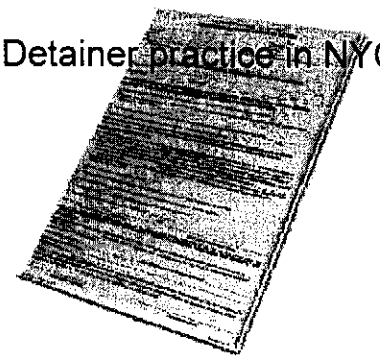
Aggravated Felony (cont'd)

- Drug trafficking (possession w/ intent; poss. of roofies)
- Rape, kidnapping, theft, burglary
- "Crime of violence," 18 U.S.C. § 16
- Some gambling, arson, firearm, prostitution offenses
- Fraud, deceit or tax evasion with >$10,000 loss
- Commercial bribery, counterfeiting, forgery
- Bail jumping on a felony
- Obstruction of Justice/Perjury
- Attempt or conspiracy to commit any of above
- Other AF offenses at 8 USC § 1101(a)(43).

Aggravated felony, cont'd

- A few (but not all!) AFs are sentence-dependent
  - Crimes of violence
  - Theft/burglary
  - Obstruction of justice
  - Forgery/counterfeiting
- Some depend on particular facts
  - Fraud w/ loss to victim > $10,000

Detainer practice in NYC



What is an Immigration Detainer?

- 8 C.F.R. § 287.7(a): "A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien."
- "The detainer is a **request** that such agency advise the Dep't, prior to release of the alien, in order for the Dep't to arrange to assume custody, in situations when gaining immediate custody is either impracticable or impossible."
- Does not prevent discharge from DOC custody, just prevents physical release (for 48 hours)

My client has a detainer – now what?

- You may be their last lawyer!
- Dispose the criminal case to beat the detainer, or if you can't:
- Use the criminal case to manage custody
  - trigger ICE pickup when the client is ready, not when ICE is

NYC's New Detainer Law

Effective July 2013

- BASICALLY: DOC and NYPD will NOT honor ICE detainers if:
  - no qualifying felony priors
  - no qualifying misdemeanor priors in the last 10 years
  - no current felony charges
  - facing only one misdemeanor/violation
  - has no criminal warrants from any jurisdiction
  - has no order of removal or deportation
  - not on gang or terrorist watch list
  - Some misdemeanors relating to trafficking/imm status exempt

NYC's New Detainer Law

The fine print

- DOC and NYPD will NOT honor ICE detainers if no qualifying priors . . . .
  - Any felony or misdemeanor convictions except:
    - NYPL 230.00: prostitution
    - NYPL 240.37: loitering for the purposes of prostitution
      - NOTE: if the conviction relates to "patronizing a prostitute" – DOC/NYPD will honor the detainer
    - VTL 511(1): aggravated unlicensed driving in the 3rd
    - VTL 511(2)(a)(i): aggravated unlicensed driving in the 2nd when relating to a previous conviction in the proceeding 18 months
    - VTL 511(2)(a)(iv): aggravated unlicensed driving in the 2nd when relating to 3 or more suspensions
  - Old misdemeanor convictions don't count: more than 10 years prior to the instant arrest

NYC's New Detainer Law (cont.)

- DOC and NYPD will NOT honor ICE detainers if no qualifying priors and;
  - Your client has NO pending felony charges
  - Your client has up to one pending misdemeanor charge EXCEPT NYPD/DOC will honor if charged with;
    - NYPL 265.01 – when relating to a firearm, rifle, shotgun, bullet or ammunition
    - NYPL 215.50 – criminal contempt
      - NOTE: detainer will NOT be honored if the defendant has been released pursuant to NYCPL 170.70
    - NYPL 120.00 – assault in the 3rd degree
      - NOTE: detainer will NOT be honored if the defendant has been released pursuant to NYCPL 170.70
    - NYPL Article 130 – sex offenses
    - VTL Article 31 – alcohol and drug related offenses

NYC's New Detainer Law (cont.)

NYPD/DOC will honor a detainer if your client does has more than one pending misdemeanor charge in separate cases
EXCEPT DOC/NYPD will NOT honor a detainer if charged with.

- NYPL 230.00: prostitution
- NYPL 240.37: loitering for the purposes of prostitution
  - NOTE: if the charge relates to "patronizing a prostitute" – DOC/NYPD will honor the detainer
- VTL 511(1): aggravated unlicensed driving in the 3rd
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- VTL 511(2)(a)(iv): aggravated unlicensed driving in the 2nd when relating to 3 or more suspensions

NYPD/DOC will honor a detainer if your client:

- Has an outstanding criminal warrants from any jurisdiction
- Has an order of removal or deportation
- Is on a gang or terrorist watch list

DOC implementation problems

- Contact Director of Constituent Services
  - Carleen McLaughlin, 718-546-0912
  - email:Carleen.McLaughlin@doc.nyc.gov
  - or email: CONSTITUENTSERVICES@bb.nyc.gov

RESOURCES

- M. Vargas, Representing Immigrant Defendants in New York State (5th ed.)
  - HOTLINE: (212) 725-6422
  - www.immigrantdefenseproject.org
- N. Tooby, Tooby's Guide to Criminal Immigration Law (2008)
  - free download @ www.criminalandimmigrationlaw.com

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 10-456 **July 14, 2010**

Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim

Although an ineffective assistance of counsel claim ordinarily waives the attorney-client privilege with regard to some otherwise privileged information, that information still is protected by Model Rule 1.6(a) unless the defendant gives informed consent to its disclosure or an exception to the confidentiality rule applies. Under Rule 1.6(b)(5), a lawyer may disclose information protected by the rule only if the lawyer "reasonably believes [it is] necessary" to do so in the lawyer's self-defense. The lawyer may have a reasonable need to disclose relevant client information in a judicial proceeding to prevent harm to the lawyer that may result from a finding of ineffective assistance of counsel. However, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable.

This opinion addresses whether a criminal defense lawyer whose former client claims that the lawyer provided constitutionally ineffective assistance of counsel may, without the former client's informed consent, disclose confidential information to government lawyers prior to any proceeding on the defendant's claim in order to help the prosecution establish that the lawyer's representation was competent.[1] This question may arise, for example, because a prosecutor or other government lawyer defending the former client's ineffective assistance claim seeks the trial lawyer's file or an informal interview to respond to the convicted defendant's claim, or to prepare for a hearing on the claim.

Under *Strickland v. Washington*,[2] a convicted defendant seeking relief (e.g., a new trial or sentencing) based on a lawyer's failure to provide constitutionally effective representation, must establish both that the representation "fell below an objective standard of reasonableness" and that the defendant thereby was prejudiced, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[3] Claims of ineffective assistance of counsel often are dismissed without taking evidence due to insufficient factual allegations or other procedural deficiencies. Numerous claims also are dismissed without a determination regarding the reasonableness of the trial lawyer's representation based on the defendant's failure to show prejudice. The Supreme Court recently expressed confidence "that lower courts – now quite experienced with applying *Strickland* – can effectively and efficiently use its framework to separate specious claims from those with substantial merit."[4] Although it is highly unusual for a trial lawyer accused of providing ineffective representation to assist the prosecution in advance of testifying or otherwise submitting evidence in a judicial proceeding, sometimes trial lawyers have done so,[5] and commentators have expressed concerns about the practice.[6]

In general, a lawyer must maintain the confidentiality of information protected by Rule 1.6 for former clients as well as current clients and may not disclose protected information unless the client or former client gives informed consent. *See* Rules 1.6 & 1.9(c). The confidentiality rule "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."[7]

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[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2010. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] 466 U.S. 668 (1984).

[3] *Id.* at 694.

[4] Padilla v. Kentucky, __ U.S. __, 130 S. Ct. 1473, 1485 (2010).

[5] *See, e.g.*, Purkey v. United States, 2009 WL 3160774 (W.D. Mo. Sept. 29, 2009), *motion to amend denied*, 2009 WL 5176598 (Dec. 22, 2009) (lawyer represented criminal defendant at trial and on appeal voluntarily filed 117-page affidavit extensively refuting former client's ineffective assistance of counsel claim); State v. Binney, 683 S.E.2d 478 (S.C. 2009) (defendant's trial counsel met with law enforcement authorities and provided his case file to them in response to defendant's ineffective assistance of counsel claim).

[6] *See, e.g.*, Lawrence J. Fox, *Making the Last Chance Meaningful: Predecessor Counsel's Ethical Duty to the Capital Defendant*, 31 HOFSTRA L. REV. 1181, 1186-88 (2003); David M. Siegel, *The Role of Trial Counsel in Ineffective Assistance of Counsel Claims: Three Questions to Keep in Mind*, CHAMPION, Feb. 2009, at 14.

[7] Rule 1.6 cmt. 3. *See, e.g.*, Perez v. Kirk & Carrigan, 822 S.W.2d 261 (Tex. App. 1991) (law firm breached its fiduciary duty when,

Ordinarily, if a lawyer is called as a witness in a deposition, a hearing, or other formal judicial proceeding, the lawyer may disclose information protected by Rule 1.6(a) only if the court requires the lawyer to do so after adjudicating any claims of privilege or other objections raised by the client or former client. Indeed, lawyers themselves must raise good-faith claims unless the current or former client directs otherwise.[8] Outside judicial proceedings, the confidentiality duty is even more stringent. Even if information clearly is not privileged and the lawyer could therefore be compelled to disclose it in legal proceedings, it does not follow that the lawyer may disclose it voluntarily. In general, the lawyer may not voluntarily disclose any information, even non-privileged information, relating to the defendant's representation without the defendant's informed consent.

Accordingly, unless there is an applicable exception to Rule 1.6, a criminal defense lawyer required to give evidence at a deposition, hearing, or other formal proceeding regarding the defendant's ineffective assistance claim must invoke the attorney-client privilege and interpose any other objections if there are nonfrivolous grounds on which to do so. The criminal defendant may be able to make nonfrivolous objections to the trial lawyer's disclosures even though the ineffective assistance of counsel claim ordinarily waives the attorney-client privilege and work product protection with regard to otherwise privileged communications and protected work product relevant to the claim.[9] For example, the criminal defendant may be able to object based on relevance or maintain that the attorney-client privilege waiver was not broad enough to cover the information sought. If the court rules that the information sought is relevant and not privileged or otherwise protected, the lawyer must provide it or seek appellate review.

Even if information sought by the prosecution is relevant and not privileged, it does not follow that trial counsel may disclose such information outside the context of a formal proceeding, thereby eliminating the former client's opportunity to object and obtain a judicial ruling. Absent a relevant exception, a lawyer may disclose client information protected by Rule 1.6 only with the client's "informed consent." Such consent "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rules 1.0(e) & 1.6(a). A client's express or implied waiver of the attorney-client privilege has the legal effect of forgoing the right to bar disclosure of the client's prior confidential communications in a judicial or similar proceeding. Standing alone, however, it does not constitute "informed consent" to the lawyer's voluntary disclosure of client information outside such a proceeding.[10] A client might agree that the former lawyer may testify in an adjudicative proceeding to the

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under threat of subpoena, it disclosed former client's statement to prosecutor without former client's consent; court stated that "[d]isclosure of confidential communications by an attorney, whether privileged or not under the rules of evidence, is generally prohibited by the disciplinary rules," *id.* at 265 n.5).

[8] "Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that ... the information sought [in a judicial or other proceeding] is protected against disclosure by the attorney-client privilege or other applicable law." Rule 1.6, cmt. 13. The lawyer's obligation to protect the attorney-client privilege ordinarily applies when the lawyer is called to testify or provide documents regarding a former client no less than a current client. *See, e.g.*, ABA Comm. on Eth. and Prof'l Responsibility, Formal Op. 94-385 (1994) (Subpoenas of a Lawyer's Files) ("If a governmental agency, or any other entity or person, subpoenas, or obtains a court order for, a lawyer's files and records relating to the lawyer's representation of a current or former client, the lawyer has a professional responsibility to seek to limit the subpoena or court order on any legitimate available grounds so as to protect documents that are deemed to be confidential under Rule 1.6."); *see also* Connecticut Bar Ass'n Eth. Op. 99-38 (absent a waiver, subpoenaed lawyer must invoke the attorney-client privilege if asked to testify regarding inconsistencies between former client's court testimony and former client's communications with lawyer and previous lawyer), 1999 WL 33115188; Maryland State Bar Ass'n Committee on Eth. Op. 2004-17 (2004) (if subpoenaed lawyer's client was "estate," lawyer permitted to turn over documents to successor personal representative and may reveal information; if representation included the former personal representative in both his fiduciary and in his individual capacity, lawyer is subject to constraints of Rule 1.6(a)); Rhode Island Sup. Ct. Eth. Adv. Panel Op. No. 98-02 (1998) (lawyer who received notice of deposition and subpoena must not disclose information relating to representation of former client); South Carolina Bar Eth. Adv. Committee Adv. Op. 98-30 (1998) (in response to third party's request for affidavits and/or depositions, lawyer must assert attorney-client privilege and may only disclose such information by order of court); Utah State Bar Eth. Advisory Op. Committee Op. 05-01, 2005 WL 5302775 (2005) (absent court order requiring lawyer's testimony, and notwithstanding subpoena served on lawyer by prosecution, lawyer may not divulge any attorney-client information, either to prosecution or in open court).

[9] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80(1)(b) & cmt. c (2000) ("A client who contends that a lawyer's assistance was defective waives the privilege with respect to communications relevant to that contention. Waiver affords to interested parties fair opportunity to establish the facts underlying the claim.")

[10] *Cf.* Clock v. United States, No. 09-cv-379-JD, slip op. (D.N.H. 2010). In *Clock*, at the prosecution's request, the defendant signed a form explicitly waiving the attorney-client privilege with respect to the issues in her post-conviction petition in order to authorize her trial lawyer to answer questions regarding her ineffective assistance of counsel claim. Based on her office's institutional policy, trial counsel nonetheless declined to respond to the prosecution's questions unless ordered to do so by the court. Based on the defendant's

extent the court requires but not agree that the former lawyer voluntarily may disclose the same client confidences to the opposite party prior to the proceeding.

Where the former client does not give informed consent to out-of-court disclosures, the trial lawyer who allegedly provided ineffective representation might seek to justify cooperating with the prosecutor based on the "self-defense exception" of Rule 1.6(b)(5),[11] which provides that "[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary ... to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client." The self-defense exception grows out of agency law and rests on considerations of fairness.[12] Rule 1.6(b)(5) corresponds to a similar exception to the attorney-client privilege that permits the disclosure of privileged communications insofar as necessary to the lawyer's self-defense.[13]

The self-defense exception applies in various contexts, including when and to the extent reasonably necessary to defend against a criminal, civil or disciplinary claim against the lawyer. The rule allows the lawyer, to the extent reasonably necessary, to make disclosures to a third party who credibly threatens to bring such a claim against the lawyer in order to persuade the third party that there is no basis for doing so.[14] For example, the lawyer may disclose information relating to the representation insofar as necessary to dissuade a prosecuting, regulatory or disciplinary authority from initiating proceedings against the lawyer or others in the lawyer's firm, and need not wait until charges or claims are filed before invoking the self-defense exception.[15] Although the scope of the exception has expanded over time,[16] the exception is a limited one, because it is contrary to the fundamental premise that client-lawyer confidentiality ensures client trust and encourages the full and frank disclosure necessary to an effective representation.[17] Consequently, it has been said that "[a] lawyer may act in self-defense under [the exception] only to defend against charges that *imminently* threaten the lawyer or the lawyer's associate or agent with *serious* consequences ...."[18]

When a former client calls the lawyer's representation into question by making an ineffective assistance of counsel claim, the first two clauses of Rule 1.6(b) (5) do not apply. The lawyer may not respond in order "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer

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explicit waiver, the court ordered trial counsel to submit an affidavit limited to the issues in the defendant's petition. *Id.* at *2.

[11] Although the confidentiality duty is subject to other exceptions, none of the other exceptions seems applicable to this situation.

[12] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 cmt. b ("in the absence of the exception . . ., lawyers accused of wrongdoing would be left defenseless against false charges in a way unlike that confronting any other occupational group").

[13] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 83.

[14] Rule 1.6 cmt. 10 ("The rule] does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion."). Cases addressing the self-defense exception to the attorney-client privilege are to the same effect. *See, e.g.*, Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir.), *cert. denied*, 419 U.S. 998 (1974) (lawyer named as defendant in class action brought by purchasers of securities who claimed that prospectus contained misrepresentations had right to make appropriate disclosure to lawyers representing stockholders as to his role in public offering of securities).

[15] *See, e.g.*, First Fed. Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557 (S.D.N.Y. 1986) (self-defense exception to attorney-client privilege permits lawyer who is being sued for misconduct in securities matter to disclose in discovery documents within attorney-client privilege if lawyer's interest in disclosure outweighs interest of client in maintaining confidentiality of communications, and if disclosure will serve truth-finding function of litigation process); Association of the Bar of the City of New York Committee on Prof'l and Jud. Eth. Op. 1986-7, 1986 WL 293096 (1986) (lawyer need not resist disclosure until formally accused because of cost and other burdens of defending against formal charge and damage to reputation); Pennsylvania Bar Association Committee on Legal Eth. and Prof'l Resp Eth. Op. 96-48, 1996 WL 928143 (1996) (lawyer charged by former clients with malpractice in their defense in SEC is permitted to speak to SEC lawyers and reveal information concerning the representation as he reasonably believes necessary to respond to allegations); South Carolina Bar Eth. Adv. Committee Adv. Op. 94-23, 1994 WL 928298, (1994) (lawyer under investigation by Social Security Administration for possible misconduct in connection with his client may reveal confidential information as may be necessary to respond to or defend against allegations; no grievance proceeding pending anywhere else against lawyer).

[16] Disciplinary Rule 4-101(C)(4) of the predecessor ABA Model Code of Professional Responsibility (1980) provided: "A lawyer may reveal . . . [c]onfidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct," but did not expressly authorize the disclosure of confidences to establish a claim on behalf of a lawyer other than for legal fees.

[17] Rule 1.6 cmt. 2. Commentators have maintained that the exception should be narrowly construed, both because the justifications for the exception are weak, *see* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 308 (1986), and because there are strong policy considerations that disfavor the exception, including that it is subject to abuse, frustrates the policy of encouraging candor by clients, and undermines public confidence in the legal profession because it appears inequitable and self-serving. *See* Henry D. Levine, *Self-Interest or Self-Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection*, 5 HOFSTRA L. REV. 783, 810-11 (1977).

[18] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 cmt. c (emphasis added).

and the client," because the legal controversy is not between the client and the lawyer.[19] Nor is disclosure justified "to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved," because the defendant's motion or habeas corpus petition is not a criminal charge or civil claim against which the lawyer must defend.

The more difficult question is whether, in the context of an ineffective assistance of counsel claim, the lawyer may reveal information relating to the representation "to respond to allegations in any proceeding concerning the lawyer's representation of the client." This provision enables lawyers to defend themselves and their associates as reasonably necessary against allegations of misconduct in proceedings that are comparable to those involving criminal or civil claims against a lawyer. For example, lawyers may disclose otherwise protected information to defend against disciplinary proceedings or sanctions and disqualification motions in litigation. On its face, the provision also might be read to apply to a proceeding brought to set aside a criminal conviction based on a lawyer's alleged ineffective assistance of counsel, because the proceeding includes an allegation concerning the lawyer's representation of the client to which the lawyer might wish to respond.[20]

Under Rule 1.6(b)(5), however, a lawyer may respond to allegations only insofar as the lawyer reasonably believes it is *necessary* to do so.[21] It is not enough that the lawyer genuinely believes the particular disclosure is necessary; the lawyer's belief must be objectively reasonable.[22] The Comment explaining Rule 1.6(b)(5) cautions lawyers to take steps to limit "access to the information to the tribunal or other persons having a need to know it" and to seek "appropriate protective orders or other arrangements ... to the fullest extent practicable."[23] Judicial decisions addressing the necessity for disclosure under the self-defense exception to the attorney-client privilege recognize that when there is a legitimate need for the lawyer to present a defense, the lawyer may not disclose all information relating to the representation, but only particular information that reasonably must be disclosed to avoid adverse legal consequences.[24] These limitations are equally applicable to Rule 1.6(b)(5).[25]

Permitting disclosure of client confidential information outside court-supervised proceedings

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[19] *See* Utah State Bar Eth. Adv. Op. Committee Eth. Op. 05-01, 2005 WL 5302775, at *6 (criminal defense lawyer may not voluntarily disclose client confidences to prosecutor or in court in response to defendant's claim that lawyer's prior advice was confusing; court stated, "[w]hile an arguable case might be made for disclosure under this exception, it ... is fraught with problems. The primary problem is that the 'controversy' is not between lawyer and client, except quite tangentially. While there may well be a dispute over the facts between lawyer and client, there is no 'controversy' between them in the sense contemplated by the rule. Nor is there a criminal or civil action against the lawyer."). *But see* Arizona State Bar Op. 93-02 (1993), *available at* http://www.myazbar.org/Ethics/opinionview.cfm?id=652 (interpreting "controversy" to include a disagreement in the public media).

[20] *Cf.* State v. Madigan, 68 N.W. 179, 180 (Minn. 1896) (lawyer accused of inadequate criminal defense representation may submit affidavit containing attorney-client privileged information to disprove such charge).

[21] *See* Rule 1.6(b)(5) (allowing disclosure only "to the extent the lawyer reasonably believes necessary"); Rule 1.6 cmts. 10 & 14.

[22] *See* Rule 1.0(i) ("'Reasonable belief' or 'reasonably believes' when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.")

[23] Rule 1.6 cmt. 14. Similar restrictions have been held applicable to the related context in which a lawyer seeks to disclose confidences to collect a fee. *See, e.g.*, ABA Comm. on Eth. and Prof'l Responsibility, Formal Op. 250 (1943), in OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS ANNOTATED 555, 556 (American Bar Foundation 1967) ("where a lawyer does resort to a suit to enforce payment of fees which involves a disclosure, he should carefully avoid any disclosure not clearly necessary to obtaining or defending his rights").

[24] For example, in In re Nat'l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig., 120 F.R.D. 687, 692 (C.D. Cal. 1988), the district court "reject[ed] the suggestion made by some parties that 'selective' disclosure should not be allowed, that if the exception is permitted to be invoked, all attorney-client communications should be disclosed," finding that this suggestion was "directly contrary to the reasonable necessity standard." *Accord* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 83 cmt. e ("The lawyer's invocation of the exception must be appropriate to the lawyer's need in the proceeding. The exception should not be extended to communications that are of dubious relevance or merely cumulative of other evidence."); *cf.* Dixon v. State Bar, 653 P.2d 321, 325 (Cal. 1982) (lawyer sanctioned for gratuitous disclosure of confidence in response to former client's motion to enjoin lawyer from harassing her); Levin v. Ripple Twist Mills, Inc., 416 F. Supp. 876, 886-87 (E.D. Pa. 1976) ("In almost any case when an attorney and a former client are adversaries in the courtroom, there will be a credibility contest between them. This does not entitle the attorney to rummage through every file he has on that particular client (regardless of its relatedness to the subject matter of the present case) and to publicize any confidential communication he comes across which may tend to impeach his former client. At the very least, the word 'necessary' in the disciplinary rule requires that the probative value of the disclosed material be great enough to outweigh the potential damage the disclosure will cause to the client and to the legal profession.").

[25] Courts further recognize that disclosures may be made to defend against a non-client's accusation of misconduct only if the accusation is credible enough to put the lawyer at some risk of adverse consequences, such as a criminal indictment or a civil lawsuit; third parties otherwise would have an incentive to raise utterly meritless claims of lawyer misconduct to gain access to confidential information. *Cf.* SEC v. Forma, 117 F.R.D. 516, 519-525 (S.D.N.Y. 1987) (formal charges need not be issued in order for the self defense exception to apply); First Fed. Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557, 566 n.15 (S.D.N.Y. 1986) (former auditor's evidence against lawyer must "pass muster under Fed. R. Civ. P. 11").

undermines important interests protected by the confidentiality rule. Because the extent of trial counsel's disclosure to the prosecution would be unsupervised by the court, there would be a risk that trial counsel would disclose information that could not ultimately be disclosed in the adjudicative proceeding.[26] Disclosure of such information might prejudice the defendant in the event of a retrial.[27] Further, allowing criminal defense lawyers voluntarily to assist law enforcement authorities by providing them with protected client information might potentially chill some future defendants from fully confiding in their lawyers.

Against this background, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable. It will be rare to confront circumstances where trial counsel can reasonably believe that such prior, ex parte disclosure, is necessary to respond to the allegations against the lawyer. A lawyer may be concerned that without an appropriate factual presentation to the government as it prepares for trial, the presentation to the court may be inadequate and result in a finding in the defendant's favor. Such a finding may impair the lawyer's reputation or have other adverse, collateral consequences for the lawyer. This concern can almost always be addressed by disclosing relevant client information in a setting subject to judicial supervision. As noted above, many ineffective assistance of counsel claims are dismissed on legal grounds well before the trial lawyer would be called to testify, in which case the lawyer's self-defense interests are served without the need ever to disclose protected information.[28] If the lawyer's evidence is required, the lawyer can provide evidence fully, subject to judicial determinations of relevance and privilege that provide a check on the lawyer disclosing more than is necessary to resolve the defendant's claim. In the generation since *Strickland*, the normal practice has been that trial lawyers do not disclose client confidences to the prosecution outside of court-supervised proceedings. There is no published evidence establishing that court resolutions have been prejudiced when the prosecution has not received counsel's information outside the proceeding. Thus, it will be extremely difficult for defense counsel to conclude that there is a reasonable need in self-defense to disclose client confidences to the prosecutor outside any court-supervised setting.[29]

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[26] *Cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 cmt. e (before making disclosures under the self-defense exception, a lawyer ordinarily must give notice to former client).

[27] Some courts preclude the prosecution from introducing the trial lawyer's statements in a later trial, *see, e.g.*, Bittaker v. Woodford, 331 F.3d 715 (9th Cir.), *cert. denied*, 540 U.S. 1013 (2003) (waiver of privilege for purposes of habeas claim does not necessarily mean extinguishment of the privilege for all time and in all circumstances), but not all courts have done so. *See, e.g.*, Fears v. Warden, 2003 WL 23770605 (S.D. Ohio 2003) (scope of habeas petitioner's waiver of privilege not waived for all time and all purposes including possible retrial).

[28] *See, e.g.*, Utah State Bar Eth. Advisory Op. Committee Op. 05-01, *supra* notes 8 & 19 (where criminal defense lawyer's former client moved to set aside his guilty plea on ground that lawyer's advice about plea offer confused him, lawyer may not divulge attorney-client information to prosecutor to prevent a possible fraud on court or protect lawyer's reputation; lawyer must assert attorney-client privilege in hearing on former client's motion, and may testify only upon court order).

[29] *See* Rule 1.6 cmt. 14.

Dear District Attorney:

Thank you for your recent inquiry concerning my representation of Defendant in People v. Defendant, in which Defendant has filed a post-conviction motion.

Given my continuing ethical obligations to my former client, set forth in RULES OF PROF'L CONDUCT 1.9(c) and 1.6(b), I cannot release any information relating to the representation without informed written consent from Defendant. In addition, I cannot under any circumstances do so outside a proceeding subject to judicial supervision. *See* ABA Opinion 10-456, Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim (2010) (copy attached). I appreciate your assistance in avoiding any effort to violate my ethical obligations, pursuant to RULE OF PROF'L CONDUCT 8.4(a).

Defendant is now represented by Post-Conviction Attorney, to whom I have provided a copy of my file from People v. Defendant.

Sincerely,

Prior Counsel

Cc: Post-Conviction Attorney

IMMIGRANT DEFENSE PROJECT

Suggested Approaches for Representing a Noncitizen in a Criminal Case

(References are to sections of IDP's manual, *Representing Immigrant Defendants in New York*, 5th ed., 2011)

Below are suggested approaches for criminal defense lawyers in planning a negotiating strategy to avoid negative immigration consequences for their noncitizen clients. The selected approach may depend very much on the particular immigration status of the particular client. For further information on how to determine your client's immigration status, refer to Chapter 2 of our manual, *Representing Immigrant Defendants in New York* (5th ed., 2011).

For ideas on how to accomplish any of the below goals, see Chapter 5 of our manual, which includes specific strategies relating to charges of the following offenses:

- Drug offense (§5.4)
- Violent offense, including murder, rape, or other sex offense, assault, criminal mischief or robbery (§5.5)
- Property offense, including theft, burglary or fraud offense (§5.6)
- Firearm offense (§5.7)

If your client is a LAWFUL PERMANENT RESIDENT:

- First and foremost, try to avoid a disposition that triggers deportability (§3.2.B)
- Second, try to avoid a disposition that triggers inadmissibility if your client was arrested returning from a trip abroad or if your client may travel abroad in the future (§§3.2.C and E(1)).
- If you cannot avoid deportability or inadmissibility, but your client has resided in the United States for more than seven years (or, in some cases, will have seven years before being placed in removal proceedings), try at least to avoid conviction of an "aggravated felony." This may preserve possible eligibility for either the relief of cancellation of removal or the so-called 212(h) waiver of inadmissibility (§§3.2.D(1) and (2)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid conviction of a "particularly serious crime" in order to preserve possible eligibility for the relief of withholding of removal (§3.4.C(2)).
- If your client will be able to avoid removal, your client may also wish that you seek a disposition of the criminal case that will not bar the finding of good moral character necessary for citizenship (§3.2.E(2)).

If your client is a REFUGEE or PERSON GRANTED ASYLUM:

- For a refugee, first and foremost, try to avoid a disposition that triggers deportability (see Matter of D-K, 25 I&N Dec. 761 (BIA 2012))
- For an asylee or a refugee, try to avoid a disposition that triggers inadmissibility (§§3.3.B and D(1)).
- If you cannot do that, but your client has been physically present in the United States for at least one year, try at least to avoid a disposition relating to illicit trafficking in drugs or a violent or dangerous crime in order to preserve eligibility for the so-called 209(c) waiver of inadmissibility for refugees and asylees (§3.3.D(1)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid a conviction of a "particularly serious crime" in order to preserve eligibility for the relief of withholding of removal (§3.3.D(2)).

If your client is ANY OTHER NONCITIZEN who might be eligible now or in the future for LPR status, asylum, or other relief:

IF your client has some prospect of becoming a lawful permanent resident based on having a U.S. citizen or lawful permanent resident spouse, parent, or child, or having an employer sponsor; being in foster care status; or being a national of a certain designated country:

- First and foremost, try to avoid a disposition that triggers inadmissibility (§3.4.B(1)).
- If you cannot do that, but your client may be able to show extreme hardship to a citizen or lawful resident spouse, parent, or child, try at least to avoid a controlled substance disposition to preserve possible eligibility for the so-called 212(h) waiver of inadmissibility (§§3.4.B(2),(3) and(4)).
- If you cannot avoid inadmissibility but your client happens to be a national of Cambodia, Estonia, Hungary, Laos, Latvia, Lithuania, Poland, the former Soviet Union, or Vietnam and eligible for special relief for certain such nationals, try to avoid a disposition as an illicit trafficker in drugs in order to preserve possible eligibility for a special waiver of inadmissibility for such individuals (§3.4.B(5)).

IF your client has a fear of persecution in the country of removal, or is a national of a certain designated country to which the United States has a temporary policy of not removing individuals based on conditions in that country:

- First and foremost, try to avoid any disposition that might constitute conviction of a "particularly serious crime" (deemed here to include any aggravated felony), or a violent or dangerous crime, in order to preserve eligibility for asylum (§3.4.C(1)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid conviction of a "particularly serious crime" (deemed here to include an aggravated felony with a prison sentence of at least five years), or an aggravated felony involving unlawful trafficking in a controlled substance (regardless of sentence), in order to preserve eligibility for the relief of withholding of removal (§3.4.C(2)).
- In addition, if your client is a national of any country for which the United States has a temporary policy of not removing individuals based on conditions in that country, try to avoid a disposition that causes ineligibility for such temporary protection (TPS) from removal (§§3.4.C(4) and (5)).

See reverse ➡

Immigration Consequences of Crimes Summary Checklist

For more comprehensive legal resources, visit the Immigrant Defense Project website at **www.immigrantdefenseproject.org** or call **212-725-6422** for individual case support.

CRIMINAL INADMISSIBILITY GROUNDS

Will or may prevent a noncitizen from being able to obtain lawful admission status in the U.S. May also prevent a noncitizen who already has lawful admission status from being able to return to the U.S. from a future trip abroad.

Conviction or admission of a **Controlled Substance Offense**, or DHS reason to believe that the individual is a drug trafficker

Conviction or admission of a **Crime Involving Moral Turpitude** (CIMT), which category includes a broad range of crimes, including:

- Crimes with an *intent to steal or defraud* as an element (e.g., theft, forgery)
- Crimes in which *bodily harm* is caused or threatened by an intentional act, or *serious bodily harm* is caused or threatened by a reckless act (e.g., murder, rape, some manslaughter/assault crimes)
- Most sex offenses
- *Petty Offense Exception* – for one CIMT if the client has no other CIMT + the offense is not punishable >1 year + does not involve a prison sentence > 6 mos.

Prostitution (e.g., conviction, admission, or intent to engage in U.S.) and other unlawful **Commercialized Vice**

Conviction of **two or more offenses** of any type + **aggregate prison sentence of 5 yrs.**

CRIMINAL BARS ON 212(h) WAIVER OF CRIMINAL INADMISSIBILITY

based on extreme hardship to USC or LPR spouse, parent, son or daughter

- Conviction or admission of a **Controlled Substance Offense** other than a single offense of simple possession of 30 g or less of marijuana
- Conviction or admission of a **violent or dangerous crime** is a presumptive bar.
- In the case of an LPR, conviction of an **Aggravated Felony** [see Criminal Deportability Gds], or any **Criminal Inadmissibility** if removal proceedings initiated before 7 yrs of lawful residence in U.S.

CRIMINAL BARS ON ASYLUM based on well-founded fear of persecution in country of removal OR WITHHOLDING OF REMOVAL based on threat to life or freedom in country of removal

Conviction of a "**Particularly Serious Crime**" (PSC), including the following:

- **Aggravated Felony** [see Criminal Deportability Gds]
  - All aggravated felonies will bar asylum
  - Aggravated felonies with aggregate 5 years sentence of imprisonment will bar withholding, & aggravated felonies involving unlawful trafficking in controlled substances are a presumptive bar to withholding of removal
- **Violent or dangerous crime** will presumptively bar asylum
- **Other PSCs** – no statutory definition; see case law

CRIMINAL BARS ON 209(c) WAIVER OF CRIMINAL INADMISSIBILITY based on humanitarian purposes, family unity, or public interest (only for persons who have asylum or refugee status)

- DHS reason to believe that the individual is a **drug trafficker**
- **Violent or dangerous crime** is a presumptive bar

CRIMINAL BARS ON NON-LPR CANCELLATION OF REMOVAL based on continuous physical presence in U.S. for 10+ years; and "exceptional and extremely unusual" hardship to USC or LPR spouse, parent or child

- Conviction of type of offense listed in criminal inadmissibility or deportability grounds, maybe whether or not the ground applies to the person, e.g., one CIMT with a potential sentence of 1 year or longer [see Criminal Deportability Gds] even if the offense was not w/n five years of an admission to the US
- Conviction or admission of crimes barring required finding of good moral character during 10 year period [see Criminal Bars on Obtaining U.S. Citizenship]

CRIMINAL DEPORTABILITY GROUNDS

Will or may result in deportation of a noncitizen who already has lawful admission status, such as a lawful permanent resident (LPR) green card holder or a refugee.

Conviction of a **Controlled Substance Offense**
EXCEPT a single offense of simple possession of 30g or less of marijuana

Conviction of a **Crime Involving Moral Turpitude** (CIMT) [see Criminal Inadmissibility Gds]

- One CIMT committed within 5 years of admission into the US and for which a prison sentence of 1 year or longer may be imposed
- Two CIMTs committed at any time after admission and "not arising out of a single scheme"

Conviction of a **Firearm or Destructive Device Offense**

Conviction of a **Crime of Domestic Violence, Crime Against Children, Stalking, or Violation of Protection Order** (criminal or civil)

Conviction of an **Aggravated Felony**

- *Consequences*, in addition to deportability:
  - Ineligibility for most waivers of removal
  - Permanent inadmissibility after removal
  - Enhanced prison sentence for illegal reentry
- *Crimes included*, probably even if not a felony:
  - **Murder**
  - **Rape**
  - **Sexual Abuse of a Minor**
  - **Drug Trafficking** (including most sale or intent to sell offenses, but also including possession of any amount of flunitrazepam and possibly certain second or subsequent possession offenses where the criminal court makes a finding of recidivism)
  - **Firearm Trafficking**
  - **Crime of Violence + at least 1 year prison sentence***
  - **Theft or Burglary + at least 1 year prison sentence***
  - **Fraud or tax evasion + loss to victim(s) >10, 000**
  - **Prostitution business offenses**
  - **Commercial bribery, counterfeiting, or forgery + at least 1 year prison sentence***
  - **Obstruction of justice or perjury + at least 1 year prison sentence***
  - **Various federal offenses** and possibly state analogues (money laundering, various federal firearms offenses, alien smuggling, etc.)
  - **Other offenses listed at 8 USC 1101(a)(43)**
  - **Attempt or conspiracy** to commit any of the above

* The "at least 1 year" prison sentence requirement includes a suspended prison sentence of 1 year or more.

CRIMINAL BARS ON LPR CANCELLATION OF REMOVAL based on LPR status of 5 yrs or more and continuous residence in U.S. for 7 yrs after admission (only for persons who have LPR status)

- Conviction of an **Aggravated Felony**
- **Offense** triggering removability referred to in **Criminal Inadmissibility Grounds if committed before 7 yrs of continuous residence in U.S.**

CRIMINAL BARS ON OBTAINING U.S. CITIZENSHIP – Will prevent an LPR from being able to obtain U.S. citizenship.

Conviction or admission of the following crimes bars the finding of good moral character required for citizenship for up to 5 years:

- **Controlled Substance Offense** (unless single offense of simple possession of 30g or less of marijuana)
- **Crime Involving Moral Turpitude** (unless single CIMT and the offense in not punishable > 1 year (e.g., in New York, not a felony) + does not involve a prison sentence > 6 months)
- 2 or more offenses of any type + aggregate prison sentence of 5 years
- 2 gambling offenses
- **Confinement** to a jail for an aggregate period of 180 days

Conviction of an **Aggravated Felony** on or after Nov. 29, 1990 (and conviction of murder at any time) permanently bars the finding of moral character required for citizenship

"CONVICTION" as defined for immigration purposes

A formal judgment of guilt of the noncitizen entered by a court, **OR**, if adjudication of guilt has been withheld, where:

(i) A judge or jury has found the noncitizen guilty or the noncitizen has entered a plea of guilty or *nolo contedere* or has admitted sufficient facts to warrant a finding of guilt, and

(ii) The judge has ordered some form of punishment, penalty, or restraint on the noncitizen's liberty to be imposed

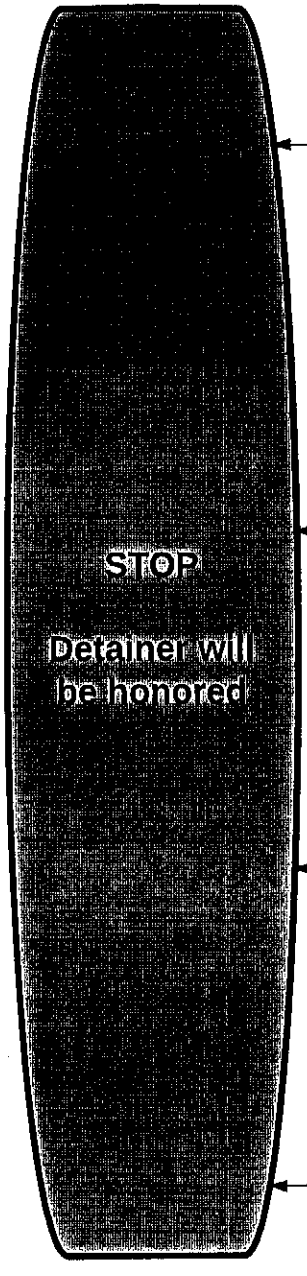
THUS:

- A court-ordered drug treatment or domestic violence counseling alternative to incarceration disposition IS a conviction for immigration purposes if a guilty plea is taken (even if the guilty plea is or might later be vacated)
- A deferred adjudication without a guilty plea IS NOT a conviction
- **NOTE:** A youthful offender adjudication IS NOT a conviction if analogous to a federal juvenile delinquency adjudication

IMMIGRANT DEFENSE PROJECT

NEW Immigration Detainer Law

Effective date: July 16, 2013



Is client free of **disqualifying pending charges** **OR** mandatory YO or JD?

No

Yes

Disqualifying pending charges:
- **any felony**
- 120.00*
- 215.50*
- Sex offense under NYPL 130
- VTL 1192
- 265.01 + firearm, rifle, shotgun, bullet, or ammunition

*Client ordered released at 170.70 will not be held on detainer if there are no other disqualifying factors

Prior (non-Y.O) felonies = 0
Open warrants = 0
This is the only **qualifying open case.**

No

Yes

Any open case is a qualifying open case **unless** the only charges are:
- 230.00
- 240.37 (where related to loitering for the purpose of prostitution, not patroniszing a prostitute)
- 511(1), 511(2)(a)(i), 511(2)(a)(iv)
- similar out of state charges

Does client have prior misdemeanors in last 10 years (**note exceptions**)?

Yes

No

Exceptions to prior misdemeanor bar:
- 230.00
- 240.37 (where related to loitering for the purpose of prostitution, not patronising a prostitute)
- 511(1), 511(2)(a)(i), 511(2)(a)(iv)
- YO/JD adjudication
- similar out of state convictions

Does client have an **old order of removal**?

Yes

No

How to find out if there is an **old order of removal**:
- Check copy of detainer
- Check end of rap sheet
- EOIR Hotline with client's A# (800-898-7180)
- Ask client about all immigration contacts

Detainer WILL NOT be honored

Client can be ROR'd or pay bail

But warn about disqualification for gang or terrorist watch list

Brooklyn Defender Services

IMMIGRANT DEFENSE PROJECT

NEW YORK CITY'S 2013 IMMIGRATION LAWS (Local Laws 2013/021 and 2013/022) MAY PROTECT YOUR NON-CITIZEN CLIENTS FROM TRANSFER TO IMMIGRATION DETENTION

These new laws, effective July 2013 replace NYC's first detainer law (Local Law 2011/62), and apply to clients with immigration detainers in both the New York Police Department (NYPD) and Department of Corrections (DOC) custody.

If ICE has issued a detainer[1], in certain cases NYPD and DOC will NOT honor the detainer. The attached chart (page 3) details when a detainer will and will not be honored by NYPD or DOC according to the new detainer discretion law.

Since the activation of Secure Communities in New York City in May 2012, more immigrants have detainers at arraignment. Under this new law, certain clients with detainers may be protected from being turned over to ICE custody if they bail out or are ROR'ed at arraignment. Additionally, certain clients may be able to take certain misdemeanor pleas, or alternative dispositions, and avoid transfer to immigration detention whether in NYPD or DOC custody.

Bail Payment Issues:

- If it is clear that your client does not have a detainer, bail out as soon as possible before immigration issues a detainer.
- If your client has a detainer at arraignment and you are unsure whether the detainer will be honored by the NYPD, bailing out or being ROR'ed could result in a transfer to immigration custody, you and your client will have more time to research for eligibility for release If your client enters DOC custody. Please contact the IDP hotline if you have questions at 212-725-6422.

Plea Decisions:

- To avoid transfer to immigration custody, your client may want to:
  - Spend more time in DOC custody to receive a violation, vacate prior convictions or correct a RAP sheet (rap sheet errors may result in transfer to ICE—see back for more info and how to correct)
  - If a detainer is lodged, reject non-jail sentence misdemeanor or felony pleas that would release someone from NYPD or DOC custody to ICE custody
  - Take the risk of going to trial

What the law does NOT change:

- ICE will still receive fingerprints from the NYPD and issue detainers
- ICE will still receive intake information for people in DOC custody, conduct interviews, and issue detainers
- ICE may still commence removal proceedings against people they discover in NYPD or DOC custody

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[1] An immigration detainer is a request from ICE to DOC to detain your client for up to 48 hours (excluding Saturdays, Sundays, and holidays) after he or she would otherwise be released, in order to provide ICE an opportunity to assume custody of your client and initiate deportation proceedings. *See* 8 C.F.R. § 287.7. Under this new immigration law, DOC will not keep custody of qualifying individuals beyond the 48-hour period.

IMMIGRANT DEFENSE PROJECT

DOC SCREENING PROCESS AND RAP SHEET ERRORS

DOC will look at your client's RAP sheet as well as federal gang and terrorist databases to determine if your client with a detainer is eligible for release under this law. If your client's record makes him or her ineligible for release, he or she will be handed over to ICE at time of discharge from DOC custody so that ICE can commence deportation proceedings.

Correcting Errors in RAP Sheets

Errors not corrected on a RAP sheet may result in your client being sent to ICE detention. Unfortunately, errors in RAP sheets are very common: some of the most common are closed cases that are listed as open, warrants that have been resolved but are listed as outstanding, and arrests for which charges were dismissed but for which final dispositions are not displayed.

Errors should typically be corrected by providing documentation of the error to the state Division of Criminal Justice Services (DCJS). To obtain supporting documentation, you can do the following:

- If the RAP sheet shows an open arrest or warrant, contact the police precinct where the arrest took place or where the warrant was issued. Sometimes the records may not be complete and a FOIL request must be filed.
- If the client's charge was dismissed by a court, then contact the court clerk to get a Certificate of Disposition showing the dismissal. (Note that the appropriate terminology may be different outside New York.)
- If the RAP sheet shows an open charge but the case was not prosecuted, then contact the District Attorney's office to get evidence of a "decline prosecution" (DP) decision.

It is crucial that this process be started as early as possible, as the procedure can take approximately six weeks to complete via DCJS. To fix errors, send a letter detailing the RAP sheet mistake(s) and enclosing documentation of the correct disposition via certified mail to DCJS. DCJS will mail confirmation when corrections have been made.

In cases where a correction must be made more quickly, you can contact DCJS directly by phone to expedite your request *and* you can correct the error in CRIMS (an OCA database) via the relevant court clerk. If you make the correction via CRIMS, you will have to inform the DOC Office of Constituent Services at (718) 546-1500 or constituentservices@doc.nyc.gov that they should rely on CRIMS in your client's case rather than DCJS.

More Information

If you have questions or if NYPD or DOC has violated the 48-hour detainer rule for your client, please contact:

Immigrant Defense Project Legal Hotline, (212) 725-6422, info@immigrantdefenseproject.org

IMMIGRANT DEFENSE PROJECT	ICE Detainer Will Be Honored By NYPD/DOC	ICE Detainer Will NOT Be Honored By NYPD/DOC
1 Pending Charge	• Felony charge OR • 1 misdemeanor charge for: » NYPL 265.01 - when relating to a firearm, rifle, shotgun, bullet or ammunition » NYPL 215.50 criminal contempt (see exceptions to the right) » NYPL 120.00 - assault in the 3rd degree (see exceptions to the right) » NYPL Article 130 - sex offenses » VTL Article 31 - alcohol and drug related offenses	• 1 misdemeanor charge (see exceptions to the left) » Unless client has been released pursuant to NYCPL 170.70 for NYPL 215.50 » Unless client has been released pursuant to NYCPL 170.70 for NYPL 120.00 • Mandatory Y.O. or J.D. adjudication
Multiple Open Cases	• 2 or more misdemeanor charges in separate cases (see exceptions to the right) » Unless the NYPL 240.37 charges relate to "patronizing a prostitute"	• Unless 2 or more misdemeanor charges in separate cases for: » VTL 511(1): aggravated unlicensed driving in the 3rd » VTL 511(2)(a)(i): aggravated unlicensed driving in the 2nd when relating to a previous conviction in the preceding 18 months » VTL 511(2)(a)(iv): aggravated unlicensed driving in the 2nd when relating to 3 or more suspensions » NYPL 230.00: prostitution » NYPL 240.37 loitering for the purposes of prostitution (see exception to the left)
Warrants	• Criminal warrant from any jurisdiction	
Prior Conviction	• Felony conviction • Misdemeanor conviction (see exceptions to the right) » Unless the NYPL 240.37 conviction relates to "patronizing a prostitute"	• Unless 1 or more misdemeanor convictions for: » NYPL 230.00 » NYPL 240.37 (see exception to the left) » VTL 511(1) » VTL 511(2)(a)(i) » VTL 511(2)(a)(iv) • Misdemeanor convictions more than 10 years prior to the instant arrest • ACD or JO disposition
Deportation Issues	• Order of removal or deportation	• Prior interaction with DHS that didn't result in order of removal/deportation
"Public Safety" Issues	• Client is on a gang or terrorist watch list	