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The Basic Steps a Criminal Defender Must Take to Understand the Adverse Immigration Consequences of Drug Offenses

A criminal defense attorney is starting a normal workday in state criminal court for her client's arraignment. The attorney's client was arrested the previous day and spent the night in jail. She was not able to visit her client last night and now she is meeting her client for the first time. She has been waiting in the courtroom going over the file, noting that her client has no prior convictions, and reading the police report and the complaint for the pending case. Her client is charged with one misdemeanor count of possession of marijuana for sale and a second count of misdemeanor transportation of marijuana for sale.[1] The district attorney (DA) has offered to drop the transportation count if the client pleads to possession and the DA will recommend that the client receive a probationary sentence, which, knowing the judge, will likely be granted. The DA also informs defense counsel that a witness statement in the police report likely will support amending the complaint to add a felony criminal threats charge and that the DA would likely add the charge if the client rejects the current offer. Defense counsel is familiar with the DA and believes that she might not be bluffing and that the offer is fair given the quantity of marijuana involved, the bad witness statements, and other harmful facts alleged in the police reports.

It is Friday and the court staff and judge make it clear that they want to move through the overloaded calendar as quickly as possible. After waiting awhile, the client's attorney is finally let into the secure holding cell. There are six or seven inmates in the large cell and some are talking loudly. She looks down at her file, calls out the client's name, and a young, clean cut man in his early 20s wearing a sweatshirt from a local state university responds and walks over to the cell bars where defense counsel is standing. The client looks terrified, desperate, and appears not to have slept a wink the night before.

Defense counsel introduces herself, having to raise her voice above the noise coming from the other men in the cell, the metal doors opening and closing behind her, and other attorneys and sheriffs talking. She asks her client to move over to the side of the wall so that she may try to have as confidential of a discussion as possible. She explains the charges, goes over the police report, and tells him what the possible sentence could be. Defense counsel conveys that her preference is typically to first enter a not guilty plea and then to focus on getting the client released from custody so that she and her client can assess possible defenses and make decisions about the case without the stress of the client being in custody. Counsel tells the client about his constitutional rights, which include but are not limited to going to trial, confronting adverse witnesses and calling his own, testifying

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on his own behalf, and more. She does her best to assure him that she is his fierce, loyal and skilled advocate and tries to convince him that she will zealously fight the case should he want to.

Counsel continues the interview and tells the client that she is also obligated to communicate the DA's offer, which she does. Her client does not dispute the police report other than a few minor details and asks his attorney what she thinks of the case. Counsel reiterates her preference for fighting, but honestly informs him of why the initial facts in the police report are bad. She tells him that the DA is contemplating adding a felony criminal threats charge that would be a felony "strike" offense,[2] which she explains is a type of offense that is much more serious in nature and can trigger harsher penalties if he picks up new cases in the future. She informs her client that this particular felony charge would expose him to up to three years in state prison, unlike the current offer that would result in him being released today on probation with a misdemeanor. Counsel cautions that, on the other hand, the DA's discussion of adding the felony charge could be a bluff but that there are some facts in the report that possibly support adding the felony.

The client is clearly deeply upset, scared and depressed, but he is able to show that he understands what his attorney is saying. He desperately does not want a felony conviction, especially not a strike offense; he cannot imagine going to state prison and decides that he does not want to risk it. He just wants to get out of there as fast as possible and says that he wants to take the deal. Defense counsel pushes back, telling him about how she has won harder cases, where she thinks there are problems with the prosecution's case, and that she probably could get the same offer in a few days after the client has had time to think. Despite her dogged efforts, her client remains steadfast. He understands everything and still wants to take the deal. The defense attorney does as he asks and goes over the plea waiver forms with him.

A few minutes later, when the judge is hearing cases, counsel has her client brought into court and informs the judge of the plea bargain. The judge assents to the recommended terms and begins taking the client's plea. In the middle of the plea colloquy, the judge reads a generic advisement that explains that if the person entering the plea is not a citizen, the plea could result in deportability, excludability, and/or a bar to naturalization.[3] The client, suddenly looking a little flustered, tells the judge he understands and the judge proceeds with the colloquy. As the judge reads the next part of the colloquy, the client leans over to his attorney and whispers, "I'm not going to be deported right? It was just pot. They don't deport for pot, right? The judge just has to say that to everyone, right?" The attorney realizes that she was so focused on the criminal penalties that she forgot to ask about his citizenship. Now, however, she knows that he is not a citizen. What should she do?

Understanding Immigration Consequences of Drug Offenses

While many criminal defenders will likely have experience completing immigration analyses and would never forget to ask a client about citizenship status before advising to accept a plea, the hypothetical in this article will be used to focus on the most basic analytical steps to determine immigration consequences because, even after the seminal U.S. Supreme Court decision *Padilla v. Kentucky*,[4] it is apparent that many attorneys still are intimidated by their duty to advise on immigration consequences. And it may be that some new attorneys or pro bono attorneys without much criminal defense experience simply do not realize that their duty extends to counseling clients on certain immigration consequences. This part of a defense attorney's job should not be intimidating, and with the right approach, one can effectively incorporate immigration consequences into one's criminal defense practice. This article will focus nearly exclusively on understanding the immigration consequences and will only briefly address defense strategies.

To know what an effective attorney does in this situation, it helps to first go over what *not to do.* First, do not guess and do not assume that the consequences will make sense. Federal immigration law often defies logic and reason. An infraction can have terrible immigration consequences and a felony might have few or none. Next, do not ignore or discount the client's questions about immigration consequences. Following *Padilla v. Kentucky,* silence or misadvice as to immigration consequences of a criminal case will constitute ineffective assistance of counsel.[5] Last, do not underestimate how critically important it is for the client that his or her attorney properly advises the client about immigration consequences. As the U.S. Supreme Court correctly noted, "as 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."[6] This article does not thoroughly examine the scope of defense counsel's Sixth Amendment duty to advise clients of immigration consequences, but suffice it to say that *Padilla v. Kentucky* makes it clear in no uncertain terms that criminal defenders must, at minimum, research immigration consequences and, when consequences are clear, provide similarly clear advice.[7]

P.I.P.E. Issues

Okay. It is clear what *not* to do. Now consider what this hypothetical attorney needs to do. Remember, the judge is almost finished going through the plea colloquy, her client is nervous about getting deported but wants to get out of criminal custody as fast as possible, and defense counsel knows that her judge will be very annoyed if the client abandons the plea colloquy at this point. First, counsel should take a deep breath. Even though immigration law can be complex and arcane, with the right approach, she can do it.

After a criminal defense attorney does a lot of immigration advisements, he or she will internalize some of the most important ways that criminal and immigration law intersect. But, before one develops that kind of command of the law, an attorney needs to know the basic framework. Since this is an article about drugs, perhaps the acronym "**P.I.P.E.**" may help readers to remember the four areas of inquiry that are required to complete a thorough and accurate immigration advisement: **P**rior interaction with the government; **I**mmigration status and events; **P**riority of client; and **E**ffects of pending case.

Prior interaction with the government: There are two main reasons defense counsel needs to determine if the client has prior convictions, juvenile adjudications, and/or arrests, or has made any admissions[8] to the government about illegal conduct. First, the client might already be deportable or inadmissible based on these past events, and knowing this will likely affect defense strategy.[9] This inquiry is also necessary to see what the pending case's effect will be, since multiple convictions can interact and, together, create new adverse immigration consequences.[10] Last, ascertaining the immigration posture of the client based on these past

events will also tell defense counsel if there is any way for the client to seek postconviction relief that may cure her immigration problems from these prior convictions, such as requesting a reduction or a resentencing.

Immigration status and events: There are dozens of possible immigration statuses. Counsel needs to know her client's status because different statuses require different approaches to preserve them. For example, if an adverse immigration consequence is unavoidable, for lawful permanent residents (LPRs), the most important consequence to avoid is deportability, whereas for undocumented people, one most wants to avoid inadmissibility.[11] The threshold question an attorney should ask to determine immigration status is whether the client was born in the United States. If the answer is no, counsel must ask a series of follow-up questions to determine the client's country of citizenship, status, and changes of status over time in the United States.

Immigration events that are necessary to ask the client about include whether she has a pending application for an immigration status or relief, whether he is in removal proceedings (if so, did the client receive a Notice to Appear?[12]), and whether/when he has left the country since arriving. This information goes to the client's current status and will likely be important to know strategically.

If counsel has determined that the client is not a citizen, one should also always ask about the citizenship of the client's parents and grandparents. Depending on the facts, the client may have derivative or acquired U.S. citizenship and not know.[13]

Priority of client: Criminal defense counsel needs to ask the client whether he is most interested in defending against criminal or immigration penalties.[14] Sometimes defense counsel can successfully reduce or eliminate one type of penalty by increasing the other.[15]

Effects of pending case: Most attorneys focus on this prong at the expense of the other three equally important lines of inquiry. Clearly, a criminal defender needs to investigate, understand, and advise her client of the clear adverse immigration consequences triggered by the client's pending case.[16] This requires counsel to determine if the state crime falls under certain federal categories or definitions and whether it interacts with prior convictions to trigger adverse immigration consequences. However, for the attorney and her client to truly understand what immigration posture the client is in, and for the client to be able to meaningfully determine the objectives of the defense of his case,[17] counsel needs to consider all four P.I.P.E. issues.

To help with this analytical prong, there are a few general rules of thumb when it comes to immigration consequences. Immigration law penalizes certain categories of offenses very harshly. Whenever one of these kinds of offenses is alleged, warning bells should immediately sound. Some examples are domestic violence, theft, and gang-related offenses. Above and beyond any other type of offense, however, are controlled substances offenses. Perhaps this is because the federal laws that regulate drugs have not been significantly altered since legislation was enacted in 1996 — during the height of the War on Drugs — which hugely expanded the number of immigrants subject to mandatory detention, deportation, and denial of lawful status based on often minor state drug offenses. Regardless of state legalization or of general social acceptance of some drug use since the 1990s, federal immigration laws still to this day punish drug offenses in unimaginably severe ways.

Regardless of state legalization or general social acceptance, federal immigration laws punish drug offenses in severe ways.

Let's return to the hypothetical (the courthouse at 11 a.m. Friday morning): Defense counsel's judge is proceeding with the plea colloquy but, because she now knows that she needs to investigate, consider, and advise on all the **P.I.P.E.** issues, the client's attorney realizes that she has a lot more work to do before her client can plead to anything. She knows that her previous counseling of the client violated his Sixth Amendment rights and ethical guidelines because she did not discuss immigration. Defense counsel also knows it is very likely that the specific plea her client is entering into — a violation of possession of marijuana for sale — is going to trigger horrible immigration consequences because it is a drug offense.

Knowing all this, the first thing this attorney needs to do is inform the judge that something important has come up and she needs a few minutes to talk to her client. In a confidential setting, counsel needs to tell her client in simple, direct terms, that drug offenses are very bad for noncitizens and will trigger his deportation, even though it is only for marijuana. Counsel needs to tell him that she needs time to investigate more facts and look at the law to accurately advise him.

In this situation, the attorney needs to be careful, however, given that the DA has indicated that she may add a felony criminal threats charge. Advising a client to reject a favorable plea offer and that he must plead not guilty while counsel investigates the immigration consequences may constitute ineffective assistance of counsel.[18] Despite the fact that this misdemeanor charge will nearly certainly trigger deportability and worse, the client may still prefer these terrible immigration consequences to state prison, a strike, and becoming a felon. Or he may feel the opposite way.[19] That is not the attorney's call to make. The defense attorney's role in these circumstances is to provide the client with the correct information about the potential penalties so that he can make a knowing and intelligent decision.

Defense counsel's client decides that he is willing to risk losing the DA's offer and that he wants to know exactly what will happen with his immigration status before making a decision. The attorney can get her client a release on his own recognizance and now she has some time to investigate, research, understand, and provide a truly thorough immigration advisement. She returns to her office to research and write a memo outlining the immigration advisement she is going to provide her client. Again, **P.I.P.E.** is her friend.

Prior interaction with the government: As mentioned above, prior interactions with the government can trigger adverse immigration consequences. Convictions[20] are not the only events that can cause adverse immigration consequences, but they are the most common. Conduct, admissions, or other behavior that provide immigration authorities a "reason to believe" that a person has

engaged in certain activities can, under the right circumstances, be enough to make that person inadmissible or deportable. For example, abusing drugs, even without criminal convictions, can render an individual inadmissible because it may be a sign of a physical disorder.[21] Practically speaking, the government may find that someone is inadmissible under these grounds if there is evidence of participation in drug rehabilitation programs, admissions made as part of a drug diversion program, admissions made to immigration officers at ports of entry, or police reports coming from arrests even when a criminal complaint was not filed. Also, any conduct that gives the government "reason to believe" that the person has been involved in drug trafficking or money laundering can render the person inadmissible.[22]

Juvenile adjudications, however, are not convictions for immigration purposes[23] and admissions made about conduct that occurred when someone was a minor cannot serve as an admission to having committed the essential elements of a crime involving moral turpitude (CIMT) because, as a matter of law, juvenile conduct can only constitute juvenile delinquency and not a crime.[24] However, having cases in juvenile court can still trigger adverse immigration consequences.[25]

A prior conviction that occurred in any state jurisdiction will have the same immigration effect. Accordingly, defense counsel will need to consider the client's convictions that occurred outside defense counsel's own jurisdiction. Attorneys may not have access to county databases outside their own or to federal FBI or DOJ databases. Depending on how reliable the client is, counsel may have to trust the client to reveal these kinds of interactions, or the attorney may have to do the legwork to obtain those records.

Based on the information available to the attorney and her interview with her client, he has no prior convictions and no other past events that raise flags. Defense counsel can move to the next **P.I.P.E.** prong.

Immigration status and events: Next, this attorney needs to determine her client's immigration status and when he obtained that status. "Where were you born?" This is the best question with which to begin this investigation. If the answer is outside the United States, defense counsel should know to then dig deeper and ask a series of follow-up questions to ascertain immigration status. Many times, clients may be unsure or confused about their status. If one senses that her client might not have accurate information about his or her status, best practices are to corroborate his or her response with documents, speaking with immigration counsel, or even obtaining a copy of the client's immigration file from federal immigration officials.

In this case, defense counsel is able to confidently confirm from her client that he became a lawful permanent resident (LPR) three years ago, meaning that he has a "green card." He has not received a Notice to Appear, which means that he is not in removal proceedings, and has not left the country since arriving.[26] Learning that he is an LPR is important because it means that he has a relatively strong type of legal status. If the government wants to put him in removal proceedings, it will be the government's burden to show with clear and convincing evidence that he has become deportable.[27] While a completely immigration-neutral disposition should always be defense counsel's goal, since deportability is the main concern for this client, he can afford to suffer a conviction that triggers inadmissibility if necessary and still remain in the country lawfully. This is not to say that becoming inadmissible does not trigger adverse consequences. Whenever anyone, including an LPR, becomes inadmissible, the attorney needs to make sure to caution the client that being "inadmissible" means that the client likely cannot ever leave the country, even for brief trips and even if the client is used to regularly leaving the country.[28] If a client becomes inadmissible but not deportable, that client needs to know to consult with an immigration attorney before leaving the country or applying for an immigration status, benefit, or relief.

Priority of client: This client has already indicated to his attorney that he has strong concerns about protecting his immigration status. After counsel completes her immigration analysis and can tell him exactly what the potential penalties would be should he plead to the charged offenses or lose in trial, and after she sees whether there is a new offer from the DA or if the DA is going to add the felony count, counsel needs to have another conversation with her client to determine what he wants to do.

Effects of pending case: This analytical prong looks at whether the pending charges trigger immigration consequences either on their own or by interacting with prior convictions. To get a sense of all the different inadmissibility and deportability grounds, one should start by reading 8 U.S.C. §§ 1182(a), 1227(a), and 1101(a)(43), and, more importantly, find practice advisories or books that summarize the most important parts of these statutes and how they interact with the state's criminal statutes where one practices.[29] Where possible, all criminal defense offices should have a way to consult with an expert, who will save attorneys time in analysis and provide confidence that one is getting it right. For this client's current charges – misdemeanor possession of marijuana for sale and misdemeanor transportation of marijuana for sale — defense counsel should go straight to the federal immigration statutes and practice guides that discuss controlled substances.[30]

In these materials and sections of the Immigration and Nationality Act (INA), defense counsel will learn that a controlled substances offense (CSO) typically will always trigger a variety of terrible immigration penalties. One federal definition of a controlled substance offense is "a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substance Act (21 U.S.C. § 802))."[31] A controlled substance conviction makes someone inadmissible.[32] In addition, a controlled substance conviction renders a noncitizen deportable, except for a single offense of possession of 30 grams or less of marijuana for personal use.[33] Drug offenses that trigger deportability and inadmissibility but are not aggravated felonies include most possession offenses, possession of paraphernalia, being in a place where drugs are used, being under the influence, transportation for personal use and, in the Ninth Circuit only, "offering" to commit any drug offense.[34]

Defense counsel will also learn that most CSOs are crimes involving moral turpitude, many are aggravated felonies, and many are "particularly serious crimes."[35] An aggravated felony is a term of art, and there are many offenses that are "aggravated felonies" that are neither felonies nor aggravated. Aggravated felonies trigger the worst imaginable immigration consequences.[36]

Also, as discussed above, there are deportability and inadmissibility grounds triggered by conduct, admissions, or a factual basis that give federal officials a "reason to believe" that the person has ever participated in drug trafficking, or if she is the spouse or

child of a trafficker who benefited from the trafficking within the last five years.[37]

Therefore, since a CSO can qualify as multiple categories of offenses under federal immigration law, and each category of offense triggers its own penalty, one conviction, evidence of conduct, or acts related to drugs can trigger multiple and different kinds of adverse immigration consequences. For example, an aggravated felony, by itself, does not make one inadmissible.[38] But if the crime is a CSO in addition to being an aggravated felony, by being a CSO it will trigger inadmissibility, and by being an aggravated felony it will result in all adverse aggravated felony consequences.

Knowing these general rules about what consequences drug offenses trigger in federal law, the next question that counsel needs to ask is whether the specific state drug offense alleged in the client's case qualifies as a controlled substance offense as enumerated in federal statutes. Most state drug offenses will.[39] Moreover, most offenses that are analogous to trafficking, like possession for sale or sale, will constitute aggravated felonies for federal purposes.[40] Also, many state offenses that do not involve trafficking, such as cultivation, distribution for free, or obtaining a prescription by fraud, can be aggravated felonies despite not being drug trafficking offenses due to being analogous to certain federal drug felonies.

One way that state offenses will sometimes *not* qualify as a type of drug offense that matches with the federal definition is when the state statute regulates more behavior or substances than the relevant federal statutes. The state's list of controlled substances, for example, could include substances than are not on the federal lists. Therefore, in theory, one could violate the state statute by possessing that substance and such behavior could not violate federal law.[41] To be certain of what immigration consequences a particular violation of a state offense triggers, counsel should try to confirm whether the Board of Immigration Appeals or federal courts have interpreted the immigration consequences of violating the state statute in question or whether experts in the particular state have published practice advisories that address this question.[42]

Let's return to the hypothetical case: Misdemeanor possession of marijuana for sale and misdemeanor transportation of marijuana for sale will nearly certainly qualify as a few comparable types of offenses regulated by federal laws. Since the statutes specifically list "marijuana" as the substance that is controlled, this client will not be able to argue in removal proceedings that the state statute is overbroad in terms of controlled substances. Thus, both convictions — possession and transportation for sale — will be controlled substances offenses, triggering inadmissibility and deportability. Next, because the charges are related to sales, they will also nearly certainly be aggravated felonies as trafficking offenses. This is important: even though these are misdemeanor offenses that could result in the client receiving probation and no actual custodial sentence, these kinds of convictions would be "aggravated felonies" for immigration purposes. Additionally, this client's arrest and the police report from the incident, even if the case is dismissed, would not likely rise to drug abuse or addiction, but perhaps could be enough to form a basis for the probative and substantial "reason to believe" inadmissibility ground that the client participated in drug trafficking if Immigration and Customs Enforcement (ICE) obtains the police documents.

Last, these convictions also would be crimes involving moral turpitude. Since these charges are drug offenses and already trigger deportability and inadmissibility, the CIMT consequences are redundant and performing the CIMT analysis is mostly academic.[43]

Now that this criminal defense attorney understands how these specific convictions would affect her client's ability to stay or return to the country, she needs to convey this to her client in simple, direct terms. Immigration law can be hard for practicing attorneys to wrap their heads around, let alone someone without a legal background. Thus, she needs to find ways to translate the immigration jargon into language anyone can understand. Consider this example:

> If you plead guilty to the current charges or lose at trial, because both these offenses are drug offenses, you will become deportable and inadmissible. This means that ICE will very likely come to your house or workplace, arrest you, put you in an immigration prison and not let you out, and make you go through an immigration trial that's called removal proceedings where they almost certainly will be able to prove that you are deportable. The current federal government is enforcing immigration laws very aggressively and you should expect that they will go after you. Also, because these charges involve selling drugs, for immigration they would also be what is called an aggravated felony, which is extremely bad. With this kind of conviction, you would not have a chance to be released from immigration detention while your immigration case is happening, you could not apply for most kinds of relief or waivers that would stop your deportation and let you stay in the country, and you could never become a citizen. If you tried to come back into the country without permission after being deported, the federal government could charge you with a new crime[44] and send you to federal prison. You need to take this very seriously as you decide what you want to do in this case. If you want me to, I will try to negotiate a plea that might avoid these immigration problems. Do you understand what I've said?

After the client understands his case's immigration consequences, defense counsel then needs to inform the client whether there are potential alternatives she can seek that avoid or mitigate immigration consequences. This is where practice advisories or consulting with criminal immigration experts can be very helpful to become aware of these strategies. Finally, after this client is aware of what he faces and what is possible, defense counsel needs to ask the client what he prioritizes. She will then finalize her defense strategy based on this informed discussion.

Options for the Client in the Hypothetical Case

In the hypothetical discussed in this article, if the client does not want to go to trial, defense counsel should first try to negotiate for one or multiple misdemeanors that are neither controlled substance offenses nor crimes involving moral turpitude. Depending on the state's criminal laws and the facts of the alleged offense, viable alternatives may include trespass, disturbing the peace, failure to disperse, commercial burglary, accessory after the fact, vandalism, public nuisance, loitering, or similar offenses. If it is unrealistic to negotiate for a noncontrolled substances offense, the next best option would be to secure a stipulated plea to simple possession of marijuana for one's own use with the explicit provision in the charging document and the plea that the amount of marijuana possessed is less than 30 grams. This will avoid the controlled substances deportability ground,[45] but the client should be advised that this is a one-time exception to the controlled substances deportability ground. Similarly, the client could plead to a possession offense and keep the record of conviction vague as to the substance and quantity. With the vague record of conviction, ICE will not be able to meet its burden to show deportability. This may be less desirable than a stipulated plea to less than 30 grams of marijuana, however, since an immigration judge could erroneously find that the conviction triggers deportability despite the vague record of conviction.

Conclusion

Any time a criminal defense attorney sees a drug or drug-related charge or drug conduct alleged against a noncitizen client, the attorney should immediately think of immigration consequences. Defense counsel should remember that federal immigration law hates drugs, and drug convictions are nearly always very bad for noncitizens. As criminal defenders continue to become educated about how immigration and criminal law intersect, counsel will learn that the main defense strategies for drug cases are as follows, in order of preference: (1) avoiding a drug conviction entirely through dismissal or negotiation; (2) if a drug conviction is unavoidable, avoid an aggravated felony; (3) plead specifically to a substance that is not federally controlled; or (4) create a vague record of conviction as to the substance if the state law is overbroad. Defense strategies can vary depending on a variety of factors, including the facts of the alleged incident, the willingness of the prosecution and the judge to arrive at an immigration-safe disposition, and the client's equities. A thorough discussion of defense strategies exceeds the scope of this article.

Do not guess or rely on a hunch when it comes to immigration consequences. Immigration is a complicated area of the law and, when immigration plays a role in a criminal case, the criminal defense attorney should at least contact or consult with an immigration attorney to confirm that the defense attorney's analysis is correct. Several organizations have published practice advisories, guides, and other useful secondary sources that can assist an attorney's legal analysis, such as the Immigrant Legal Resource Center (https://www.ilrc.org), the Immigrant Defense Project (https://www.immigrantdefenseproject.org), the National Legal Aid & Defender Association (http://www.nlada.org), and the National Immigration Project of the National Lawyers Guild (http://nationalimmigrationproject.org), to name only a few.

Notes

1. Depending on which state an attorney practices in, these kinds of offenses may be misdemeanors or felonies. In California, for example, Proposition 64 was passed in 2016 and reduced Possession for Sale, Health and Safety Code Section 11359, from a felony to a misdemeanor subject to certain limitations. CAL. HEALTH & SAFETY CODE § 11359.

2. Depending on which state an attorney practices in, the laws that punish recidivism may have different names. In California, Penal Code Section 1170.12(c) defines strike offenses.

3. *See, e.g.,* Cal. Penal Code § 1016.5.

4. 559 U.S. 356 (2010).

5. *Id.* at 369.

6. *Id.* at 364 (footnote omitted).

7. *Id.* at 369 ("But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.") The defense attorney also should look into whether his state has laws affecting his duty to advise noncitizens. For example, in 2016 California's Penal Code Section 1016.3 went into effect, which imposes affirmative duties on defense counsel to advise noncitizen clients. Cal. Penal Code § 1016.3.

8. Immigration advocates have reported that Customs and Border Protection officers have been questioning an increasing number of noncitizens about marijuana use especially when seeking entry into states that have legalized medicinal or recreational marijuana. This is an example of an admission that can create serious problems for noncitizen clients if the admission is formal, offered freely and voluntarily, and addresses each statutory element of the offense. Partial or general admissions will not suffice. *See Matter of E- V-*, 5 I. & N. Dec. 194 (BIA 1953); *Matter of Espinosa*, 10 I. & N. Dec. 98 (BIA 1962); *Pazcoguin v. Radcliffe*, 292 F.3d 1209 (9th Cir.), *as amended on denial of reh'g and reh'g en banc*, 308 F.3d 934 (9th Cir. 2002).

9. For example, conduct-based deportability grounds include drug addiction or drug abuse that occurs after being admitted or a finding by a civil or criminal judge that the noncitizen violated a previously issued domestic violence protective order. 8 U.S.C. § 1227(a)(2)(B)(ii); 8 U.S.C. § 1227(a)(2)(E). Conduct that supports a finding of alcohol or drug abuse even without criminal convictions can also render an individual inadmissible. 8 U.S.C. § 1182(a)(1)(A)(iii)(I) (one is inadmissible if he has "a physical or mental disorder and behavior … that may pose … a threat to the property, safety, or welfare of the alien or others. …"). Also, any conduct that gives the government "reason to believe" that the person has been involved in drug trafficking or money laundering will render the person inadmissible. 8 U.S.C. § 1182(a)(2)(C),(I). Similarly, even without criminal convictions, admitting to having committed the acts that constitute the essential elements of any crime involving moral turpitude renders the individual inadmissible. 8 U.S.C. § 1182(a)(2)(A)(i)(I).

10. For example, if a lawful permanent resident (LPR) client already has one conviction for a crime involving moral turpitude (CIMT), and the pending charge is also a CIMT, the client needs to know that a second CIMT not arising out of the same scheme will make her deportable. 8 U.S.C. § 1227(a)(2)(A)(ii). The lawyer will need to adjust defense strategy to avoid the second CIMT. The Immigration and Nationality Act (INA) does not define "crime involving moral turpitude." Whether a crime involves moral turpitude is decided by the categorical or modified categorical approach; these approaches are discussed in *Mathis v. United States*, 136 S. Ct. 2243 (2016).

11. To be deportable means that ICE can strip a noncitizen who was admitted into the country of his or her current legal status and remove the noncitizen from the country. 8 U.S.C. § 1227(a). When a noncitizen is inadmissible, the noncitizen can be denied the ability to enter or return to the United States legally. 8 U.S.C. § 1182 (a). Inadmissibility also can preclude or significantly delay a noncitizen from becoming a U.S. citizen or a lawful permanent resident, or otherwise become eligible for certain kinds of immigration status or relief. While a singular conviction can trigger both inadmissibility and deportability, many times that is not the case.

12. The Notice to Appear (NTA) is the charging document issued by U.S. Department of Homeland Security (DHS) that provides written notice to persons that removal proceedings against them have commenced. See 8 U.S.C. § 1229; 8 C.F.R. § 239.1. In hearings commenced before April 1997, the charging document was called an Order to Show Cause.

13. *See* Immigrant Legal Resource Center, *Acquisition & Derivation Quick Reference Charts*, https://www.ilrc.org/acquisition-derivation-quick-reference-charts.

14. *See Lee v. United States*, 137 S. Ct. 1958, 1968 (2017) (in part reasoning that defendant had been prejudiced by counsel's ineffectiveness because deportation was a "determinative issue" for the defendant).

15. For example, some misdemeanor offenses may trigger terrible consequences and the only way a defense attorney can arrive at an immigration-safe disposition is to "plead up" to a felony. This defense strategy was discussed in *People v. Bautista*, 115 Cal.App.4th 229, 239 (2004) *as modified* (Feb. 17, 2004), where a California Court of Appeal held that the defendant "may have been prejudiced by the attorney's failure to investigate, advise, and utilize defense alternatives to a plea of guilty to an 'aggravated felony'."

16. *Padilla*, 559 U.S. at 357 ("the consequences of Padilla's plea could easily be determined from reading the removal statute"); Standards 4-5.4, 4-5.5, ABA Criminal Justice Standards for the Prosecution and Defense Functions (2015).

17. Rule 1.2, ABA Model Rules of Professional Conduct ("a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.").

18. *See Lafler v. Cooper*, 566 U.S. 156, 174 (2012) (right to the effective assistance of counsel under the Sixth Amendment can be violated by the loss of a favorable plea deal).

19. *See, e.g., United States v. Rodriguez-Vega*, 797 F.3d 781, 790 (9th Cir. 2015) (reasoning "[a] young lawful permanent resident may rationally risk a far greater sentence for an opportunity to avoid lifetime separation from her family and the country in which they reside.").

20. "Conviction" is a term of art for purposes of federal immigration law and its definition is subject to precedential and statutory authority. A conviction occurs if there was a formal judgment of guilt entered by a court or, when, first, a judge or jury "has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt," and, second, "the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed." 8 U.S.C. § 1101(a)(48)(A). Importantly, if a judgment was entered, whether in standard criminal proceedings or as part of a state diversion program, such judgment will serve as a conviction unless a state court vacates the judgment for cause, and not for rehabilitative or humanitarian purposes. *See, e.g.*, *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003). This means that post-plea drug diversion programs are still convictions for immigration purposes even if the conviction is dismissed upon successful completion of the program and that, with very rare exceptions, expunged convictions are still convictions for immigration purposes.

21. 8 U.S.C. § 1182(a)(1)(A)(iii)(I).

22. 8 U.S.C. § 1182.

23. *Matter of Ramirez-Rivero,* 18 I&N Dec.135 (BIA 1981). If a deportability or inadmissibility ground requires a conviction, ICE cannot use a juvenile adjudication or disposition as a substitute for a conviction in removal proceedings. *Matter of Devison*, 22 I&N Dec.1362 (BIA 2000).

24. *Matter of MU*, 2 I&N Dec. 92 (BIA

1944) (admission by adult of activity while a minor is not an admission of committing a crime involving moral turpitude triggering inadmissibility under 8 U.S.C. § 1182(a)(2)(A)(i)(I)).

25. For example, a minor's conduct can trigger the conduct-based deportability and inadmissibility grounds.

26. Leaving and re-entering the country or adjusting status after becoming inadmissible can make someone deportable, but this is a complicated topic and a detailed explanation of this deportability ground exceeds the scope of this article. 8 U.S.C. § 1227(a)(1)(A).

27. 8 U.S.C. § 1229a(c)(3).

28. Someone who is inadmissible at the time of entry becomes deportable. 8 U.S.C. § 1227(a)(1)(A). An LPR will be considered to be seeking admission for several reasons, including if the LPR has been absent from the United States for a continuous period in excess of 180 days or if the LPR has committed an offense identified in 8 U.S.C. § 1182(a)(2). 8 U.S.C. § 1101(a)(13)(C).

29. *See, e.g.*, Immigrant Legal Resource Center (ILRC), https://www.ilrc.org; Immigrant Defense Project (IDP), https://www.immigrantdefenseproject.org; National Legal Aid & Defender Association (NLADA), http://www.nlada.org; the National Immigration Project of the National Lawyers Guild (National Immigration Project), http://nationalimmigrationproject.org.

30. For a more comprehensive overview of immigration consequences with a California focus, see Immigrant Legal Resource Center, *§ N.8 Controlled Substances* (2015) *available at* https://www.ilrc.org/sites/default/files/resources/n.8-controlled_substance.pdf.

31. 8 U.S.C. § 1227(a)(2)(B)(i). Additional acts other than the Controlled Substances Act, however, regulate controlled substances.

32. 8 U.S.C. § 1182(a)(2)(A)(i)(II).

33. 8 U.S.C. § 1227(a)(2)(B)(i).

34. *United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001) (en banc).

35. Particularly serious crimes are classifications of crimes that can make one ineligible for asylum and/or withholding of removal. 8 U.S.C. § 1158(b)(2)(A)(ii), 8 U.S.C. § 1231(b)(3)(B). All aggravated felonies are particularly serious crimes. 8 U.S.C. § 1158(b)(2)(B)(i).

36. 8 U.S.C. § 1101(a)(43)(B) lists the offenses that constitute aggravated felonies. An aggravated felony conviction includes the following penalties: deportability (8 U.S.C. § 1227); ineligibility for LPR cancellation of removal (8 U.S.C. § 1229b); mandatory detention if arrested by ICE (8 U.S.C. § 1226); permanent bar to establishing good moral character, which is required for naturalization (8 U.S.C. § 1427, 8 U.S.C. § 1101(f)(8)); and ineligibility for most forms of relief.

37. 8 USC § 1182(a)(2)(C).

38. 8 U.S.C. § 1182.

39. *See, e.g.*, *Matter of Barrett*, 20 I&N Dec. 171, 177–78 (BIA 1990) (concluding that "the definition of 'drug trafficking crime' for purposes of determining drug-related 'aggravated felonies' within the meaning of the Immigration and Nationality Act encompasses state convictions for crimes analogous to offenses under the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act.").

40. 8 U.S.C. § 1101(a)(43)(B).

41. See *Moncrieffe v. Holder*, 569 U.S. 184, 192 (2013) (explaining that the categorical approach is used to determine whether a state drug offense is comparable to an offense in the INA). This article's scope is too narrow to discuss the categorical approach in depth. For a handful of advisories on this topic, see Immigrant Defense Project, *Using and Defending the Categorical Approach*, *available at* https://www.immigrantdefenseproject.org/using-and-defending-the-categorical-approach.

42. For example, one wrinkle that only exists in the Ninth Circuit is that courts have held that *offering* to sell a controlled substance is not an aggravated felony in the Ninth Circuit only. *United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001), *superseded by statute on other grounds as noted in United States v. Vidal*, 426 F.3d 1011 (9th Cir. 2005).

43. One conviction for a CIMT makes an LPR deportable if the maximum possible sentence is equal to or greater than one year and the offense was committed within five years of the last admission into the country. 8 U.S.C. § 1227(a)(2)(A)(i). The "date of admission" refers to the admission by virtue of which a noncitizen is present in the United States; *i.e.*, if the noncitizen is admitted as a nonimmigrant and later adjusts status without leaving the United States, adjustment of status does not constitute a new admission and restart the five-year clock. *Matter of Alyazji,* 25 I. & N. Dec. 397, 406 (BIA 2011). Two or more convictions after admission for CIMTs not arising out of a single scheme of criminal conduct renders an LPR deportable regardless of the maximum possible sentence or the date of commission. 8 U.S.C. § 1227(a)(2)(A)(ii). For the client in this hypothetical, this conviction would be within five years of the client becoming an LPR, which is not necessarily when he was admitted. Thus, if the CIMT analysis were determinative, the lawyer would want to follow up to see when the client was first admitted if the maximum possible sentence of the charges was at least a year. The CIMT adverse consequences are not determinative in this case because the charges are drug offenses and thus trigger deportability and inadmissibility on that basis, and because the charges are misdemeanors and may not have a maximum year sentence and could not be a second CIMT since the client does not have any prior convictions.

44. 8 U.S.C. § 1326(b)(2).

45. 8 U.S.C. § 1227(a)(2)(B)(i). ■

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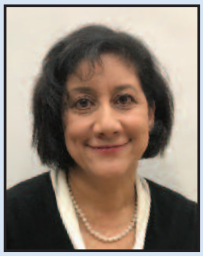

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