

# INTRODUCTION

## A SUGGESTED APPROACH WHEN REPRESENTING NONCITIZEN CLIENTS

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Representing noncitizen criminal defendants often requires an entirely different approach in defense strategy than would otherwise be employed if the client were a U.S. citizen. While most criminal defendants seek to avoid a conviction, how to go about this overarching objective or know which criminal offenses are safe havens for immigration purposes when a conviction is unavoidable, is likely to vary depending on your client's immigration status, pending criminal charges, and previous criminal convictions.

This section provides a suggested approach to incorporating a step-by-step analysis to identifying and avoiding, or at least minimizing, adverse immigration consequences for noncitizen clients. After conducting your own research, consult with an immigration attorney or expert to discuss your analysis since immigration laws are constantly changing. See Appendix F for a list of available legal resources.

### **Step 1: Determine your client's citizenship and immigration status**

During the initial intake interview with a client, defense practitioners should always attempt to obtain the client's citizenship status. Selectively choosing which clients to ask about citizenship or immigration status, relying on such indicators as race or ethnicity, difficulty in speaking or understanding English, or speaking with a foreign accent, risks under-identifying noncitizen clients. Since defense goals are likely to vary significantly depending on a client's citizenship and immigration status, it is absolutely critical that defense counsel identify the client's status as early as possible to incorporate defense strategies specific to noncitizen criminal defendants from the very beginning of representation.

An intake questionnaire is useful for identifying key information regarding a client's citizenship and immigration status relevant to conducting a comprehensive analysis of possible adverse immigration consequences resulting from a criminal conviction. A sample questionnaire is included in Appendix A. In Chapter 2, the different categories of possible immigration status are discussed and the common documents used to evidence immigration status are listed to assist in identifying a noncitizen's immigration status.

- **Practice Tip:** Always confirm your client's affirmations as to his or her immigration status by reviewing documents evidencing lawful status. Noncitizens may be unsure or mistaken in their understanding of their immigration status. Request and make copies of all documentation evidencing the client's foreign citizenship and past and present immigration status.
- **Practice Tip:** After identifying that your client is a noncitizen, you will need time to conduct a thorough analysis of immigration consequences. Consider requesting a continuance at arraignment if more time is necessary to determine your client's citizenship and immigration status.

## **Step 2: Protect your noncitizen client's constitutional rights**

Noncitizen criminal defendants in state or federal criminal proceedings are entitled to full protections under the First, Fifth, Sixth, and Fourteenth Amendments of the U.S. Constitution.

- **Practice Tip:** Defense practitioners should note that because federal immigration proceedings are civil and NOT criminal in nature, the extent to which these rights may be asserted in federal immigration proceedings varies and is dependent on a number of factors, including the person's immigration status, past immigration violations, and criminal record.

Your noncitizen criminal defendant client has an implicit right under the Fifth, Sixth, and Fourteenth Amendments of the U.S. Constitution to a court interpreter, so be sure to secure a competent interpreter if necessary to effectively communicate with your client and to protect your client's due process rights.

- **Practice Tip:** Foreign consulates in the area may be able to assist in finding an interpreter who speaks the same language and dialect as the noncitizen client. See Appendix F for foreign consulate contact information in the area.

In addition to the advice typically given to all criminal defendants, defense practitioners should also advise their noncitizen clients to NOT discuss their immigration status with law enforcement agents, including custodial officials, probation officers, and authorities with DHS. Since certain immigration violations carry criminal penalties, the noncitizen client has the protected privilege against self-incrimination and does not have to affirm his or her place of birth, immigration status, or method of entry to the U.S.

- **Practice Tip:** Defense practitioners should note that admissions made to a DHS agent may be used against a noncitizen client in subsequent immigration proceedings or adjudications.
- **Practice Tip:** A reference postcard for noncitizen clients in state or federal custody on this subject is included in Appendix B.

## **Step 3: Consider whether you should get your client out of state custody immediately**

One of the ways that the U.S. Department of Homeland Security (DHS) identifies noncitizens who are removable (deportable or inadmissible) is to receive notice from local law enforcement that a noncitizen is in state custody. With increased information sharing between state and federal law enforcement, it is probably safe to assume that if your client is in state custody, DHS may already have been made aware of his or her presence. If your noncitizen is deportable or inadmissible, DHS can issue an immigration hold or detainer, which requests prior notification before the client is released from state custody. DHS can also request the temporary detention of your client for up to 48 hours, excluding Saturdays, Sundays, and federal holidays, beyond the time the noncitizen would have been released from custody. See 8 C.F.R. § 287.7.

It may be most advantageous for your client to seek immediate bond and release from state custody before an immigration hold can be issued; however, consult with an immigration attorney or expert before posting bond. A noncitizen may be arrested by DHS upon release from state custody, sent to a remote immigration detention facility, and be prevented from appearing for his or her state criminal proceeding. This scenario poses obvious challenges to preparing an adequate defense and may prevent your client from appearing for his or her criminal case.

- **Practice Tip:** In assessing whether to seek immediate release for your noncitizen client, discuss with an immigration expert whether your client is eligible for release on an immigration bond if he or she is taken into DHS custody after release from state custody. Eligibility for immigration bond is based on a number of factors, including a noncitizen's immigration status, past criminal record and immigration violations, and pending charges.
- **Practice Tip:** If ineligible for release from DHS custody, your client may be detained and deported from the U.S. prior to the completion of his or her criminal proceeding. While this avoids a criminal conviction, your client will have an outstanding arrest warrant that will pose additional problems if he or she is ever allowed to reenter the U.S. lawfully.
- **Practice Tip:** Defense practitioners should also consider that seeking release from state custody also prevents your client from getting credit for time served, a possible strategy for avoiding adverse immigration consequences triggered by a lengthy sentence. See Chapter 4 for more details.

#### **Step 4: Avoid a conviction if possible**

While admissions of certain criminal acts or other bad conduct may be sufficient to trigger grounds for removing a noncitizen from the U.S., most criminal-based grounds for removal require criminal convictions. Therefore, avoiding a conviction may go far to avoiding adverse immigration consequences.

Defense practitioners should note that the term "conviction" is defined by federal immigration law and NOT by Vermont law. State dispositions and "first time offender" programs that expunge convictions may still constitute a conviction for purposes of immigration law. See Appendix D for an analysis of specific Vermont dispositions and whether they constitute as convictions for purposes of federal immigration law.

- **Practice Tip:** Alford pleas and pleas of nolo contendere, or no contest, are convictions for purposes of applying federal immigration law.

#### **Step 5: If a conviction is unavoidable, establish defense goals based on a client's immigration status and the client's priorities**

Defense goals will vary depending on the client's immigration status. Although with some exception, the general rule is that if a noncitizen client is a lawful permanent resident then the primary defense goal should be to avoid triggering grounds of deportation. If this is not possible, then the defense goal should be to avoid a conviction of an "aggravated felony," a term defined by federal immigration law. See Chapters 1 and 3 and Appendix C for a more detailed discussion of an aggravated felony.

If a client is NOT a lawful permanent resident, the primary defense goal shifts to avoiding grounds of inadmissibility. Note that there are exceptions to this general rule for noncitizens who are refugees or asylees. Also note that these are just the primary defense goals. Other considerations are also required to conduct a complete analysis and achieve an overall objective of avoiding or minimizing adverse immigration consequences. See Chapter 3 for a comprehensive analysis of defense goals based on various types of immigration status. See Chapter 1 for a discussion of the various grounds of deportation and inadmissibility and Appendix C for a one-page quick checklist of deportation and inadmissibility grounds.

Defense practitioners should also determine how important the immigration goals are to their client as opposed to more traditional criminal defense goals. A defense practitioner may have to be prepared to negotiate for an increased number of criminal charges or for an enhanced criminal offense or penalty than what would otherwise be done for a similarly situated U.S. citizen criminal defendant to avoid a result with harsh immigration consequences. Ultimately, a noncitizen client may prefer deportation over having to serve a lengthy prison sentence. The critical point, however, is that the client must be fully informed of potential immigration consequences, be offered alternatives, and be counseled on the short- and long-term impact of a particular criminal disposition.

**Step 6: Review pending charges, possible sentence, and all past criminal convictions for any adverse immigration consequences**

After identifying the specific statute listed in the charging document or record of conviction, review the statutory language and any applicable case law to determine whether the elements of the offense trigger adverse immigration consequences. Refer to the Chart of Immigration Consequences of Select Vermont Offenses in Appendix E, the discussion in Chapter 4, and the Immigration Consequences of Convictions Summary Checklist in Appendix C to identify any immigration consequences associated with a particular offense.

When the statute is divisible, i.e., the statutory language of an offense includes elements that both trigger and do not trigger immigration penalties, defense practitioners should attempt to establish in the record of conviction that the client was convicted of violating only those elements of the offense that do NOT trigger immigration penalties or, at the very least, attempt to leave unclear from the record of conviction under which elements the client is convicted. See Chapter 4 for a more detailed discussion of divisible statutes and the record of conviction.

- ***Practice Tip:*** If the record of conviction is vague or lacks information, DHS will be unable to prove that the noncitizen was convicted of a removable offense in the event that the client is convicted under a divisible statute.
- ***Practice Tip:*** The "record of conviction" for immigration purposes includes: the elements of the offense as enumerated in the statute of conviction and interpreted by applicable case law; the charging document (to the extent that it is consistent with the final conviction); a written plea agreement; the transcript of a plea colloquy; sentencing minutes; and any factual finding by the trial court to which the defendant assented. The ROC will generally NOT include things like police reports. See Chapter 4 for more details.

**Step 7: Identify and secure alternative criminal charges or dispositions that avoid or minimize adverse immigration consequences**

This step requires close analysis of the statutory language and any applicable case law of alternative, safe haven offenses. Refer to Chapter 5 and the Chart of Immigration Consequences of Select Vermont Offenses in Appendix E for possible strategies to avoiding adverse immigration consequences associated with a specific offense and for identifying possible alternative offenses. Chapter 4 also includes strategies to avoiding lengthy sentences that trigger immigration penalties.

**Step 8: If adverse immigration consequences cannot be avoided, and conviction results, properly advise your client**

In this situation, you should warn your client that the conviction may affect immigration status, and, if removable (deportable), s/he may be taken into federal immigration custody upon completion of his or her state sentence. If your client is an LPR, you should also warn him/her to consult an immigration attorney before traveling abroad (or even to border areas within the U.S.), applying for naturalization, or requesting a replacement "green card". For your non-LPR noncitizen client, advise that s/he should consult an immigration attorney before filing for ANY benefit with USCIS (the former INS), including adjustment of status, asylum, work permits, or naturalization. Finally, warn your noncitizen client that reentering the country illegally after being removed (aka "deported") because of a criminal conviction could lead to federal criminal charges and significant jail time.