

Washington Defender Association's Immigration Project

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The "Quick & Dirty" Advisory for Representing Noncitizens Defendants Charged with Felony DV Assault Violations - 2009¹

IDENTIFY IMMIGRATION STATUS & CRIMINAL HISTORY

- **Undocumented Persons (UP):** Note many UP (except those w/prior deportations) have avenues for obtaining lawful status, particularly if they have U.S. citizen spouse or parents and have never left the U.S. Two types of UP: 1). Entered illegally and have never had status; 2). Came lawfully with a temporary visa (e.g. student or tourist) that has since expired.
- **Lawful Permanent Residents (LPR or greencard holders) & Refugees²:** Face permanent loss of their lawful status and deportation. Identify how long person has had lawful status.
- **Temporary (non-immigrant) Visa Holders (e.g. student & tourist visas):** Identify if person's status is current or expired. If current, goals = LPRs & refugees. If expired, goals = UPs.
- **Mandatory Immigration Detention.** Felony DV convictions can trigger mandatory detention once person is in deportation proceedings, which can last for months/years if D fights deportation.
- **Deportation is Permanent.** Virtually impossible to obtain/regain lawful status if deported. Illegal re-entry after deportation most-prosecuted federal felony; sentence enhancements if prior convictions.
- **Obtain Complete Criminal History.** Prior history impacts immigration analysis of current charges.

DEFENSE GOALS FOR UNDOCUMENTED PERSONS (UPs):

1. **Avoid ICE apprehension by getting/staying out of jail.** A UP who goes to jail for even one day is likely to encounter ICE, get a detainer imposed and end up in ICE custody & removal proceedings. If defendant does not yet have ICE detainer, getting out of jail may be the highest priority (see #2).
2. **Preserve avenues to obtain lawful status.** Congress currently debating immigration law changes that will provide UP with avenue to get permanent resident status. Many UPs already have avenues to obtain lawful status, especially if LPR/USC spouse. DV assault convictions could render them ineligible to do this. Preserving avenue(s) to obtain LPR status may be a higher priority.

DEFENSE GOALS FOR LAWFUL PERMANENT RESIDENTS & REFUGEES

1. **Avoid a conviction that triggers deportation.** Even where you do, advise clients not to leave the U.S. or apply for LPR status/citizenship without first consulting an immigration attorney.
2. **If #1 is not possible, preserve avenues for relief from deportation.** LPRs and refugees will get a hearing before an immigration judge who has the power to grant *discretionary* "relief from removal (deportation)" through one of several legal avenues to qualifying noncitizens. Generally speaking, that means LPRs with 7 years of residency and refugees/asylees who've not yet become LPRs.

¹This advisory is intended to serve as a quick-reference guide for defenders representing noncitizen defendants. Whenever possible defenders are advised to consult specifically with WDA's Immigration Project for individual case assistance and our extensive resources, including a practice advisory on DV cases available at the **Immigration Resources Section of the WDA website: www.defense.net**

² People who come to the US in refugee status must apply for LPR status after one year, although many take longer to do so. People granted asylum in the U.S. can also apply to be LPRs.

DEFENSE STRATEGIES FOR ASSAULT SECOND DEGREE – RCW 9A.36.21

- Virtually all provisions of assault 2nd will be classified as “crimes involving moral turpitude” (CIMT).
 - **CIMT deportation exception:** *One* CIMT conviction *will not* trigger removal for persons lawfully admitted (LPRs, refugees & asylees) IF the offense was not *committed* w/in five years of admission. But any two separate CIMT convictions “after admission” will trigger removal.
 - **CIMT inadmissibility exception:** The CIMT inadmissibility ground triggers removal for most UPs. It is also a basis to deny (re)admission into the U.S., as well as LPR status and citizenship. EXCEPTION: where there is *only one* CIMT conviction with a maximum possible sentence of not > 1yr and where actual sentence imposed (regardless suspended time) was not more than 180 days – so no Assault 2nd offense qualifies. This exception also does not apply if 2 CIMTs.
- An Assault 2nd conviction will be classified as **aggravated felony crime of violence** (COV) where a sentence of one year (365 days) or more is imposed. **Avoid one year or more sentence:** 11 mo 364 days okay; consider multiple counts w/consecutive sentences (<1 yr each) vs. concurrent sentences.
- Assault 3rd per (f) negligence prong is best alternative.³ Assault 3rd with negligence is preferable to misd. Intentional Assault 4th because a crime of negligence is not a CIMT, nor a ‘crime of violence.
- If Assault 2nd conviction unavoidable, plead to “(e) With intent to commit a felony, assaults another” where the felony is not a CIMT (e.g. Malicious Mischief 2nd) and D’s statement indicates an assault that is limited to “offensive touching” or language that does not show use/threat of force. See below.
- Keep specific acts involving the use of force *out* of the “record of conviction” (ROC). Defendant’s statement should admit only to non-forceful offensive or unwarranted touching. Sample language: “On [date], I offensively touched [victim].”
- **DO NOT** do an Alford plea.
- To avoid deportation as a crime of DV, try to negotiate to remove the “DV” label from ROC and do not reference any relationship to victim in D’s statement.
- To avoid deportation as a “crime of child abuse” (COCA) ensure that the ROC does not identify the relationship of the alleged victim to D. If the alleged victim is <18, omit any reference to age in the ROC. Washington law does not require victim’s name or age to be identified in the record.⁴

DEFENSE STRATEGIES FOR ASSAULT THIRD DEGREE – RCW 9A.36.31

- **IMMIGRATION SAFE PLEAS** – Because of “negligence” mens rea provisions (f) & (d) cannot trigger removal/deportation/inadmissibility as a CIMT nor as an aggravated felony-COV.
- §(f) is the safest preferable alternative for any assault offense (better than assault 4th).
- If pleading to §(d), critical to ensure record does not specify weapon as a firearm.⁵
- To avoid deportation as a COCA, if alleged victim is <18, omit any reference to age in the ROC. Washington law does not require victim’s name or age to be identified in the record.

NEGOTIATING TO MISDEMEANOR OFFENSES

Misdemeanor assault is not a safer alternative to assault 3rd (f), with negligence. It is possible to craft an assault 4 resolution that does not trigger deportation. However, to do so, it is critical that the plea be crafted very carefully and for counsel to consult WDA’s Immigration Project advisory for misdemeanor assault 4-DV. (Keys to sanitizing A4 would be: avoid 365 suspended; avoid record showing DV or minor victim; avoid showing use or threat of force.)

³ *Matter of Perez-Contreras* 20 I&N 615 (BIA 1992)

⁴ *State v. Johnston*, 100 Wn. App. 126, 134 (Wash. Ct. App. 2000), citing *State v. Plano*, 67 Wn. App. 674, 679-680 (Wash. Ct. App. 1992). Cf. *State v. Clowes* 104 Wn. App. 935, 942 (2001).

⁵ Firearms offenses constitute an additional ground of deportation. See 8 U.S.C. 1227(a)(2)(C).