

Washington Defender Association's Immigration Project

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The "Quick & Dirty" Advisory for Representing Noncitizens Defendants Charged with Misdemeanor DV Assault Offenses-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.** DV assault convictions can trigger 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.defensenet.org

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.

KEY CONCEPTS

- **Grounds of Deportation/Removal.** Misdemeanor DV assault (m/d DV assault) can trigger removal under one of 4 provisions of immigration law: a crime of Domestic Violence (CODV), an aggravated felony (AF), a crime involving moral turpitude (CIMT), or a crime of child abuse (COCA). Both the CODV and AF grounds require that the offense has as an element the use/threat of use of force.
- **Classification as an Aggravated Felony (AF).** Where a 365 day sentence is imposed (regardless of time suspended), m/d assault can be classified as an AF under immigration law, which carries harsh immigration consequences, and a severe sentence enhancement in an illegal reentry prosecution.
- **Immigration-Safe Language Required for Deferred Adjudications (E.g. SOC's).** Immigration law has its own definition of what constitutes a conviction, which includes a finding of guilt, admission of guilt, or *admission to facts sufficient* to warrant a finding of guilt. A conviction under this definition will be *in perpetuity* unless vacated for a legal defect.
- **Defendant's Plea Statement Is Critical.** Under the analytical framework used to determine whether a conviction falls under a ground of removal, the wording of defendant's statement in the plea agreement will often determine whether the offense triggers removal. It is imperative that D's statement not include use of force, establish a relationship to the victim or, if a minor, victim's age.
- **Mandatory Immigration Detention.** M/d DV convictions can trigger mandatory detention once person is in deportation proceedings, which can last for months/years if the person fights her/his case.
- **Deportation is Permanent.** Only a tiny fraction of people will ever obtain or regain lawful status once deported. Illegal re-entry after deportation is now the most-prosecuted federal felony and carries significant sentence enhancements for persons with criminal convictions.

STRATEGIES TO AVOID/MITIGATE IMMIGRATION CONSEQUENCES

If avoiding immigration consequences is a critical defense goal, and you cannot negotiate the necessary immigration-safe requirements in a plea, it may be more important for defendant to go to trial since the immigration consequences of conviction at trial are no greater.

- Advocate for a sentence imposed (regardless of time suspended) of 364 days or less.³
- Trespass and disorderly conduct are immigration-safe alternative offenses. Malicious mischief w/364 day sentence (or other property crime) is preferable to misdemeanor assault (or theft).
- 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.
- Attempt to negotiate getting the "DV" label out of the ROC. Even if you can't, ensure that the ROC does not identify the relationship of the alleged victim to the defendant. If the alleged victim is under 18, omit any reference to age in the ROC to avoid the possibility that the conviction could trigger deportation as a 'crime of child abuse.' Washington law does not require that the victim's name or age be identified in the record.⁴You *must* use "immigration-safe" deferral language in any deferred adjudication (e.g. SOC). If not, *the agreement will be a conviction in perpetuity* for immigration purposes even if the defendant complies with conditions and the case is dismissed.⁵
- **Deferred sentence** resolutions will constitute *convictions in perpetuity* (even if plea is subsequently withdrawn). As such, they only work in DV cases if underlying offense does not trigger removal.

³ For detailed arguments in support of requests for 364 day sentences (or less) see the advisory and briefing available at the Immigration Resources section of WDA's website – www.defensenet.org

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 See the practice advisory *Negotiating Deferred Adjudication Agreements* at the WDA website for specific alternative immigration-safe language to include in your client's agreement.