Defending Against Deportation: Equipping Public Defenders to Represent Noncitizens Effectively

Jennifer Welch†

TABLE OF CONTENTS

Introduction ................................................................. 543
I. The Legislative and Demographic Trends ....................... 547
   A. Legislative Trend of Targeting Noncitizens with Criminal Convictions .................................. 547
   B. Demographic Trends of the Noncitizen Population in the United States ..................................... 551
II. The Importance of the Public Defender in Helping Defendants Avoid Immigration Consequences .................... 553
   A. Immigration Consequences Are Usually Determined During Adjudication of Criminal Charges .......... 553
   B. The Noncitizen Lacks Access to Information and Advice on Immigration Consequences ................ 554
   C. Professional Ethics Require Public Defenders to Consider Immigration Consequences .................. 556
III. The Emergence of Resources to Assist Public Defenders in Representing Noncitizens ............................... 559
IV. Environmental Constraints That Undermine Training Programs ......................................................... 562
   A. Constraints on Public Defenders ................................ 562
      1. Too Many Clients and Too Few Resources ............... 563
      2. Complexity of Immigration Law ............................ 563
      3. Difficulty of Preventing Immigration Consequences ..... 567

† J.D. Candidate, School of Law, University of California, Berkeley (Boalt Hall), 2004; B.A., Pomona College, 1995. Special thanks to Katherine Brady at Immigrant Legal Resource Center and all of the interviewed public defenders who shared their experiences in addressing this issue. I am also deeply grateful to Professor Charles Weisselberg for providing important guidance through the writing process, to Professor Robert MacCoun for commenting on an earlier draft, and to my colleagues at CLR for their meticulous editing.
B. How Environmental Constraints Decrease Training Effectiveness ......................................................... 568

V. Five Strategies for Effective Training Despite Environmental Constraints .................................................. 572
A. Establish Collaborations with Immigration Attorneys ................................................................. 573
B. Create an Adequate Intake System to Determine the Immigration Status of Clients ......................... 576
C. Focus Training Efforts on Misdemeanor Attorneys ................................................................. 578
D. Hold Frequent, Short Trainings on Specific Categories of Criminal Charges ................................. 579
E. Design Training and Resources to Address Public Defenders’ Actual Working Conditions ................. 580

Conclusion ................................................................................................................................. 582
Appendix .................................................................................................................................. 583
Defending Against Deportation: Equipping Public Defenders to Represent Noncitizens Effectively

Jennifer Welch

INTRODUCTION

Over the past fifteen years, U.S. immigration policy has increased dramatically the severity and certainty of immigration consequences for noncitizens convicted of a crime. Beginning with the Immigration Reform

1. These numbers do not include undocumented immigrants. All data are from the U.S. DEP’T OF JUSTICE, STATISTICAL YEARBOOKS OF THE IMMIGRATION AND NATURALIZATION SERVICE. Data for 1986 through 1994 are from the 1994 STATISTICAL YEARBOOK. Data for 1995 through 2001 are from the respective STATISTICAL YEARBOOKS. These numbers reflect statistics for the Immigration and Naturalization Service’s fiscal year: October 1 through September 30 (e.g., fiscal year 2000 runs from October 1, 1999, to September 30, 2000). Regarding the term “deportation,” note the following: In 1996, the two processes of deportation of legal immigrants and exclusion of those apprehended at the border or who had entered without documents were combined as “removal proceedings.” Therefore, the statutory language refers to those “removed” because of a criminal conviction. Nevertheless, this Comment uses the term “deportation” because it is less sanitized than “removal” and is the common vernacular.
and Control Act (IRCA) of 1986, the deportation of noncitizens with a criminal conviction became one of the Immigration and Naturalization Service’s (INS) primary goals. Then, in the late 1980s and early 1990s, Congress enacted a series of legislative reforms to the 1952 Immigration and Nationality Act. These laws increased both the number of categories of criminal defendants who could face immigration consequences and the severity of those consequences. Depending on the crime charged and the immigration status of the individual, noncitizens may now face a series of consequences that would jeopardize their stay in the United States. Possible consequences include deportation with either a temporary or lifetime exclusion from the United States (see Chart 1); a finding of inadmissibility, which prevents a permanent resident from reentering the United States after a temporary visit abroad; bars from immigration relief, which otherwise might allow an immigrant to stay in the United States because of family ties, for example; prohibition of or limitations on judicial review of immigration decisions; and foreclosure of future naturalization possibilities stemming from a lack of "good moral character" finding.

While the law does not consider these outcomes to be punishment, deportation is one of the most serious consequences faced in our legal system. The Supreme Court has recognized the harsh nature of deportation: "It may result . . . in loss of both property and life, or of all that makes life worth living." Indeed, many of those deported are not recent, undocumented immigrants but longtime legal permanent residents. These

3. On March 1, 2003, the INS ceased to exist, and its functions were divided into three separate agencies: the U.S. Citizenship and Immigration Services (USCIS), responsible for providing immigration-related services and benefits; the Bureau of Immigration and Customs Enforcement (ICE), responsible for investigation and enforcement of federal immigration and customs laws; and the Bureau of Customs and Border Protection (CBP), responsible for policing the borders. Each of these agencies is under the authority of the Department of Homeland Security. See Dep’t of Homeland Security website, at http://www.dhs.gov/dhspublic/theme_home4.jsp (last visited Feb. 17, 2004).
6. See, e.g., Carlson v. Landon, 342 U.S. 531, 537 (1952) ("Deportation is not a criminal proceeding and has never been held to be punishment. No jury sits."); Mahler v. Eby, 264 U.S. 32, 39 (1924) ("It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment."); United States ex rel. Turner v. Williams, 194 U.S. 279, 289-90 (1904). For critiques of this doctrine, see Robert Pauw, A New Look at Deportation as Punishment: Why at Least Some of the Constitution’s Criminal Procedure Protections Must Apply, 52 ADMIN. L. REV. 305 (2000); Lisa Mendel, Note, The Court’s Failure to Recognize Deportation as Punishment: A Critical Analysis of Judicial Deference, 5 SUFFOLK J. TRIAL & APP. ADVOC. 205 (2000).
8. See Chart 1, supra note 1.
immigrants often have families, well-established community ties, careers or businesses, and property in the United States.

In many cases, the immigrant’s life is not the only one profoundly impacted by deportation; family members, employers, and communities are also adversely affected. It is not difficult to imagine the many effects of a breadwinner’s deportation:

The family may now be without a breadwinner; the family members left behind may face eviction due to their inability to make mortgage or rent payments. The family suffers from the emotional toll of having a loved one . . . often thousands of miles from home . . . . [T]he system forces many of these families to separate permanently.9

Legal permanent residents also contribute to the labor force and pay taxes, enlarging the economic consequences of their deportation.10 Deportation thus affects many citizens in addition to the deported noncitizens.

In many criminal cases, the so-called collateral consequence of deportation is the most serious consequence for the accused. For example, consider a legal permanent resident charged with first-time felony drug dealing. With a plea bargain, he or she may receive credit for time served and probation as his punishment—but face the more serious collateral consequence of deportation.11 Therefore, in many misdemeanor and low-level felony cases, a noncitizen criminal defendant is usually much more concerned about immigration consequences than about the term of imprisonment.

The increasing impact of defendants’ criminal cases on their immigration status has more tightly intertwined the practices of immigration and criminal law. The role of the criminal defense attorney in avoiding or at least ameliorating negative immigration consequences has expanded. This expansion of responsibility creates formidable challenges for counsel representing the indigent accused.

Three types of indigent defense systems exist within state criminal justice systems: public defender programs, assigned counsel programs, and contract attorney programs.12 Public defender programs are public

agencies, usually at either the state or local level, with staff attorneys. In assigned counsel programs, the court appoints private bar members on a case-by-case basis. Contract attorney programs allow local governments to contract with private attorneys, law firms, or nonprofit organizations to represent defendants over a certain time period. Public defenders represent the vast majority of indigent criminal defendants in the nation’s one hundred most populous counties—precisely those counties that have the highest number of noncitizens. In 1999, public defenders handled 82% of the 4.2 million cases in those counties. Court-appointed attorneys handled 15% and contract attorneys 3% of the cases. Because public defenders represent the majority of noncitizen criminal defendants, this Comment focuses on them.

This Comment considers how county public defender offices can adequately represent accused noncitizens given today’s severe immigration laws and the limited budgets of public defender offices. Part I outlines the two forces that have compelled public defender offices to confront this issue: immigration legislation and changing demographics. Part II summarizes the importance of public defenders in addressing the increasing overlap of criminal and immigration law and the inability of courts to warn the accused adequately regarding immigration consequences. Part III then briefly describes the recent efforts of public defenders to better represent noncitizens, focusing on public defender trainings and practitioners guides. Part IV argues that such training efforts can be undermined by public defenders’ high caseloads, the complexity of immigration law, and the difficulty of avoiding immigration consequences. This Part draws on psychological scholarship about training effectiveness to reveal how these three phenomena can limit the effectiveness of immigration law training. Finally, Part V outlines five strategies for public defender offices to address these barriers through both organizational changes and alterations to training programs.

The research for this Comment involved interviewing public defenders from seven California counties: Alameda, Contra Costa, Kern, Los Angeles, Riverside, Sacramento, and San Diego. Each is among the fifteen California counties with the highest noncitizen populations. The counties

Jersey, 530 U.S. 466, 551 (O’Connor, J., dissenting) (noting that in 1998 federal criminal prosecutions represented only about 0.4% of the total number of criminal prosecutions in federal and state courts).
14. Id.
15. Id.
16. The noncitizen populations for these counties as of the 2000 Census were as follows: Los Angeles, 2,137,689; San Diego, 356,129; Alameda, 222,984; Riverside, 186,878; Sacramento, 113,213; Contra Costa, 98,171; and Kern, 78,354. See U.S. Census Bureau, American Factfinder, at www.census.gov (last visited Nov. 12, 2003).
also represent urban, suburban, and rural areas. These interviews are cited throughout the paper.17

I

THE LEGISLATIVE AND DEMOGRAPHIC TRENDS

A. Legislative Trend of Targeting Noncitizens with Criminal Convictions

With recent immigration legislation, Congress has widened the net of immigration law, affecting an ever-increasing number of noncitizen criminal defendants. While expanding the list of qualifying crimes, Congress simultaneously eliminated certain forms of relief and procedural safeguards, such as judicial review, for certain noncitizens with criminal convictions. Through this combination of legislative actions, Congress has both increased the number of people eligible for deportation and made that consequence more probable.18

In 1907, nearly thirty-two years after enactment of the first federal immigration law,19 Congress for the first time made criminal conduct within the United States a basis for deportation.20 Under this law, however, only one crime rendered a person deportable: prostitution.21

In 1952, Congress integrated federal immigration law into a single statute, the Immigration and Nationality Act (INA).22 Under this scheme, criminal behavior was a basis for deportation in several limited circumstances. First, noncitizens were deportable if convicted of a "crime involving moral turpitude,"23 provided they committed the crime within
five years of entry into the United States and the sentence was at least one year of imprisonment.\textsuperscript{24} Second, two separate convictions for crimes involving moral turpitude not originating from the same criminal scheme, regardless of the length of the sentence, made a noncitizen deportable.\textsuperscript{25} Third, drug and firearm violations were grounds for deportation.\textsuperscript{26}

Passage of the Anti-Drug Abuse Act of 1988 (ADAA)\textsuperscript{27} marked the start of a legislative trend toward increased removal of noncitizens with criminal convictions. The ADAA created a new category of crimes that rendered a person deportable: "aggravated felonies." At the time, the category of aggravated felonies was narrow and included only murder, drug trafficking, and firearms trafficking.\textsuperscript{28} The ADAA also strengthened and expedited enforcement.\textsuperscript{29} Additionally, Congress began prohibiting deported aggravated felons from applying for reentry to the United States for ten years, even if they were otherwise eligible.\textsuperscript{30}

The trend continued as Congress greatly expanded the scope of the aggravated felony category with the Immigration Act of 1990.\textsuperscript{31} Most notably, Congress added "crimes of violence" as a subcategory of aggravated felonies.\textsuperscript{32} The law did include some limits, however, such as allowing for deportation of noncitizens convicted of an aggravated felony only if they had been sentenced to at least five years' imprisonment.\textsuperscript{33} In addition to crimes of violence, the Immigration Act of 1990 deemed several other crimes to be aggravated felonies: the actual or attempted illicit trafficking

\\n


\textsuperscript{28} ADAA § 7342, 102 Stat. at 4469 (codified as amended at INA § 101(a), 8 U.S.C. § 1101(a)).

\textsuperscript{29} See id. § 7343 (codified as amended at INA § 242(a), 8 U.S.C. § 1252(a)).


\textsuperscript{32} A crime of violence is defined as:

\hspace{1cm}(a) any offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

\textsuperscript{18} U.S.C. § 16.

\textsuperscript{33} Immigration Act of 1990 § 501.
of any controlled substance and any money laundering offense.\textsuperscript{34} The Act also expanded the definition of an aggravated felony to include both federal and state convictions.\textsuperscript{35}

The Immigration and Nationality Technical Corrections Act of 1994 (INTCA)\textsuperscript{36} further expanded the definition of aggravated felony.\textsuperscript{37} Congress added multiple crimes, including theft offenses for which the term of imprisonment is at least five years,\textsuperscript{38} child pornography offenses,\textsuperscript{39} control of a prostitution business,\textsuperscript{40} alien smuggling,\textsuperscript{41} and the attempt or conspiracy to commit any of these offenses.\textsuperscript{42}

In 1996, Congress capped this line of legislation with two immigration reforms that many consider the harshest immigration laws ever passed in America.\textsuperscript{43} First, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),\textsuperscript{44} largely in response to the Oklahoma City bombing.\textsuperscript{45} Six months later, Congress passed the even more comprehensive Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).\textsuperscript{46} These two laws added to the list of deportable crimes. Notably, Congress included domestic violence, stalking, child abuse, child neglect, and child abandonment.\textsuperscript{47} Violating a civil protective order is now also a ground for deportation.\textsuperscript{48}

Within the categories of deportable offenses, the AEDPA and the IIRIRA distorted the definition of aggravated felony so that now the crime "need not be either aggravated or a felony."\textsuperscript{49} Congress added some crimes formerly categorized as crimes of moral turpitude, such as any crime with

\textsuperscript{34} For money laundering, see \textit{id.} For drug offenses, see \textit{id.} § 508 (codified as amended at INA § 241(a)(11), 8 U.S.C. § 1251(a)(11)).

\textsuperscript{35} \textit{id.} § 501(a)(5).


\textsuperscript{37} \textit{id.} § 222 (codified at 8 U.S.C. § 1101(a)(43)).

\textsuperscript{38} \textit{id.} § 222(G).

\textsuperscript{39} \textit{id.} § 222(I).

\textsuperscript{40} \textit{id.} § 222(K)(i).

\textsuperscript{41} \textit{id.} § 222(N).

\textsuperscript{42} \textit{id.} § 222(Q).


\textsuperscript{49} Morawetz, supra note 9, at 1939.
an element of fraud, to the list of aggravated felonies. This expansion increased dramatically the number of accused who could face deportation. Noncitizens who have resided in the United States for more than five years are deemed deportable with two convictions for crimes of moral turpitude or just one conviction for an aggravated felony. Therefore, this change affects many first-time offenders who are long-term U.S. residents.

The most significant expansion of the aggravated felony category came through the reduction of the sentence requirement for crimes of theft or violence. Whereas in the past a theft or violent crime conviction carrying a five-year sentence qualified as an aggravated felony, the sentence today need be only one year. As a result, many state misdemeanors, for which the maximum sentence is one year, now qualify as aggravated felonies. For example, a conviction for simple battery or shoplifting with a suspended sentence of one year can be an aggravated felony. Also, misdemeanor statutory rape is an aggravated felony in some states, because it falls within the aggravated felony classification of "sexual abuse of a minor." Prosecutors, defense attorneys, and observers of the criminal justice system have criticized this expansion of the list of aggravated felonies for its overinclusiveness.

The 1996 laws widened the deportation net further by changing the definition of "sentence" to include suspended sentences. State courts often use suspended sentences to impose probation on first-time offenders or for petty offenses. Congress's inclusion of suspended terms in the

50. Id. at 1940.
52. See id.
54. See Morawetz, supra note 9, at 1939.
55. "All fifty states have laws criminalizing sexual relations with a person based solely on the fact that the person is below what is typically referred to as the 'age of consent.'" Iris Bennett, The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions, 74 N.Y.U. L. REV. 1696, 1720-21 (1999) (recounting one such statutory rape case in which a nineteen-year-old legal permanent resident had consensual sex with his fifteen-year-old girlfriend and the conviction for "sexual misconduct" resulted in a finding of aggravated felony).
calculation ignores the equities considered by state trial courts and effectively undermines the courts’ discretion.

Congress further limited state courts’ discretion by formally defining “conviction” in its statutes. The current definition of conviction includes either (1) a formal judgment of guilt by a court or (2) a finding of guilt, a guilty or nolo contendere plea, or facts sufficient to warrant a finding of guilt and a judge’s order of “some form of punishment, penalty, or restraint on the alien’s liberty.” By adopting this definition, Congress intended to eliminate the possibility of avoiding immigration consequences through state diversion procedures or expungement. Thus, while alternative dispositions might be ideal for citizens, noncitizens still suffer immigration consequences, even when the sentencing court determines that imprisonment is unnecessary.

The lower sentencing requirements and changed definitions of “sentence” and “conviction” result in an “Alice-in-Wonderland-like definition” of aggravated felony. For example, a single shoplifting conviction with a one-year suspended sentence qualifies as an aggravated felony. Such a conviction triggers mandatory detention and deportation of noncitizens. Such drastic legislative changes necessitate that public defenders representing accused noncitizens consider immigration consequences for any criminal charge.

B. Demographic Trends of the Noncitizen Population in the United States

Increasingly strict immigration laws affect all noncitizens, but legal immigrants, many of whom are firmly resettled in the United States and have obtained permanent resident status, feel the impact most strongly. Most have wives, children, parents, siblings, and employers in the United States who experience the ripple effects of the increasingly strict immigration laws.

60. Pilcher, supra note 57, at 320-21. Diversion programs resolve criminal charges through the imposition of work or educational programs as part of probation. Such a resolution is possible either before or after the adjudication of guilt. See BLACK’S LAW DICTIONARY, supra note 23, at 491.
61. BLACK’S LAW DICTIONARY, supra note 23, at 603. Expungement is the “removal of a conviction (especially for a first offense) from a person’s criminal record.” Id.
62. See Morawetz, supra note 9, at 1939.
63. Under immigration law, undocumented immigrants are deportable simply for entering the United States illegally. Therefore, many, though not all, of the new laws’ provisions are redundant in effect. For undocumented immigrants, the primary issue is not the avoidance of deportation but preventing lifetime exclusion from the United States.
The noncitizen population in the United States has increased rapidly over the past thirty years, from 3.5 million in 1970 to 17.8 million in 2000, a more than fourfold increase. The increase resulted from record-high immigration in the 1990s, when more than 13 million people entered the United States. Annual immigration flows have tripled over the past generation; more immigrants entered the United States in the 1990s than in any other decade. Because the rate of increase for immigration far exceeded the rate of naturalization, the proportion of naturalized citizens in the foreign-born population dropped from 63.6% in 1970 to 50.1% in 2000. In short, there are now more foreign-born individuals in the United States than there were thirty years ago, and more of them are noncitizens.

The foreign-born population is not evenly distributed across the country. In March 2000, six states held 70.4% of the total foreign-born population: California (8.8 million), New York (3.6 million), Florida (2.8 million), Texas (2.4 million), New Jersey (1.2 million), and Illinois (1.2 million). Furthermore, the foreign-born are especially concentrated in major metropolitan areas and their central cities. For example, Los Angeles and New York each hold 4.7 million foreign-born; together they account for 33.1% of all foreign-born residents of the United States. Public defender offices in the six states mentioned above, and especially those in their urban centers, face an acute challenge in representing accused noncitizens.

However, recent statistics suggest that immigration trends are changing. The share of immigrants in the six major receiving states has begun to decline as immigration has increased overall, leading to rapid dispersal of immigrants to new growth states. Many of these states have not received significant numbers of immigrants for more than a century. During the 1990s, the immigrant population in the “new immigrant states” grew almost twice as fast (61% versus 31%) as the immigrant population in the six states that receive the largest number of immigrants. Although the total

66. Id.
69. Schmidley, supra note 65, at 20.
70. Id. at 2.
71. Id.
72. Id.
73. Id.
74. Capps et al., supra note 67, at 3.
75. Fix et al., supra note 68, at 9. The new immigrant states are all states except California, Connecticut, Florida, Illinois, Massachusetts, Michigan, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Texas, Washington, and Wisconsin, where immigrants historically have settled. Id.
number of noncitizens in the new immigrant states is still far lower than the number in California or New York, for instance, this trend makes representing noncitizen defendants a pressing issue throughout the nation.76

II
THE IMPORTANCE OF THE PUBLIC DEFENDER IN HELPING DEFENDANTS AVOID IMMIGRATION CONSEQUENCES

The legislative and demographic trends described above impact public defender offices because of the key role public defenders play in the initial stages of legal proceedings, when immigration consequences often are determined. There are two reasons why public defenders’ role is so crucial. First, irreversible determinations are made during the adjudication of the criminal charges. Second, they are often the only lawyers to whom accused noncitizens have access. In addition to the potential effects on the outcome, professional ethics require public defenders to consider all possible consequences flowing from pleading and trial decisions.

A. Immigration Consequences Are Usually Determined During Adjudication of Criminal Charges

Literature advising criminal defense attorneys on strategies to avoid or ameliorate immigration consequences during representation focuses on the crimes charged and the sentences imposed in plea agreements.77 These two elements are the most fundamental in determining whether and what immigration consequences will flow from the criminal conviction. Also, both factors are often negotiable to some extent within the plea-bargaining process. When they are not, informed noncitizens might rightly demand a trial. The plea-bargaining stage is the most obvious point at which the public defender’s knowledge of immigration law can affect the noncitizen’s future immigration status.

However, admissions by noncitizen defendants, whether at trial or at a sentencing hearing, could also affect future immigration decisions. For example, federal law allows for the deportation of any noncitizen who has abused or who has been addicted to drugs at any time after entry.78 Therefore, it is particularly important to avoid admissions of drug use in the record.79 In some criminal trials, such as those that include a charge of

---


possession for sale, drug possession for personal use by the accused may be a strategic admission to avoid the more serious criminal penalties for a possession for sale charge. With the noncitizen defendant, however, such admissions could have potentially disastrous immigration consequences.

Even when the public defender has negotiated a charge and sentence scheme that avoids deportation, it remains important to protect the record at sentencing. For example, the attorney of a client who is pleading guilty to an assault charge for domestic violence must limit the sentencing hearing record to avoid any references to the victim’s relationship to the defendant. A record that reflects an intimate relationship between the noncitizen and the victim may trigger immigration consequences despite the public defender’s negotiation of a nondeportable charge and sentence.

Ultimately the charges, sentence, and admissions on the record after the criminal adjudication will usually seal a noncitizen’s immigration fate. Although these determinations are made outside of the immigration court, these facts will determine deportability—or other immigration consequences. In addition, because Congress has eliminated most of the options for immigration relief once available, noncitizens are unlikely to find exceptions, despite personal or family hardship due to deportation or extenuating circumstances around the crime. To avoid or ameliorate immigration consequences, then, public defenders must strategize around immigration consequences during all stages of criminal adjudication.

B. The Noncitizen Lacks Access to Information and Advice on Immigration Consequences

Because immigration consequences are not “punishment” in a legal sense, those facing deportation and other immigration proceedings are not entitled to the same constitutional protections provided to criminal defendants. Although the Sixth Amendment right to counsel guarantees noncitizens accused of a crime counsel on the criminal charge, it does not give them the right to appointed representation regarding immigration. Unless accused noncitizens can afford and retain immigration attorneys to represent them while the criminal charges are being resolved, public defenders are the only counsel defendants have.

Many states attempt to ameliorate the problem by requiring trial judges to warn defendants during plea agreements that a guilty plea may lead to immigration consequences. For example, California’s warning

---

80. Id. at 7.
81. See supra note 5.
reads: "If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." While this warning ostensibly informs noncitizens of potential immigration consequences of a guilty plea, it is an inadequate substitute for the specific, timely advice of counsel for at least three reasons.

First, under such state statutes, the trial judge must provide such a warning when accepting a plea from "all defendants in all cases." Therefore, both those who have no risk of deportation and those facing mandatory deportation receive this boilerplate warning. The trial judge does not assess the likelihood of deportation in any individual case. This lack of particularity leaves defendants without guidance in assessing whether a plea is desirable.

Second, the timing of this warning does not allow noncitizens to consider its weight. By the time defendants stand in front of a judge to offer a plea, they essentially have made their decision. The ABA’s Standards for Criminal Justice recognize that a judicial warning of any type is not a substitute for a lawyer’s advice: "The court’s warning, coming as it does just before the plea is taken, may not afford time for mature reflection." Non-citizen defendants may encounter additional difficulties, such as a language barrier or intimidation that accentuate the futility of such a generalized, late warning.

Finally, some states’ trial court warnings are simply unenforceable; immigrants have no recourse if the judge does not comply with the law. For example, after providing for a generalized warning akin to California’s, the New York statute adds:

The failure to advise the defendant pursuant to this subdivision shall not be deemed to affect the voluntariness of a plea of guilty or the validity of a conviction, nor shall it afford a defendant any rights in a subsequent proceeding relating to such defendant’s deportation, exclusion or denial of naturalization.

Other states’ laws are less straightforward, but the effect is the same. A similar but more oblique disclaimer follows Florida’s required
admonition: "Failure to follow any of the procedures in this rule shall not render a plea void absent a showing of prejudice." In states that explicitly require a showing of prejudice for the invalidation of a plea agreement after noncompliance with the warning, such as Florida, most defendants will be unable to successfully challenge the plea bargain. Many other states, where the statutes do not explicitly address court noncompliance, have relied on the common law harmless error doctrine to uphold convictions based on pleas.

C. Professional Ethics Require Public Defenders to Consider Immigration Consequences

Litigation over whether a public defender's failure to consider immigration consequences qualifies as ineffective assistance of counsel has increased dramatically in the wake of expanding immigration laws. In most cases, noncitizens have sought to vacate judgments based on plea bargains due to ineffective assistance of counsel, a violation of the Sixth Amendment. This issue has reignited a smoldering debate on the collateral consequences doctrine, which states that

while lawyers must advise clients of the direct consequences of a guilty plea—such as the period of incarceration and the fine that will be imposed at sentencing—... lawyers need not explain collateral consequences, which, although they might follow by operation of law, are not part of the penalty imposed by the particular statute the defendant is accused of violating.

Most state and federal courts have dismissed noncitizens' claims of ineffective assistance of counsel. Sometimes the court concludes that because deportation, or any immigration consequence, is a collateral

87. FLA. R. CRIM. PROC. 3.172(i).
91. See Chin & Holmes, supra note 11, at 699.
DEFENDING AGAINST DEPORTATION

consequence, defense counsel has no duty to investigate or advise the client on the issue.\(^9\) Sometimes, after finding that defense counsel had such a duty, the court concludes that there was no prejudice, so that the case falls within the broad parameters of the harmless error doctrine.\(^9\) However the court reaches its conclusion, the result is the same: the plea bargain will stick for most noncitizens and a finding of ineffective assistance of counsel is unlikely for most public defenders.

These decisions stem from courts’ unwillingness to upset criminal convictions, not from any common sense or practical definition of “effective.” Public defenders are probably the only advocates in a position to inform noncitizens of potential immigration consequences and to strategize so as to avoid them. When deportation is possible, it becomes noncitizens’ top priority. Indeed, what public defender would boast over a disposition in which his or her client chose a suspended sentence to avoid six months in county jail, only to face deportation afterward? What client would be satisfied with a plea bargain when deportation with a lifetime prohibition on reentry is a mandatory consequence? In reality, the public defender must deal with immigration issues to properly serve the client.

Despite their refusal to overturn convictions, courts have recognized that attorneys have a basic duty to analyze each case and provide clients with the legal advice they need to make informed decisions.\(^9\) Recently, the Supreme Court acknowledged the duty of defense counsel to advise clients of immigration consequences. In *INS v. St. Cyr*, the Court considered the retroactive application of new immigration consequences for criminal convictions.\(^9\) The majority noted that “[e]ven if the defendant were not initially aware of [a provision allowing avoidance of deportation in certain circumstances], competent defense counsel, following the advice of numerous practice guides, would have advised him concerning the provision’s importance.”\(^9\) Indeed, the Court in *St. Cyr* relied on the assumption that defense counsel would fully consider immigration

\(^93\) *Id.*

\(^94\) See generally Edwards, *supra* note 88.

\(^95\) See, e.g., *United States v. Campbell*, 778 F.2d 764, 769 (11th Cir. 1985) (“It is highly desirable that both state and federal counsel develop the practice of advising defendants of the collateral consequences of pleading guilty; what is desirable is not the issue before us.”). See generally Michel *v. United States*, 507 F.2d 461, 465-66 (2d Cir. 1974) (recognizing defense counsel’s obligation to advise about the “indirect consequences the guilty plea may trigger,” including deportation); *People v. Soriano*, 240 Cal. Rptr. 328, 335-36 (Cal. Ct. App. 1987) (citing ABA standards as evidence of defense counsel’s obligation to advise clients fully about collateral consequences of their guilty pleas); *People v. Pozo*, 746 P.2d 523, 529 (Colo. 1987) (en banc) (“Attorneys must inform themselves of material legal principles that may significantly impact the particular circumstances of their clients.”); *Williams v. State*, 641 N.E.2d 44, 49 (Ind. Ct. App. 1994) (“[A]n attorney’s duties to a client are [not] limited by a bright line between the direct consequences of a guilty plea and those consequences considered collateral.”).


\(^97\) *Id.* at 323 n.50.
consequences in advising noncitizen clients. St. Cyr illustrates the tension between an assumption that defense counsel will advise clients on immigration consequences and an unwillingness to reverse convictions when counsel does not effectively advise clients. Despite lower courts' denial of relief to such clients, they are clearly not suggesting that defense counsel is not obliged to investigate, understand, and advise noncitizen clients on potential immigration consequences.

Ethical codes of conduct also arguably require lawyers to consider immigration consequences when representing noncitizen clients. In the American Bar Association's Model Rules of Professional Conduct, an official comment on Rule 1.1 regarding competence states that "perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge." Certainly clients would not benefit if attorneys foresee potential legal problems but fail to inform clients or discuss strategies to avoid negative consequences. Rather, the duty of competence requires attorneys to foresee potential consequences and strategize accordingly. Under ABA Standards for Criminal Justice, public defenders must advise defendants on the probability of a negative consequence in the particular case. Commentary makes the issue explicit: "It may well be that many clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction." The Performance Guidelines of the National Legal Aid and Defender Association likewise recognize that it is defense counsel's duty to "be fully aware of, and make sure that the client is fully aware of[,]... consequences of conviction such as deportation," and to explain to the client the potential consequences of any plea agreement. Taken together, these guidelines provide powerful evidence of a public defender's duty to deal with the question of immigration consequences.

98. Id. at 322.
100. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 2 (2002). The rule states: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Id. R. 1.1.
101. ABA STANDARDS FOR CRIMINAL JUSTICE, supra note 85, standard 14-3.2 commentary at 116.
102. Id. standard 14-3.2(f) commentary at 127.
104. Id. Guideline 6.3(27).
III
THE EMERGENCE OF RESOURCES TO ASSIST PUBLIC DEFENDERS IN REPRESENTING NONCITIZENS

The criminal defense bar, and specifically public defenders, have responded to this emerging and growing need to provide immigration counseling to noncitizen criminal defendants by implementing immigration law training for public defenders and by producing practice guides on immigration consequences.

Training public defenders is crucial, because few public defender systems have established, funded resources to assist attorneys in the time-consuming and complicated process of analyzing potential immigration consequences. Only two states, New York and Washington, have state-funded resource centers on the immigration consequences of criminal convictions. These centers employ immigration law specialists to support public defenders by training them, writing guides, and advising on individual cases. Because they are state funded, these services are available to all county public defender offices.

Public defender offices in other states are left to fund training, written resources, and collaboration with immigration experts out of their own already limited budgets. Some individual county public defender offices in areas with a high proportion of noncitizen clients now employ immigration specialists. However, such positions are rare. The vast majority of offices depend on outside training of public defenders on immigration consequences.

The Defending Immigrants Partnership (DIP), a national pioneer in training public defenders, comprises four organizations: the National Legal Aid and Defender Association, the Immigrant Legal Resource Center, the Immigrant Defense Project of the New York State Defenders Association, and the National Immigration Project of the National Lawyers Guild. The DIP provides training and support for public defenders representing noncitizens through projects in the six states with the largest noncitizen populations (California, Florida, Illinois, New Jersey, New York, and Texas) and in the federal defender system.


106. For example, in California, Los Angeles and Santa Clara Counties have each hired immigration experts to analyze and assist in specific cases and to train staff attorneys. Brady Interview, supra note 105.

107. Id.
The DIP employs two training models. In California and New York, two states with very large immigrant populations and training programs on this issue already in place, the DIP is seeking to train experts within each county public defender office. This "train-the-trainers" model is designed to equip each office with an in-house expert on immigration consequences. In the remaining four states, the DIP has coordinated training programs on immigration consequences that are open to all attorneys. These programs are designed to raise awareness both of the potential of immigration consequences and of the legal strategies for avoiding these consequences.

In addition to DIP trainings, the number of state- and county-based trainings has increased significantly. Trainers have stepped up from academia, the immigrant services nonprofit sector, and the private immigration bar, showing the diversity of legal and institutional backgrounds from which training efforts are emerging. These trainings include outside, one- or two-day training programs and much briefer one- or two-hour in-house training programs given on a regular basis. One public defender also has reported that information on immigration consequences is now included in a training program for newly hired public defenders in his county.

A growing literature, especially practical manuals to assist criminal defense attorneys in their representation of noncitizens, has also developed. Some works, such as Immigration Law and Crimes and Criminal Defense of Immigrants, are general national volumes. Others, such as Aggravated Felonies and Crimes of Moral Turpitude, target specific categories of crime that trigger immigration consequences. Still others offer

---

108. In California, one popular trainer is Professor James Smith from the University of California, Davis, School of Law. He supervises an immigration clinic that helps public defenders to assess potential immigration consequences faced by their clients and has provided training to the California Public Defender’s Association and county public defender offices. Interview with anonymous California public defender (Mar. 17, 2003) [hereinafter Interview #6]; Interview with anonymous California public defender (Mar. 7, 2003) [hereinafter Interview #4]. See Professor James Smith’s faculty profile, at http://www.law.ucdavis.edu/Facultyinfo.asp?PROFNAME=JamesFSmith (last visited Nov. 15, 2003).

109. Katherine Brady, Senior Staff Attorney at the Immigrant Legal Resource Center in San Francisco, provides training on immigration consequences.

110. Norton Tooby, Senior Staff Attorney at the Immigrant Legal Resource Center in San Francisco, provides training on immigration consequences.

111. Interview #6, supra note 108; Interview #4, supra note 108; Interview with anonymous California public defender (Feb. 28, 2003) [hereinafter Interview #3]; Interview with anonymous California public defender (Feb. 21, 2003) [hereinafter Interview #2]; Interview with anonymous California public defender (Feb. 20, 2003) [hereinafter Interview #1].

112. Interview #3, supra note 111.


state-specific information, such as *California Criminal Law and Immigration*,116 *Defending Non-Citizens in Minnesota Courts*,117 and *Representing Noncitizen Criminal Defendants in New York State*.118 All of these guides provide information on immigration consequences and defense strategies for ameliorating or avoiding these consequences.

Finally, jurisdiction-specific online resources provide information on criminal charges and the potential immigration consequences of each. The DIP has led the way in the development of seven such charts.119 These charts provide crucial information about immigration consequences and potential defense strategies in ameliorating or avoiding these consequences. Access is free, and the online format allows for continual updating.

Although these efforts to provide public defenders with training and resources are important steps in ensuring adequate client counseling on immigration consequences, current efforts are insufficient to ensure adequate representation for noncitizens who face immigration consequences. Most fundamentally, current efforts affect only a limited geographic region and only some of the public defenders within those regions. As stated above, only two states have systematically addressed this problem. Even the DIP, the national leader in addressing this issue, has focused its efforts in six states because of limited resources. Therefore, many public defenders still lack basic training on the issue and knowledge of available resources. Evidence of the inadequacy of current efforts is found in the accounts of ill-advised criminal defendants who are deported after accepting a plea bargain leading to deportation.120 While important steps have been taken to train public defenders and to provide them with the necessary information and support to advise their clients about immigration consequences, these efforts are insufficient because of their limited scope and depth.

118. MANUEL D. VARGAS, REPRESENTING NONCITIZEN CRIMINAL DEFENDANTS IN NEW YORK STATE (3d ed. 2003).
120. See, e.g., Tyndall, supra note 99, at 663-71 (describing cases in which counsel was ignorant of immigration consequences or affirmatively misrepresented immigration consequences to clients).
IV
ENVIRONMENTAL CONSTRAINTS THAT UNDERMINE TRAINING PROGRAMS

Public defender offices face constraints that limit the effectiveness of existing training programs. This Part begins with a description of three contextual impediments to training effectiveness. A brief summary of psychological scholarship that addresses how these constraints reduce training effectiveness follows.

A. Constraints on Public Defenders

To understand the contextual constraints on public defenders, one must explore each level of the system, from the individuals directly involved to the legislature. For instance, an individual employee’s job description, work group, supervisor, or department could impact training.\(^{121}\) On this individual level, whether an attorney handles misdemeanor or felony cases affects training on immigration consequences, because felony charges almost always raise the possibility of immigration consequences and drastically reduce the attorney’s ability to plea-bargain a favorable disposition. Within individual public defender offices, the shortage of time and resources—and the resulting high caseloads—influences training implementation. At the next level, each county’s criminal justice system, including the system of prosecution, the policies of the district attorney, and the relationship between the public defender and district attorney offices, influences the public defender’s ability to negotiate dispositions without immigration consequences. The legislative context, which includes the complexity, harshness, and ever-changing nature of the immigration laws, forms a final layer. Each level of the system generates constraints on the ability of public defenders to represent noncitizen defendants effectively.\(^{122}\)

An examination of these different contextual levels reveals three primary constraints: (1) a lack of time due to high caseloads at the office level, (2) the complexity of immigration law at the legislative level, and (3) the difficulty of avoiding immigration consequences because of felony charges, the unwillingness of the district attorney’s office to plea-bargain, or the severe immigration statutes.

---

1. **Too Many Clients and Too Few Resources**

"[S]taggering caseloads, tremendous time pressure, limited resources, and inadequate training" constrain almost all public defender offices. Numerous studies have shown that indigent defense is underfunded on both the federal and state levels throughout the United States. The result of this underfunding is excessive caseloads. Not surprisingly, public defenders frequently cite excessive caseloads as one of their primary problems. Indeed, many question the ability of public defenders to provide zealous advocacy under such conditions. One commentator described the average public defender office as "a world where lawyers spend minutes, rather than hours, with their clients; a world in which individualized scrutiny is replaced by the indifferent mass-processing of interchangeable defendants."

Nevertheless, studies indicate that criminal dispositions are not markedly different for accused represented by public defenders and those with privately retained attorneys. The similarity in results, however, obscures the reality that the combination of scarce resources and high caseloads restricts public defenders’ ability to respond to the impacts of the new immigration laws on their clients. Without more time and money, overburdened public defenders have difficulty getting training, doing extra research on immigration issues, and retaining immigration attorneys for advice. So, despite comparable dispositions, the lack of resources provides a real hurdle to public defenders representing noncitizens.

2. **Complexity of Immigration Law**

Courts consistently have recognized the inherent complexity of U.S. immigration laws: "With only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in complexity.'" The Second Circuit has stated that immigration

---


126. For a study of client perceptions of public defenders, see Robert J. Aalberts et al., *Public Defender’s Conundrum: Signaling Professionalism and Quality in the Absence of Price*, 39 SAN DIEGO L. REV. 525 (2002) (presenting a study of criminal defendants’ perception that public defenders were less competent than other court-appointed counsel).


128. See Aalberts et al., *supra* note 126, at 542-44 (presenting evidence that public defenders’ case dispositions do not differ from those of other criminal defense attorneys).

129. Castro-O’Ryan v. INS, 847 F.2d 1307, 1312 (9th Cir. 1988) (quoting ELIZABETH HULL, *WITHOUT JUSTICE FOR ALL* 107 (1985)).
laws resemble "King Minos's labyrinth in ancient Crete." In another case, the Eleventh Circuit explained that, in immigration law, "the issues are seldom simple and the answers are far from clear." The First Circuit has noted that even federal immigration agents have difficulty sifting through immigration code provisions. One immigration judge, speaking at a conference for immigration law practitioners, remarked, "[H]ave you got it by now, that this stuff is not easy?"

Successful representation does not require public defenders to master all of the intricacies of immigration law. However, the seemingly narrow issue of immigration consequences flowing from criminal convictions is both complex in its own right and implicates many other areas of immigration law. This complexity and interconnection become readily apparent when one considers the process necessary to advise noncitizens correctly.

First, to assess whether and which immigration consequences will result from a criminal conviction, an attorney must determine the immigration status of the person accused. This determination is often more difficult than one might expect. Any person born in the United States is a citizen. A person with at least one parent who is a U.S. citizen or who was naturalized while the person was still a minor may or may not be a citizen. Although citizenship is the threshold question in determining the possibility of immigration consequences, knowing a noncitizen's immigration status—whether legal permanent resident, nonimmigrant visa holder, or undocumented immigrant—is critical in determining what sections of the immigration code apply. For defendants with valid "green cards," the determination is simple. But what if family members have petitioned for

---

130. Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977). A synopsis of the Greek myth: Daedalus designed the labyrinth for King Minos to hold the Minotaur. The maze was so well designed that no one could escape it (or the Minotaur). Daedalus provided golden thread to King Minos's daughter, who gave it to Theseus, her lover. He used the thread to enter the labyrinth, kill the Minotaur, and escape. Minos was angry, so he imprisoned Daedalus and his son, Icarus, in the maze. Unable to find his way out, Daedalus made wings so he could fly to freedom. He used wax to attach them to his and Icarus's bodies. While escaping, Icarus approached the sun. The wax melted, and he fell into the sea. Daedalus, however, escaped to Sicily.


132. See Choeum v. INS, 129 F.3d 29, 32 (1st Cir. 1997).

133. DeJesus, supra note 64, at 19.

134. See U.S. Const. amend. XIV, § 1 (stating that "[a]ll persons born or naturalized in the United States... are citizens of the United States...").


136. If the person is a legal permanent resident, he or she probably is most concerned about being designated "deportable" under INA § 237, 8 U.S.C. § 1227. If the person is undocumented, he or she probably will be more concerned about being found "inadmissible" or "excludable" because this finding will preclude the possibility of being admitted legally either then or in the future. See INA § 212(a)(2), 8 U.S.C. § 1182(a)(2).

a client's immigration but have not yet heard a response? Even if clients are undocumented, the answer to this question can be muddled if they have a close relative who is a U.S. citizen or legal permanent resident. Given the number and complexity of factors one must consider, one can see how some clients would themselves be uncertain of their immigration status. Thus, determining immigration status could require a time-consuming interview, fact investigation, and legal research.

The second determination an attorney must make is whether conviction of the crimes charged would result in deportation or some other immigration consequence for the accused. The law is just as arcane on this issue as on the determination of immigration status. Three classifications might concern noncitizens: "deportable," "inadmissible," and lacking "good moral character." (A finding of good moral character is necessary for naturalization.) Which classification is relevant depends on a client's immigration status and on the crimes with which he or she is charged. For example, although a conviction for domestic violence renders a person deportable, this conviction is not per se a basis for inadmissibility. A public defender must, then, determine which immigration consequences will be triggered by the potential charges.

Determining whether a specific state law violation will trigger a specific immigration consequence is difficult because of the complexity of the nexus between federal immigration law and state criminal law. The state criminal statute—and not the conduct of the accused—determines whether a crime is categorized, for example, as a crime of violence or as a crime of moral turpitude. The result is inconsistency among states and uncertainty among defense attorneys. For example, in both In re Balao and In re Bart, the respondents had been convicted of passing bad checks. However, Balao was convicted in Pennsylvania, where the statute did not require fraudulent intent for conviction, whereas Bart was convicted in Georgia, where case law required a finding of fraudulent intent for conviction. Because of this difference in state laws, the Board of Immigration Appeals (BIA) found that only Bart was guilty of a crime of moral turpitude.

---

138. Interview with anonymous California public defender (Mar. 11, 2003) [hereinafter Interview #5].
139. See INA § 316(a)(3), 8 U.S.C. § 1427(a)(3) ("No person . . . shall be naturalized unless such applicant . . . is a person of good moral character . . .").
142. See id.
143. The attorney general appoints the BIA to review decisions made at removal proceedings. The BIA usually decides cases in three-member panels. To ensure neutrality, the BIA is not a part of the Immigration and Naturalization Service, which enforces immigration laws, but instead is part of the Executive Office for Immigration Review, a subdivision of the Department of Justice and directly
Therefore, only Bart faced immigration consequences stemming from his conviction. Such differences in the elements of crimes require jurisdiction-specific training and practice guides and prevent public defenders from sharing information across state lines. These challenges further hinder a public defender’s ability to assess immigration consequences for noncitizens.

Even if the charge itself does not trigger immigration consequences, the sentence sometimes will. Consequently, counsel for noncitizens must both analyze the charges and be aware of the potential sentences and their consequences. For example, in some jurisdictions, petty theft is an aggravated felony if the sentence is one year or more, because it falls within the definition of “theft crimes.” For this reason, the public defender must also consider immigration consequences in strategizing around sentencing.

Finally, the public defender must determine what immigration relief might be available. Researching different prospects for relief is particularly crucial when avoiding immigration consequences is impossible. Ensuring that the possibility of subsequent reentry or the cancellation of deportation remains open might be the best available outcome. Specifically, defendants might qualify for special relief provisions, such as political asylum or relief for battered spouses. Each of these comprises an entire area of immigration law, which might be implicated in any given case. A second important aspect of researching the prospects of relief is assessing the possibility of judicial review, or the opportunity to appeal a decision denying a client immigration relief. Immigration law relief provisions, including types of relief available, requirements to qualify, and the appeal procedures, are extremely complex. However, where deportation or a finding of inadmissibility is unavoidable, relief provisions are the immigrant’s only hope of remaining in the United States or of being able to return.

After completing this analysis—by evaluating a client’s immigration status, potential immigration consequences of charges and sentencing, and relief possibilities—the attorney must devise strategies to ameliorate possible consequences. This has been the focus of other articles, and is beyond the scope of this Comment. However, viewing all of the above factors shows the complexity of the attorney’s strategic considerations.

This analysis of the likelihood of immigration consequences comes on top of the underlying criminal law issues a defense attorney must consider.
What are the elements of the crime charged? Can the prosecutor prove the case beyond a reasonable doubt? Is there an affirmative defense, such as self-defense? What are the possible dispositions—prison sentence, county jail sentence, residential treatment, suspended sentence, probation, or some combination? Analysis of these legal issues is accompanied by the sometimes daunting tasks of fact investigation and trial preparation.

3. Difficulty of Preventing Immigration Consequences

The increasing harshness of immigration legislation, which subjects noncitizens to severe immigration consequences for even nonviolent and misdemeanor offenses, makes the task of avoiding such consequences particularly daunting. The usual distinctions that determine the seriousness of criminal penalties, such as whether the charge is a felony or a misdemeanor, whether the alleged conduct was violent, and the defendant's prior criminal history, often prove irrelevant in the immigration context. This arbitrariness of results often leaves noncitizen defendants little reason to hope for a favorable outcome.

Public defenders are wrestling not only with an incredibly harsh legislative scheme but also a continually changing one. As one public defender has noted, "[t]he law can change from morning to afternoon." Because immigration laws are applied retroactively, and the constitutional ex post facto protection is not applicable, a noncitizen can face immigration consequences, including deportation, for convictions issued when the criminal conduct in question triggered no immigration consequence. Therefore, a public defender's advice and strategies to avoid immigration consequences are continually in jeopardy of being undermined by future changes in the law.

Finally, the culture of the district attorney's office and its relationship with the public defender's office can, in some counties, thwart efforts to negotiate a disposition that protects a defendant's immigration status. Plea bargains result from "informal negotiations between the prosecutor and the defense attorney." Therefore, a prosecutor's unwillingness to negotiate

---

148. See infra Part IV.A.2.
149. Interview #6, supra note 108.
150. "No Bill of Attainder or ex post facto Law shall be passed." U.S. CONST. art. I, § 9, cl. 3. But the Supreme Court consistently has held that the Ex Post Facto Clause does not apply to deportation. See, e.g., Galvan v. Press, 347 U.S. 522, 531 (1954).
152. See Pilcher, supra note 57, at 282.
in a particular case or a district attorney's policy of not negotiating regarding immigration consequences may undermine the public defender's efforts. One public defender reported that "one of the most exasperating parts" of attempting to prevent the deportation of a client is that the district attorneys in his county respond, "good," upon hearing that a potential conviction would lead to deportation.\footnote{154}{Interview #3, supra note 111.}

**B. How Environmental Constraints Decrease Training Effectiveness**

Various subfields of psychology have developed a large body of research and theory addressing the creation and implementation of effective training programs.\footnote{155}{Miguel A. Quiñones & Addie Ehrenstein, Introduction: Psychological Perspectives on Training in Organizations, in Training for a Rapidly Changing Workplace: Applications of Psychological Research 2 (1997).} Effective training requires that trainees be ready to learn, be motivated, learn the content of the training program, and then apply their training to the work environment, resulting in better job performance.\footnote{156}{Raymond A. Noe & Jason A. Colquitt, Planning for Training Impact: Principles of Training Effectiveness, in Creating, Implementing, and Managing Effective Training and Development 56 (Kurt Kraiger ed., 2002) [hereinafter Effective Training].} Although researchers traditionally have focused on the training methods and settings,\footnote{157}{See Colquitt et al., supra note 121.} the personal characteristics of individual trainees,\footnote{158}{See Noe & Colquitt, supra note 156, at 60.} and motivational factors,\footnote{159}{Id. at 66-68.} researchers recently have begun to focus on how the larger context influences training effectiveness. New research has considered many different contextual factors that could influence training effectiveness, such as training policies and practices, supervisor encouragement, coworker support, and constraints on time and resources.\footnote{160}{Scott Tannenbaum, A Strategic View of Organizational Training and Learning, in Effective Training, supra note 156, 42 (Kurt Kraiger ed., 2002).} The premise is that the larger context determines both incentives and constraints on behavior.\footnote{161}{Colquitt et al., supra note 121, at 680.} According to one researcher, "[o]ne of the most consistent and compelling findings from the training research literature is that the work environment is an important determinant of training effectiveness."\footnote{162}{Tannenbaum, supra note 160, at 40.} This research highlights and explains the importance of the environmental constraints that affect public defenders' representation of noncitizens.\footnote{163}{Kozlowski & Salas, supra note 122, at 266.}
Chart 2 demonstrates how the contextual constraints described above can influence training effectiveness before, during, and after training. Although many such connections are obvious, a brief discussion of the ways that time constraints, the complexity of immigration law, and the difficulty of avoiding immigration consequences may influence training effectiveness at each stage reveals the depth of the problem and some potential solutions.

The three environmental barriers to effective training interact with one another, compounding the potential effect. For instance, the complexity of immigration law is not nearly as significant alone as when coupled with the high caseload of a public defender. Likewise, the complexity of the law compounded by the difficulty of achieving desired results can affect motivation. Because of these interrelationships, the following discussion attempts only to highlight how the three barriers together might limit training effectiveness for public defenders. As shown, the three barriers impact each stage of training: (1) pretraining self-confidence in one's ability to learn and apply the material, (2) learning during the training, (3) posttraining application of skills in the workplace, and (4) performance.

---

164. Adapted from Figure 3.1 in Noe & Colquitt, supra note 156, at 60. The model was simplified by eliminating the individual characteristics of trainees that influence learning (e.g., cognitive ability, conscientiousness, age) and modified by adding the specific environmental factors discussed in this Comment.
Self-confidence about one’s ability to learn, called self-efficacy, “is concerned not with the skills one has but with the judgments of what one can do with whatever skills one possesses.”165 Whereas ability refers to a person’s objective capability of learning and using training materials, self-efficacy is a subjective measure of a person’s own confidence that he or she will be able to learn and perform.166

Trainees’ strong self-confidence about their ability to learn can significantly improve the effectiveness of their training programs.167 It motivates an employee to expend more effort and persist in the face of setbacks.168 Self-efficacy is an individual motivational issue; however, both individual and contextual characteristics influence one’s self-efficacy.169 Also, organizations can increase individual members’ self-efficacy,170 with or without an individual’s personal effort.

Environmental constraints such as high caseloads, the complexity of immigration law, and the difficulty of ameliorating or avoiding immigration consequences can directly limit public defenders’ confidence in their ability to learn and strategize around immigration law. Attorneys may doubt their ability to learn the material in the time allotted. They may question whether their caseloads will allow them time to do the additional research necessary to determine the best strategies for their noncitizen clients. They may doubt that their efforts will actually lead to the desired outcome of ameliorated immigration consequences because of the harshness of the laws or the district attorney’s unwillingness to negotiate. Each of these possibilities decreases self-efficacy—and reduces public defenders’ motivation to learn the new material.

Environmental constraints also impact individuals’ ability to learn during the training. Learning is “a change in the content, organization, and storage of information.”171 More specifically, learning is the process by which individuals build and reorganize schema, or mental infrastructures, to incorporate new information into their existing knowledge base.172 In this context, public defenders must learn new content—immigration law—

---

168. Id.
169. Colquitt et al., supra note 121, at 679.
171. This definition is drawn from the field of cognitive psychology. P. NICK BLANCHARD & JAMES W. THACKER, EFFECTIVE TRAINING: SYSTEMS, STRATEGIES, AND PRACTICES 96 (1999) (outlining two distinct definitions of learning).
172. Id.
and reorganize existing criminal defense strategies to incorporate this new information.

Again, the effects of the environmental factors are clear. First, caseload constraints undoubtedly limit attorneys' availability for training. At the same time, the complexity of immigration law requires attorneys to spend more rather than less time in its study. Then, compounding the issue, the changing nature of immigration law requires that attorneys update their training with some frequency, which requires still more training time. These demands make it difficult for even the most brilliant attorney to master the subject.173

In addition to affecting public defenders' pretraining self-confidence and ability to learn, environmental constraints can also hamper posttraining transfer of skills to the workplace. Transfer refers to "the extent to which the trainee applies the knowledge and skills to the job and adapts or customizes what has been trained to meet the trainee's specific needs on the job."174 For public defenders, transfer of skills related to immigration consequences could be indicated by a number of new actions: asking clients about their immigration status, researching the immigration consequences of a particular charge, considering immigration consequences along with criminal penalties in designing a plea bargain, and so forth. Without transfer to the real world, training yields no results.

External, systemic constraints can reduce the success of attorneys in applying the training on the job.175 Public defenders may not have the time or opportunity to apply the new skills, especially because it may take a novice longer to analyze immigration consequences. In addition, changes in the law may invalidate or complicate what attorneys have learned in earlier training sessions. Finally, unsuccessful attempts to avoid immigration consequences, because of strict laws or the district attorney's refusal to negotiate, may discourage public defenders from applying immigration training in the future.

The ultimate measure of effectiveness is whether the training improves results on the job. For public defenders, performance means the ability to prevent or ameliorate immigration consequences for their clients. In addition to all of the barriers mentioned above to reaching this stage, the harsh nature of current immigration laws, the district attorney's refusal to negotiate, or a future legislative change could make deportation inevitable.

Importantly, each of these four stages is not only affected by the environmental factors but also itself affects the next stage, as indicated by the

173. Tannenbaum, supra note 160, at 41.
arrows in Chart 2 connecting motivation to learning, learning to transfer, and transfer to performance. This interconnection results because these stages are chronological, with each stage dependent on the preceding stages. For example, self-efficacy affects all following stages. Therefore, for each of the final three stages, there are both direct and cumulative effects. Given the strength of the environmental factors considered, their impact on job performance will be quite significant. This impact results in public defenders’ inability to properly inform and advise their noncitizen clients.

This model reveals where and how these factors undermine emerging training efforts to equip public defenders who represent noncitizens. Examining this model for the vulnerabilities of training effectiveness can reveal potential solutions.

V
FIVE STRATEGIES FOR EFFECTIVE TRAINING DESPITE ENVIRONMENTAL CONSTRAINTS

Given the complex challenges to training public defenders on immigration consequences, “training [is] more effective when accompanied by interventions at the organizational level.” Although research has demonstrated the importance of the work environment to training success, training only rarely is accompanied by organizational changes to increase its effectiveness. The following proposals suggest ways public defender offices and trainers can make trainings more effective.

The proposals seek to counteract undermining forces by concentrating on changes beyond training design. These ideas originated from two sources: practicing public defenders and training literature. This Part describes the proposals, lists ways they might overcome current barriers to effective training, and acknowledges obstacles to their implementation.

Although public defenders will undoubtedly encounter difficulties in implementing these proposals, they are far less radical than attempting to eliminate the root cause of the problem. For instance, a court’s finding that immigrants have a constitutional right to counsel during immigration proceedings would decrease (but probably not eliminate) the public defender’s role. Likewise, if states and local governments greatly increased funding for local public defender offices, they could reduce attorneys’ caseloads or even hire immigration attorneys dedicated to analyzing immigration consequences. Such increases are unlikely in the current economic climate,

177. Id. at 33.
which has already led to budget cuts for some offices. Even less likely is the possibility that legislation will decrease the number and gravity of immigration consequences for noncitizens convicted of crimes. The following proposals, then, are designed to provide realistic approaches to addressing the problem.

A. Establish Collaborations with Immigration Attorneys

Given the complexity of immigration law, public defenders must join forces with immigration practitioners to represent noncitizen defendants adequately. Public defenders have described the responsibility of advising clients on immigration consequences as “too much to ask” and “too burdensome” for public defenders to bear alone. But, within current constraints, public defenders can “recognize the issues . . . [and] know to ask or call” an immigration expert.

Collaboration fundamentally changes public defenders’ tasks and places manageable limits on the goals of training. An overwhelming task can reduce a trainee’s self-confidence, undermining the effectiveness of the training. Without collaboration, the entire process of determining immigration status, analyzing charges and potential sentences, ascertaining the possibility of relief, and strategizing for the best possible outcome falls solely on the shoulders of public defenders. However, when public defenders collaborate with immigration experts, their task becomes more manageable: to discover the issue—that is, to know what charges against noncitizens may result in immigration consequences—and to gather relevant facts to relay to immigration experts. Working with experts will increase public defenders’ efficiency, help ensure accuracy, and possibly increase learning over time.

Reducing the necessary scope of training through collaboration also shifts the public defender’s focus from outcome, such as preventing deportations, to procedure, such as identifying issues, gathering information, and consulting. Training research suggests that to increase pretraining self-confidence, organizations should emphasize learning outcomes and deemphasize performance outcomes, even though performance outcomes are ultimately more important.

---

178. Some public defender offices in California have already faced budget cuts. Interview #3, supra note 111.
179. See supra Part IV.A.2.
180. Interview #1, supra note 111.
181. Interview #5, supra note 138.
182. Interview #1, supra note 111.
183. See supra Part IV.B.
184. See supra Part IV.A.2.
In addition to bolstering self-confidence through the shift in training goals, collaboration also addresses the ways in which environmental constraints affect other stages of training effectiveness: learning, transfer, and performance. Although public defenders have limited training availability, the more manageable learning goals decrease the number of training hours necessary. Thus, the amount of learning necessary corresponds to the amount of learning possible in the time allowed. The possibility of changes in the law invalidating previously learned material can be overcome by consultation with immigration experts, who presumably will be able to advise public defenders of such changes and their significance.

Some public defenders have found ways to collaborate with immigration experts within their current systems. Depending on the office size and resources, with whom they collaborate and the formality of the arrangement vary widely. Public defenders cited four different partners: nonprofit agencies specializing in immigration law, private immigration attorneys, law school immigration clinics, and federal public defenders.

The Immigrant Legal Resource Center (ILRC) is a private, nonprofit organization in California comprising a variety of departments, each focusing on a legal issue salient to immigrants. The ILRC has been a leader in training on the immigration consequences of a criminal conviction. \(^{186}\) Under formal contracts, the ILRC currently collaborates with several California county public defender offices. The ILRC requests that public defenders gather all relevant information. Then, after investigating the relevant issues, the ILRC informs them of the potential dangers and the best strategies for a case. One public defender described his office’s relationship with the ILRC: “[T]hey are the last word on these questions.” \(^{187}\) Another public defender noted that the ILRC has always responded with an analysis of immigration consequences within twenty-four hours. \(^{188}\)

The Defending Immigrants Partnership (DIP), which includes the ILRC, is seeking to increase such collaborations by working with local immigration organizations. \(^{189}\) The DIP identified three underserved states, Florida, Illinois, and Texas, and has established collaborations with nonprofits willing to assist county public defenders. \(^{190}\) The DIP chose

\[186\] See supra Part III.
\[187\] Interview #4, supra note 108.
\[188\] Interview #2, supra note 111.
\[189\] Brady Interview, supra note 105. For a description of the DIP, see supra Part III.
\[190\] Id.
well-established organizations with extensive experience in immigration law to help ensure long-term collaboration with public defender offices. Public defenders also have established informal collaborations with practicing immigration attorneys. Several public defenders described networks of private attorneys who were involved in both training and collaborating on individual cases. In some cases, these networks were established through old friendships with law school classmates or former public defenders turned immigration practitioners. The fundamental issue with such collaborations is that private attorneys are not always available or willing to help on a pro bono basis. One public defender described the gold mine of finding two immigration attorneys he called "true believers" because they did not charge for consultations.

The University of California, Davis, School of Law has established an immigration clinic that serves as an informal collaboration partner for public defenders throughout the state. A team of six students focuses specifically on the immigration consequences of criminal conviction. The clinic assists clients directly but also receives calls from public defenders. Under the supervision of two professors, the team's goal is to respond with an analysis of each case within twenty-four hours. One public defender has reported that "they get back to me in no more than a day." Finally, one public defender reported relying heavily on an informal collaboration with federal public defenders, who often defend clients against federal immigration charges. Since 1996, the number of federal immigration prosecutions has increased dramatically. In 2000, for example, U.S. attorneys prosecuted more than 16,000 noncitizens with a suspected immigration offense as the most serious charge. This trend has impacted federal public defenders, increasing their familiarity with the immigration statutes. They are also more versed in immigration consequences because of the effects on their clients who face charges unrelated to immigration.

191. The organizations are the Florida Immigrant Advocacy Center, see Web site, at http://www.fiacfla.org (last visited Nov. 16, 2003); the Legal Assistance Foundation of Metropolitan Chicago, see Web site, at http://www.lafchicago.org (last visited Nov. 16, 2003); and the Texas Lawyers' Committee, see Web site, at http://www.txlawyerscommittee.org/about (last visited Nov. 16, 2003).
192. Brady Interview, supra note 105.
193. Interview #6, supra note 108; Interview #5, supra note 138; Interview #4, supra note 108; interview #3, supra note 111.
194. Interview #6, supra note 108; Interview #3, supra note 111.
195. Interview #6, supra note 108.
197. Id.
198. Id.
199. Interview #6, supra note 108.
200. Id.
201. See Scalia & Litras, supra note 18, at 1.
The informality of these collaborations raises questions about their limits. For instance, are there implicit limits on advice or amount of research time? Also, what happens if these lawyers are not available? Do the informal collaborations, many of which are based on personal relationships, create an inequality in the quality of representation within an office? The disadvantage might be particularly strong for clients of new attorneys, who have fewer professional contacts. Because of these uncertainties, informal collaborations are less likely to be effective in overcoming barriers to training effectiveness.

B. Create an Adequate Intake System to Determine the Immigration Status of Clients

As discussed above, the initial step in analyzing a case for potential immigration consequences is to determine the immigration status of the client. Public defender intake systems vary greatly, among counties, between in-custody and out-of-custody clients, and, in some offices, between misdemeanor and felony defendants. The primary differences lie in who performs the intake (an attorney, a law clerk, or a paralegal) and where the intake is performed (in the jail, in the court, or in the office). Whatever the system, the intake process should gather pertinent information about immigration status as early as possible.

Establishing an intake system that identifies early on clients who may face immigration consequences will improve the effectiveness of immigration training. First, because of time constraints, it is important that attorneys know as soon as possible if immigration factors are an issue. Early awareness of potential immigration consequences will facilitate research on immigration consequences and collaboration with immigration specialists, allowing for defense attorneys to strategize accordingly. Second, in offices in which other staff members, such as law clerks or paralegals, perform the intake, establishing adequate forms to determine immigration status could reduce attorneys’ workload.

Many attorneys have reported that, in some cases, the intake process presents an additional barrier: clients’ fear and unwillingness to disclose information about their immigration status. Attorneys described a “don’t-tell-anybody” attitude in the immigrant community resulting from a general “distrust of government officials.” One attorney who designed the intake form for her office, specifically to include new questions about immigration status, has learned from intake staff that “clients did not want to give the information.”

---

203. Interview #6, supra note 108.
204. Interview #5, supra note 138.
205. Interview #2, supra note 111.
fears of deportation or prosecution for immigration offenses. Also, clients represented by court-appointed attorneys may not know that public defenders have a duty of confidentiality.

Attorneys must work to resolve these misunderstandings so that they can obtain the necessary information. The task of performing an intake interview must include building the trust necessary to elicit truthful information. For example, interviewers should explain that the contents of the interview and the client's information will remain confidential.206 Also, the interviewer may need to ask more than just the single question, "Are you a U.S. citizen?" Several changes to the immigration consequences training may be necessary to effectuate these changes. Training should include strategies for building trust and eliciting honest, thorough information. For some offices, it might be necessary to train intake personnel and interpreters on these issues. Public defenders have noted that interpreters are often a key bridge or barrier in building rapport with clients.207 Easing clients' fears about revealing information, then, should affect both the content and the scope of training in the office.

Beyond the issue of ascertaining a person's true citizenship status, public defenders must establish a procedure that allows them to obtain enough information to determine which immigration consequences clients may face. As discussed above, this determination is not always a simple task. The challenge here is to balance the need for detailed and extensive information with the need for efficiency. No single intake form is best for all possible intake situations. The ILRC suggests the intake form in the Appendix. This extensive form asks for all the information that could be relevant in determining immigration consequences. Intake personnel may have ample time to fill out the entire form for an out-of-custody client who visits the office. However, many public defenders complain that "a lot of times [clients] don't know the answers."208 Also, asking all of these questions will be impossible for a misdemeanor attorney with fifty in-custody clients scheduled for one morning. Intake forms should be structured to give intake personnel the flexibility to gather the most information possible in the time allotted. In the most basic initial interview, attorneys should at least attempt to determine whether a client is a citizen and, if not, whether he or she is a legal permanent resident, a nonimmigrant visa holder, or an undocumented immigrant.

206. Interview #3, supra note 111.
207. Interview #6, supra note 108.
208. Id.
C. Focus Training Efforts on Misdemeanor Attorneys

"Misdemeanor attorneys have more impact, more ability to save their clients." Misdemeanor attorneys have a relatively good chance of avoiding negative immigration consequences for their clients because the charge is less likely to be categorized as an aggravated felony and because district attorneys are more willing to negotiate plea bargains that avoid deportation in these cases. Felony attorneys, on the other hand, are more likely to represent defendants with prior convictions (bringing immigration consequences) and more serious charges. Very experienced felony attorneys, who may be trying only murders or three-strikes cases, are especially likely to fall into this category.

In attempting to increase public defenders' pretraining and posttraining confidence in their ability to obtain a desired outcome for their clients, it is appropriate to focus training efforts on attorneys with the highest volume of cases for which research and strategy will actually avoid deportation or other immigration consequences. Everyone in a public defender office should be trained on immigration consequences, but training should be prioritized for and focused on those representing clients charged with misdemeanors.

Two concerns limit the effectiveness of this strategy: the high caseloads and inexperience of most misdemeanor attorneys. Misdemeanor attorneys' caseloads are higher than those of felony attorneys for several reasons. First, district attorneys bring more misdemeanor than felony charges. Second, because the cases are usually less complex and the potential criminal penalties are significantly lower for misdemeanor cases, fewer resources are allotted to their resolution. Misdemeanor attorneys are limited not only by heavy caseloads but also by inexperience. Most misdemeanor attorneys are brand-new public defenders, and many are straight out of law school. Their learning curve is steep, especially because training is limited in many public defender offices.

Training literature reports that novices need more time to perform their assigned tasks, as compared with experienced workers, who know the procedures and are able to perform them more efficiently. This efficiency results from experienced

---

209. Interview #1, supra note 111.
210. Three-strikes laws developed in the mid-1990s, as twenty-four states and the federal government enacted habitual offender statutes that require lengthy prison terms for defendants with prior felonies. See Ewing v. California, 538 U.S. 11, 14 (2003). These statutes vary widely, but most require a specified minimum prison term for a person's third felony or "strike." In California, for example, a defendant who is convicted of a felony and has previously been convicted of two or more violent felonies is sentenced to a minimum of twenty-five years to life. See CAL. PENAL CODE ANN. § 667 (West 2002).
211. Interview #1, supra note 111 (noting that most of their new, misdemeanor attorneys are "brand-new lawyers").
212. See supra Part IV.A.1 and accompanying notes.
213. GOLDSTEIN & FORD, supra note 174, at 92.
attorneys being able to "grasp the problem and bypass many steps while
novices are trying to figure out the surface features." The combination of
heavier caseloads and the inherent inefficiency of inexperience reduce the
effectiveness of immigration training. Instead of showing the folly of fo-
cusing on misdemeanor attorneys, however, these obstacles underscore the
need for additional organizational support, as described in the other pro-
posals.

D. Hold Frequent, Short Trainings on Specific Categories of
Criminal Charges

Cognitive psychology suggests that shorter, spaced training sessions
that are organized around criminal charges are likely to be more effective
than longer, immigration-centered programs. Shorter, spaced trainings
give trainees the opportunity to think about and even practice new skills
between training sessions. As a result, they can return to later sessions
with questions. Some public defenders have said they would prefer shorter,
spaced trainings. In describing what she thought to be the primary problem
with immigration trainings, one public defender complained that they of-
fered a "broad overview that goes over people's heads . . . [and] too much
information] to absorb." Others reiterated this point and suggested
"small doses" of immigration training in one-hour sessions.

Public defenders also have said they prefer organizing the training
material around criminal charges, not around immigration categories, such
as deportable or inadmissible. This kind of reorganization would result in
topics such as drug charges, domestic violence, theft, and so forth. "This is
how public defenders think about their cases." Psychological literature
supports this preference. Cognitive psychologists have defined learning as
the process by which people build and reorganize their mental infrastruc-
tures to incorporate new information into their preexisting knowledge.
This reorganization and learning may be easier if the new information has
the same structure as the preexisting knowledge. Specifically, it may be
easier for public defenders to incorporate new information on immigration
law into their preexisting knowledge of criminal law when the training is
structured similarly to the attorneys' understanding of criminal law. Break-
ing up the training into shorter sessions also is likely to improve public
defenders' self-confidence in applying the learning, primarily because

214. Id.
215. See BLANCHARD & THACKER, supra note 171, at 204.
216. Id.
217. Interview #2, supra note 111.
218. Id.
219. Interview #5, supra note 138.
220. Interview #4, supra note 108.
221. See BLANCHARD & THACKER, supra note 171.
trainees would not be overwhelmed by the amount of new material. In
addition, regular, short trainings would provide a forum for conveying up-
dated information on new legislation and relevant case law developments.

Usually, a series of shorter trainings is less convenient and more ex-
spensive than one long training because of increased travel time and sched-
uling problems. However, it also avoids the difficulty of carving out entire
days from the attorneys’ schedules. The difficulty may lie not in
shortening the trainings to spread out the material but in ensuring a series
of sessions that focus on immigration because public defenders can devote
limited time to training, in general. Nonetheless, shorter trainings, organ-
ized around types of criminal charges will likely enhance training effec-
tiveness.

E. Design Training and Resources to Address Public Defenders’
Actual Working Conditions

Even training that provides a strong overview of immigration law can
fail in the courthouse when public defenders do not have either a quick
means of applying their new knowledge to specific cases or a way to delay
court proceedings to allow proper research. The following account, based
on interviews with several defenders, vividly describes the problems that
are typical for attorneys dealing with a high volume of cases in a short pe-
riod of time:

As a young public defender, you are assigned the “misdemeanor
calendar,” where you appear in court for the arraignment of misdeemeanor defendants currently in custody. It is Monday
morning, and the “calendar” has more than fifty clients listed.
Between 8:30 a.m. and noon, it is your task to meet with each one,
advise him of the charges, explain his constitutional rights, and
discuss the options. At the same time, you will need to gather
information from him, including information about possible
defenses, his connections to the community (for bail purposes), and
his immigration status. Depending on the charge, the evidence, and
the prosecutor’s offer, this meeting may also include the
explanation and consideration of a plea bargain.

At 11:30 a.m., while you still have a handful of clients waiting, a
defendant informs you that he is not a citizen and that he fears he
will be deported for the crime. At the same time, the district
attorney has offered a plea agreement of “credit for time served”
and probation, which means that the client can go home today with
a guilty plea. Here’s the problem: you don’t know if the client will
face deportation for the conviction. The client desperately wants to

222. Id. at 204.
223. In the criminal justice system, misdemeanors are crimes for which the maximum term of
imprisonment is one year or less.
DEFENDING AGAINST DEPORTATION

go home—with the assurance that he won't be deported. The judge and the district attorney are ready to move on, and the other clients are waiting for their turn. What do you do?224

In the preceding situation, the defendant likely could avoid immigration consequences because he is charged with only a misdemeanor.225 At the same time, the misdemeanor attorney is relatively inexperienced; the misdemeanor calendar is long; and the client, the district attorney, and the judge expect a rapid disposition. All of these facts pressure the attorney to make a quick decision, foregoing proper research and consultation with an immigration expert. Such haste may lead the attorney to overlook potential immigration consequences or to misinform the client about them.

Immigration trainings for public defenders rarely, if ever, address how to handle these pressures. As one public defender complained, immigration attorneys are “not familiar with the real world of public defenders.”226

Only two solutions are apparent: provide the answer to the attorney in court or find a way to delay the disposition until the attorney can find an answer. One way to provide information to the attorney in the courthouse is with a chart that lists immigration consequences by penal code violation. This “pocket” practice guide would provide public defenders with a quick way to find out which charges trigger immigration consequences. New York has such a chart,227 and the DIP currently is completing such guides for six states.228

Several features are necessary to make these guides effective. First, they must be updated regularly with legislative changes and new case law.229 The guide must also be portable. A format similar to Bell’s Searches, Seizures and Bugging Compendium, a resource commonly used by public defenders, would allow for both portability and frequent updates.230 The Internet provides another option that is inexpensive and allows for frequent updates. However, online resources are useful only if the attorney has access to the Web from the courthouse.

A public defender also can access the necessary information by contacting an expert on immigration consequences. However, collaboration with outside immigration attorneys is impractical, unless at least one immigration practitioner is constantly available throughout the day. An “in-house expert”—a public defender with immigration expertise—is a

224. Scenario described in Interview #5, supra note 138, and Interview #6, supra note 108, with added details for clarity.
225. See Part V.C.
226. Interview #2, supra note 111.
227. Quick Reference Chart for Determining Key Immigration Consequences of Common New York Offenses. See Bretz, supra note 77, app. A.
228. The six selected states are California, Florida, Illinois, New Jersey, New York, and Texas.
229. See supra Part IV.A.3.
more practical option. One such in-house expert highlighted the need for her to be available while attorneys are in court: "Misdemeanor attorneys call me from court, while felony attorneys call me ahead of time." As with the guide to the immigration consequences of criminal charges, the attorney in court must be able to get the information immediately. So if the immigration expert is making a court appearance elsewhere, visiting a client in custody, meeting with a witness, or for any other reason unavailable, this system is ineffective.

Because public defenders are unlikely to be able to get quick answers every time, training must teach how to delay the disposition of cases to allow for more research on the potential immigration consequences. One young public defender recounted representing a noncitizen on a low-level felony charge. He described the pressure he faced from the judge, the prosecutor, and the client herself to settle the case when the prosecutor offered a disposition for credit for time served and probation. Because the public defender refused to accept the offered plea bargain, the client remained in custody until her next court date. In the meantime, the attorney researched immigration consequences and was able to negotiate a plea bargain that would protect the defendant’s immigration status. Although the outcome of this case was positive, trainings for misdemeanor attorneys must address the difficulty associated with delaying the plea. Such trainings must teach both when delays are necessary and how to achieve them, without precluding a plea bargain.

CONCLUSION

Immigration laws targeting immigrants with a criminal conviction combined with a growing noncitizen population have forced public defenders to add an entire layer of analysis to their representation of noncitizens: whether the defendant may face immigration consequences. However, public defenders work in overburdened offices, where high caseloads and insufficient budgets are the norm. These conditions often undermine training that might otherwise help public defenders to consider immigration consequences. Indeed, the realities of the job may not resemble at all the exercises presented at trainings. The crucial question, then, is how public defender offices can strategize to overcome these impediments to represent noncitizens effectively.

Public defender offices must think creatively about changing their internal structures and collaborating with immigration experts to meet the needs of noncitizen clients cost-effectively and efficiently. In addition, they must implement an effective training program focused on those

231. Interview #1, supra note 111.
232. Interview #6, supra note 108.
attorneys with the most urgent and recurring need for the information: new misdemeanor attorneys. These steps will allow public defender offices to integrate the analysis of immigration consequences into their legal strategies.

Although difficult to implement, these changes are necessary because noncitizen clients are vulnerable to one of the most serious legal sanctions that exists, permanent banishment from their home. Such organizational improvements are essential if public defender offices are to continue providing equal service to citizens and noncitizens alike.

APPENDIX

**IMMIGRATION STATUS QUESTIONNAIRE**

Name: ____________________________ Date: ____________________________

Date of Birth: ____________________ Date: ____________________________

Immigration Hold: Yes No

Immigration Atty: ____________________________

Phone: ____________________________

**Entry**

Date of First Entry: ____________________________

Visa Type: ____________________________

Date of Departures: ____________________________

Length: ____________________________

Purpose(s): ____________________________

Date of Last Entry: ____________________________

Visa Type: ____________________________

**Immigration Status**

Lawful Permanent Resident: Yes No

Date obtained green card: ____________________________

Other (circle): refugee asylee temporary resident work permit TPS Family Unity ABC undocumented

Visa Type: ____________________________ Date Obtained: ____________________________

Did anyone ever file a visa petition for you? Yes No

Type of Visa: ____________________________

Name: ____________________________ Date: ____________________________

Phone: ____________________________ Date: ____________________________

Granted? Yes No

---

233. Reprinted with permission of ILRC.
Prior Deportations
Previous deportation or appearance before immigration judge? Yes No
Date: ____________ Reason: _________________________________________
Immigration court date pending? Yes No
Date: ____________ Reason: _________________________________________

Prior Immigration Relief
Previously received (circle):
§ 212(c) relief  cancellation of removal  suspension of deportation
Date: ____________________________________________________________

Relatives With Status
Do you have a U.S. citizen: parent  spouse  child  brother  sister
If child, list date(s) of birth: ________________________________________
Do you have an LPR: parent  spouse

Employment
Would your employer help you immigrate? Yes No
Occupation: _______________________________________________________
Employer’s Name: _________________________________________________
Phone: ________________________________

Possible Unknown U.S. Citizenship
Were you or your spouse’s parent or grandparent born in the U.S. or
granted U.S. citizenship? Yes No
Were you a permanent resident under the age of 18 when a parent became
a U.S. citizen? Yes No

Other
Have you been abused by your spouse or parents? Yes No
In what country were you born? _______________________________________ 
Do you have a fear of returning? Yes No
Why? ____________________________________________________________