NOTE

Unexpected Consequences: Why Criminal Defense Attorneys Have an Ethical Obligation to Inform Noncitizen Clients of the Immigration Consequences of Conviction

*Megan Elman**

ABSTRACT

Noncitizens entering the criminal justice system care about not only the length of a possible sentence but also the impact of a conviction on their immigration status. Criminal defense attorneys, however, are only constitutionally required to inform clients of immigration consequences when a conviction or plea deal will unambiguously lead to deportation. Despite limited legal obligations, criminal defense attorneys arguably have an ethical obligation to understand and explain to their clients all possible immigration consequences and also to negotiate immigration-neutral outcomes. This ethical obligation derives from the American Bar Association's Model Rules of Professional Conduct. The American Bar Association should clarify and bolster this obligation by including language recommended in this Note as a comment to Model Rule of Professional Conduct 1.4. Forty-nine states have binding ethical rules based on the Model Rules of Professional Conduct; thus, inclusion of the recommended language will raise national awareness of the obligation, normalizing the standard and encouraging states to adopt similar requirements.

---

* J.D., expected 2019, The George Washington University Law School. I am grateful to *The George Washington Law Review* Notes Editor Kevin Zhang for his invaluable time and effort spent editing this Note. In addition, I am grateful to Charles Davis, Molly Rucki, Professor Alberto Benítez, and Katie D'Adamo for their insightful feedback during the drafting of this Note.

Table of Contents

Introduction

Jose Padilla moved from Honduras to the United States in the 1960s.[1] He served in the Vietnam War, has been a lawful permanent U.S. resident for over 40 years, and lives in California with his family.[2] He is married and has three adult children, two from a previous marriage and one with his current wife.[3] Since arriving in the 1960s, Pa-

1 *See* Padilla v. Kentucky, 559 U.S. 356, 359 (2010).

2 Padilla v. Commonwealth, 381 S.W.3d 322, 324 (Ky. 2012).

3 *Id.*

dilla has built a life in the United States.[4] Padilla has only returned to Honduras for two cumulative weeks since entering the United States.[5]

In 2001, Padilla, a licensed commercial truck driver, was driving in Kentucky when he was pulled over and arrested for possession of marijuana.[6] Padilla was charged with various drug offenses, including felony trafficking in marijuana.[7] Throughout the court proceedings, Jose repeatedly asked his criminal defense attorney about the consequences of the criminal proceeding on his immigration status.[8] Despite Padilla's clear concern, his attorney neither researched the impact of a conviction on his immigration status nor consulted an immigration attorney.[9] Padilla's attorney instead told him that pleading guilty would not impact his immigration status because he had been in the United States as a lawful permanent resident for years.[10] The attorney advised Padilla that he *should* plead guilty.[11] Unfortunately, the attorney was incorrect, and possession of any amount of marijuana over thirty grams is a deportable offense.[12] As a result of his conviction, Padilla entered removal proceedings and faced deportation.

Jose Padilla has a strong ineffective assistance of counsel claim because his attorney should have known that pleading guilty to any drug offense other than possession of 30 grams or less of marijuana would lead to removal proceedings.[13] Padilla's attorney thus should have negotiated with the prosecutor for a plea deal or, if plea negotiations were not going to result in a deal that would limit or avoid immigration consequences, should have recommended going to trial. Luckily, Padilla had new attorney representation when he sought to appeal his conviction on the basis of ineffective assistance of counsel. His case eventually reached the Supreme Court, which recognized that the affirmative misadvice of his attorney was ineffective assistance of counsel, stating that "when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear."[14] Most noncitizens, however, do not have the opportunity to raise ineffective

4 *See id.*

5 *Id.*

6 *See id.* at 327.

7 *See id.* at 324.

8 *See* Brief of Respondent at 8–11, Padilla v. Kentucky, 559 U.S. 356 (2010) (No. 08-651).

9 *Id.* at 11.

10 Padilla v. Commonwealth, 381 S.W.3d at 328.

11 *Id.*

12 8 U.S.C. § 1227(a)(2)(B)(i) (2012).

13 *Id.*

14 Padilla v. Kentucky, 559 U.S. 356, 369 (2010).

assistance of counsel claims[15] or do not have charges for which "the deportation consequence is truly clear," and thus the "duty to give correct advice" is "more limited."[16]

Although Padilla was able to vacate his conviction with an ineffective assistance of counsel claim,[17] the majority of noncitizens are not as lucky.[18] Criminal defense attorneys have limited legal obligations to their noncitizen clients[19] and, given the political climate as of 2018, Congress is unlikely to significantly expand criminal defense obligations to noncitizens.[20] As the United States' immigration policies become more restrictive and deportation priorities expand,[21] noncitizens facing criminal charges need comprehensive legal advice on the immigration consequences of convictions[22] to avoid entry into the immigration court system.[23] Although noncitizens are less likely to com-

---

15 Eve Brensike Primus, *Procedural Obstacles to Reviewing Ineffective Assistance of Trial Counsel Claims in State and Federal Postconviction Proceedings*, 24 CRIM. JUST., Fall 2009, at 6, 7–11.

16 Padilla v. Kentucky, 559 U.S. at 369.

17 *See* Padilla v. Commonwealth, 381 S.W.3d 322, 330–31 (Ky. 2012).

18 *See, e.g.*, Erica Bryant, *Rochester Family Torn Apart After Dad Deported*, DEMOCRAT & CHRON. (Sept. 29, 2017, 5:57 PM), https://www.democratandchronicle.com/story/news/2017/09/29/immigration-reform-rochester-man-deported-haiti/709630001 [https://perma.cc/VRP5-EXLP].

19 *See* Padilla v. Kentucky, 559 U.S. at 367–69; *see also infra* Part I.

20 *See* Dara Lind, *The Real Immigration Split in Congress Isn't on Policy. It's on Urgency*, VOX (Feb. 8, 2018, 2:40 PM), https://www.vox.com/policy-and-politics/2018/2/6/16974026/congress-immigration-bill-senate-daca [https://perma.cc/UKX9-MCX4] (describing how Congress has many proposals regarding immigrants protected by Deferred Action for Childhood Arrivals ("DACA") but no consensus on when to pass the bills).

21 *See* Camila Domonoske, *What's New in Those DHS Memos on Immigration Enforcement?*, NPR (Feb. 22, 2017, 5:40 PM), https://www.npr.org/sections/thetwo-way/2017/02/22/516649344/whats-new-in-those-dhs-memos-on-immigration-enforcement [https://perma.cc/N6J3-SXEC]; Nick Miroff, *Trump Administration, Seeking to Speed Deportations, to Impose Quotas on Immigration Judges*, WASH. POST (Apr. 2, 2018), https://www.washingtonpost.com/world/national-security/trump-administration-seeking-to-speed-deportations-to-impose-quotas-on-immigration-judges/2018/04/02/a282d650-36bb-11e8-b57c-9445cc4dfa5e_story.html?utm_term=.d48bcae37128 [https://perma.cc/NW4U-KFE5] (describing how the immigration judge quota requirement may call into question the "integrity and impartiality" of immigration judges and will penalize immigration judges "who refer more than 15 percent of certain cases to higher courts").

22 This Note uses the immigration law definition of conviction. Under immigration law, convictions include dispositions such as suspended sentences, vacated convictions, and even dismissed charges, when the noncitizen has admitted relevant facts. *See* 8 U.S.C. § 1101(a)(48)(A) (2018); *infra* Section II.A.

23 *See generally* Domonoske, *supra* note 21 (describing how President Trump's January 2017 executive orders on immigration removed deportation priorities, putting up to 11 million people at risk of deportation). Particularly under the Trump administration in 2016–2018, noncitizens need accurate advice on the immigration consequences of criminal convictions, because the Trump administration has expanded its removal priorities to include anyone who has committed a chargeable offense, even when unresolved or uncharged. *See* Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

mit crimes than citizens,[24] they are more likely to be surprised by the harsh consequences of criminal proceedings when criminal defense attorneys do not advise their clients that a criminal conviction will impact their immigration status.[25] Moreover, competent legal advice during criminal proceedings is particularly significant because noncitizens are not provided representation during removal proceedings.[26] Lack of legal counsel during removal proceedings,[27] in conjunction with language barriers,[28] makes it less likely that noncitizens will contest removal orders, let alone receive relief from removal.[29]

The lack of comprehensive legal and explicit ethical requirements guiding criminal defense attorneys' representation of noncitizen clients is problematic not only for the impact it has on individual defend-

---

24 *See* Jason L. Riley, *The Mythical Connection Between Immigrants and Crime*, WALL ST. J. (July 14, 2015, 7:33 PM), https://www.wsj.com/articles/the-mythical-connection-between-immigrants-and-crime-1436916798 [https://perma.cc/MDX2-Y3YV].

25 *See* Yolanda Vazquez, *Advising Noncitizen Defendants on the Immigration Consequences of Criminal Convictions: The Ethical Answer for the Criminal Defense Lawyer, the Court, and the Sixth Amendment*, 20 BERKELEY LA RAZA L.J. 31, 32 (2010) ("Noncitizens across the country are being convicted in criminal courts without knowing the impact their criminal conviction will have on their immigration status, both in the present and in the future."); *see also, e.g.*, Lee v. United States, 137 S. Ct. 1958, 1962 (2017); Padilla v. Kentucky, 559 U.S. 356, 359 (2010) ("Padilla claims that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he 'did not have to worry about immigration status since he had been in the country so long.' Padilla relied on his counsel's erroneous advice when he pleaded guilty to the drug charges that made his deportation virtually mandatory." (citation omitted)); State v. Addaquay, 807 S.E.2d 413, 415 (Ga. 2017). Despite the typical nomenclature, "immigrants" is a legal term of art that refers specifically to lawful permanent residents. *See* 8 U.S.C. § 1101(a)(15). Nonimmigrants are aliens in the United States temporarily and for a specific purpose. *See id.* § 1101(a)(15)(A)–(V) (defining different types of nonimmigrants).

26 8 U.S.C. § 1229a(b)(4)(A); *see also* Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, a Case Study*, 78 FORDHAM L. REV. 541, 542 (2009) ("Over the last five years [as of 2008], over 800,000 immigrants faced the prospect of deportation without the assistance of counsel.").

27 *See* 8 U.S.C. § 1229a(b)(4)(A); *see also Details on Deportation Proceedings in Immigration Court*, TRAC IMMIGR., http://trac.syr.edu/phptools/immigration/nta [https://perma.cc/5UKL-WBPT] (finding that over 58% of individuals in removal proceedings as of September 2018 did not have counsel).

28 *See, e.g.*, Colleen Connolly, *Mayan Language Survives in Champaign, Poses Challenge in Immigration Court*, CHI. TRIBUNE (Nov. 25, 2017, 5:00 AM), http://www.chicagotribune.com/news/immigration/ct-met-immigrants-mayan-languages-20170926-story.html [https://perma.cc/3XUA-N4U3].

29 INGRID EAGLY & STEVEN SHAFER, ACCESS TO COUNSEL IN IMMIGRATION COURT 15–22 (Am. Immigration Council 2016), https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court [https://perma.cc/5SH9-HXJQ]. Contesting a removal order involves arguing that the underlying basis for removal (e.g., a criminal conviction) is procedurally or substantively invalid. *See id.* at 18. In contrast, seeking relief from removal involves arguing that, although the removal order may be procedurally and substantively valid, there exists *some other* reason why the individual should not be removed. *See id.*

ants like Padilla but also for the impact their deportation proceedings have on the country. Detention and removal are extraordinarily expensive.[30]

> In 2012, before President Trump's enhanced [deportation] efforts, nearly $18 billion was spent on immigration enforcement. What is astonishing is that the combined cost[] of the [Federal Bureau of Investigations], [Drug Enforcement Agency], Secret Service, U.S[.] Marshall Service, and [Bureau of Alcohol, Tobacco, Firearms, and Explosives] for the same year was $14.4 billion.[31]

The national cost of immigration enforcement can be reduced by providing noncitizens with effective defense counsel, thus reducing the number of noncitizens entering removal proceedings.[32] Even if requiring criminal defense attorneys to provide expanded legal advice increases the cost of representation, the cost should be minimal because the attorney will already be working on the case and, regardless, will likely cost less than removal proceedings.[33]

Clarifying and strengthening criminal defense attorneys' ethical obligations to noncitizen defendants will help individuals avoid removal proceedings because noncitizen defendants will have the information they need to make educated decisions in criminal court. In *Padilla v. Kentucky*,[34] the Supreme Court cabined the constitutional duties of criminal defense attorneys to a "duty to give correct advice" when "the deportation consequence is *truly clear*."[35] However, a stronger ethical requirement arguably arises out of the American Bar Association's ("ABA") Model Rules of Professional Conduct 1.1, 1.2,

---

30 Kari Hong, *The Ten Parts of "Illegal" in "Illegal Immigration" That I Do Not Understand*, 50 U.C. DAVIS L. REV. ONLINE 43, 43 (2017).

31 *Id.* at 51 (footnotes omitted).

32 *See, e.g.*, GENDER & JUSTICE COMM'N & MINORITY & JUSTICE COMM'N, WA. STATE SUPREME COURT, IMMIGRATION RESOURCE GUIDE FOR JUDGES, CHAPTER THREE: THE IMPLICATIONS OF *PADILLA V. KENTUCKY* AND *STATE V. SANDOVAL* 3-1, 3-6 (2013), https://www.courts.wa.gov/content/manuals/Immigration/chapter3.pdf [https://perma.cc/H327-VYJZ].

33 *Compare* Octavio Blanco, *How Much It Costs ICE to Deport an Undocumented Immigrant*, CNN MONEY (Apr. 13, 2017, 10:04 AM), https://money.cnn.com/2017/04/13/news/economy/deportation-costs-undocumented-immigrant/index.html [https://perma.cc/8WL8-4QJW] ("Each deportation conducted by ICE cost taxpayers an average of $10,854 in fiscal 2016[.]"), *with* Oliver Roeder, *Just Facts: A Different Kind of Defense Spending*, BRENNAN CTR. FOR JUST.: BLOG (July 25, 2014), https://www.brennancenter.org/blog/different-kind-defense-spending [https://perma.cc/3MW9-GPSA] (noting that in fiscal year 2012, states only spent $2.2 billion on indigent defense).

34 559 U.S. 356 (2010).

35 *Id.* at 369 (emphasis added).

1.3, and 1.4.[36] The ABA should draw on its Criminal Justice Standards for the Defense Function, as well as New York State's Revised Standards for Providing Mandated Representation, and add a comment to Model Rule of Professional Conduct 1.4.[37]

This Note first introduces the current constitutional requirements of criminal defense attorneys to noncitizen clients, the impact of criminal convictions on immigration status and proceedings, the right to adequate representation, and the primary ethical obligations that guide the practice of law.[38] This Note next argues that, although the Supreme Court in *Padilla* may have foreclosed a judicial avenue for increasing the legal obligations of criminal defense attorneys to noncitizen clients,[39] and although Congress is unlikely to legislatively increase these obligations,[40] criminal defense attorneys have an ethical obligation to advise their noncitizen clients of all immigration consequences of criminal proceedings. This Note proposes language for a comment to Rule 1.4 that would more explicitly encourage states to adopt heightened ethical obligations for all attorneys representing noncitizens.

I. *PADILLA V. KENTUCKY*: CRIMINAL DEFENSE ATTORNEY DUTIES TO NONCITIZEN CLIENTS

Noncitizens have a constitutional right to an attorney in criminal proceedings,[41] but criminal defense attorneys have limited constitutional obligations to their noncitizen clients, particularly considering the expansive collateral immigration consequences of conviction.[42]

---

36 *See* MODEL RULES OF PROF'L CONDUCT r. 1.1–1.4 (AM. BAR ASS'N 2016).

37 *See* CRIMINAL JUSTICE STANDARDS FOR THE DEF. FUNCTION §§ 4-1.1, 4-1.2, 4-1.3, 4-5.5 (AM. BAR ASS'N 2016); 2015 REVISED STANDARDS FOR PROVIDING MANDATED REPRESENTATION § I-7e (N.Y. STATE BAR ASS'N 2015).

38 *See infra* Parts I–IV.

39 *Id.* at 372. *But see infra* note 57.

40 *See* Lind, *supra* note 20.

41 *See* Strickland v. Washington, 466 U.S. 668, 685 (1984).

> That a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

Id.; *see* Gideon v. Wainwright, 372 U.S. 335 (1963); *cf. Padilla*, 559 U.S. at 389 (Scalia, J., dissenting) (discussing the Sixth Amendment right to counsel and the applicable duties of that counsel to a noncitizen defendant).

42 "Collateral consequences" refers to the negative effects of a criminal conviction beyond the direct, court-determined punishment. This Note focuses on collateral immigration conse-

Criminal convictions often have a "variety of [collateral] consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses."[43] These consequences apply regardless of immigration status.[44] Noncitizens, however, face additional collateral consequences because criminal convictions can impact their ability to remain in the United States and reenter in the future.[45] Other collateral immigration consequences include the inability to adjust status (i.e., become a lawful permanent resident),[46] the inability to naturalize (i.e., become a U.S. citizen)[47], and three-year, ten-year, or even permanent bars from the United States (i.e., orders stating that the noncitizen cannot reenter the United States for three years, for ten years, or permanently).[48]

In *Padilla*, the Supreme Court affirmatively declared that criminal defense attorneys must consider the deportation consequences of conviction.[49] Criminal defense attorneys have "the duty to give correct advice" where "the deportation consequence is truly clear."[50] Jose's attorney, for example, had a duty to know that pleading guilty to possession of more than 30 grams of marijuana is a removable offense because the statute explicitly covers the crime.[51] Where "the deportation consequences of a particular plea are unclear or uncertain," however, defense attorneys "need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immi-

---

quences, specifically the impact of a criminal conviction on a noncitizen's immigration status and ability to change or adjust that status. The Supreme Court decided *Padilla* amid a nationwide debate about whether the right to counsel extended to advice on collateral consequences. *See Padilla*, 559 U.S. at 364–65 ("We . . . have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*." (citation omitted)). The Court declined to decide the issue and instead decided the case by focusing on the severity of deportation as a penalty. *Padilla*, 559 U.S. 365–66; *see also* Hill v. Lockhart, 474 U.S. 52, 60 (1985) (declining to decide whether the Sixth Amendment applies to advice on parole eligibility under a plea bargain).

43 *Padilla*, 559 U.S. at 376 (Alito, J., concurring).

44 *See id.*; Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 705–06 (2002).

45 *See* 8 U.S.C. §§ 1182(a)(2), 1227(a)(2) (2012).

46 *See, e.g.*, *id.* § 1255 (requiring admissibility for lawful permanent residence); *id.* § 1182(a)(2)(A) (describing convictions and crimes that render noncitizens inadmissible).

47 Certain crimes, such as aggravated felonies, *see id.* § 1101(a)(43), act as permanent bars to the good moral character requirement to naturalize. *See* 8 C.F.R. § 316.10(b)(1)(ii).

48 *See* 8 U.S.C. § 1182(a)(9).

49 *See* Padilla v. Kentucky, 559 U.S. 356, 365–66 (2010).

50 *Id.* at 369.

51 *See* 8 U.S.C. § 1227(a)(2)(B)(i).

gration consequences."[52] The Court in *Padilla* did not discuss the scope of this duty.[53]

In a later decision, *Chaidez v. United States*,[54] the Court noted that *Padilla* did not require effective counsel on all collateral consequences but rather focused on deportation as "unique" in its severity and thus requiring particularized advice.[55] Although both *Padilla* and *Chaidez* left open the question whether other immigration consequences may create an affirmative criminal defense obligation, *Chaidez* indicates that further obligations will operate on a case-by-case basis, comparing *Padilla* to a single chink in the "previously chink-free wall between direct and collateral consequences."[56] Criminal defense attorneys thus have few constitutional obligations where noncitizen clients face collateral immigration consequences besides deportation.[57] Although criminal defense attorneys have limited constitutional obligations, these non-deportation consequences influence the choices a criminal defendant makes during prosecution. Lack of *explicit* legal obligations is thus problematic because criminal convictions can have serious and difficult-to-remedy consequences on immigration status.

II. Collateral Consequences: How and Why Criminal Convictions Lead to Removal Proceedings

Immigration law, although civil, continually intersects with criminal law and may distort typical criminal defense strategies as nonci-

52 *Padilla*, 559 U.S. at 369.

53 *See id.*

54 568 U.S. 342 (2013).

55 *Id.* at 352–53, 355 (quoting *Padilla*, 559 U.S. at 365–66).

56 *Chaidez*, 568 U.S. at 352–53; *see Padilla*, 559 U.S. at 365–69.

57 *See, e.g.*, Santiago v. Laclair, 588 F. App'x 1, 3–4 (2d Cir. 2014) (noting that Padilla is a "narrow holding, limited specifically to the unique penalty of deportation"); United States v. Reeves, 695 F.3d 637, 639–41 (7th Cir. 2012); State v. Addaquay, 807 S.E.2d 413, 417 (Ga. 2017). Criminal defense attorneys may have broader legal obligations than those explicitly imposed by *Padilla* because organizations, such as the Immigrant Defense Project and National Immigration Law Center, create and distribute resources that help attorneys easily determine the immigration consequences of criminal convictions. *See Padilla*, 559 U.S. at 369; Immigrant Def. Project, https://www.immigrantdefenseproject.org [https://perma.cc/GY9U-92TL]; Nat'l Immigr. L. Ctr., https://www.nilc.org [https://perma.cc/BHN7-DJT7]. These resources reduce the situations where "the deportation consequences of a particular plea are unclear or uncertain." *Padilla*, 559 U.S. at 369. The Supreme Court's expansion of the right to adequate counsel may also support a broader reading of *Padilla*. *See* Hill v. Lockhart, 474 U.S. 52, 57–58 (1985) (applying the two-part *Strickland* test to plea bargain negotiations); Missouri v. Frye, 566 U.S. 134, 138 (2012) (extending *Padilla* and constitutional right to counsel to the "negotiation and consideration of plea offers that lapse or are rejected").

tizens seek to avoid deportation *and* criminal penalties.[58] As the *Padilla* Court stated, "[i]mmigration law can be complex."[59] In the typical criminal case, criminal defense attorneys seek, aside from acquittal and dropped charges, the lowest sentence for their clients. A criminal defense attorney representing a noncitizen defendant such as Jose, however, should have another goal: avoiding adverse *immigration* consequences, such as deportation.[60] Criminal defense attorneys need to think about immigration-friendly outcomes, even if they seem imperfect from a *sentence length* or *conviction category* perspective, because convictions can result in a noncitizen's entry into removal proceedings and limit the available defenses and forms of relief.[61]

This Part discusses the unique definition of conviction under immigration law before explaining the process by which noncitizens enter removal proceedings, what happens during removal proceedings, and the impact of the broad definition of convictions under immigration law on the defenses and relief available to noncitizens in removal proceedings.

A. Convictions Under Immigration Law

To understand the impact of a conviction on immigration status, an attorney must first appreciate the particularized definition of conviction under the Immigration and Nationality Act ("INA"), which defines the metes and bounds of the immigration laws. Under the INA, the definition of conviction is broad and malleable.[62] In addition to a "formal judgment of guilt," "conviction" encompasses many of the settlement outcomes that criminal defense attorneys seek for their clients as outcomes preferred over trial.[63]

---

58 *Cf.* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) ("The order of deportation is not a punishment for crime.").

59 559 U.S. at 369 (2010).

60 *See* Vazquez, *supra* note 25, at 46–48.

61 *See generally id.* at 43–48 (discussing changes to immigration law that have increased the number of noncitizens in removal proceedings and limited available defenses and forms of relief).

62 *See, e.g.*, Garcia-Madruga, 24 I. & N. Dec. 436, 437 (BIA 2008).

63 8 U.S.C. § 1101(a)(48) (2012).

> (A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—
>
> > (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
> >
> > (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Under immigration law, convictions include withheld adjudications of guilt, including situations where (1) a noncitizen pleads nolo contendere[64] or admits enough facts that an immigration judge *could find* that the noncitizen committed the crime, *and* (2) the judge has ordered some "restraint on the [noncitizen's] liberty."[65] Almost anything can constitute a restraint on liberty, e.g., probation, supervised release, community service, house arrest, and drug testing.[66] Moreover, the length of a sentence is an important consideration in removal proceedings because immigration judges consider the punishment ordered by a court even if the sentence is later suspended "in whole or in part."[67] The broad statutory definition of conviction engulfs many criminal defense strategies routinely used to seek lower sentences. Unfortunately, attorneys who are unaware of the immigration consequences of conviction may encourage noncitizen clients to accept these plea agreements without realizing the agreement counts as a conviction for a removable offense.

B. How Noncitizens Enter Removal Proceedings

A noncitizen who has been convicted of a crime or who, like Jose, accepts a deal that constitutes a conviction under immigration law is removable and will likely enter removal proceedings.[68] Unless a noncitizen can prove she is not removable or is eligible for relief, she will be ordered removed, i.e., forced to leave the country, at the conclusion of removal proceedings.[69]

> (B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

Id.

64 A nolo contendere plea, also known as a no contest plea, is when a criminal defendant does not admit guilt but does not dispute the charge. *No Contest*, BLACK'S LAW DICTIONARY (10th ed. 2014).

65 8 U.S.C. § 1101(a)(48)(A).

66 "Traditionally, a restraint on liberty includes a condition imposed on the defendant that is 'not shared by the public generally.' This would include a sentence to incarceration, probation, a fine, community service, payment of fees and restitution, completion of required classes (e.g., anger management), or compliance with a no-contact order." DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIMES § 2:4 (2018) (quoting Jones v. Cunningham, 371 U.S. 236, 240 (1963)); *see also* Mendoza-Saenz v. Sessions, 861 F.3d 720, 723 (8th Cir. 2017); Mohamed, 27 I. & N. Dec. 92, 97 (BIA 2017).

67 8 U.S.C. § 1101(a)(48)(B).

68 *See* 8 U.S.C. §§ 1182, 1227.

69 In fiscal year 2017, immigration judges ordered 56.9% of noncitizens appearing before them deported. *ICE Targeting: Odds Noncitizens Ordered Deported by Immigration Judge Through June 2018*, TRAC IMMIGR., http://trac.syr.edu/phptools/immigration/court_backlog/app

Noncitizens convicted of crimes that render them inadmissible or deportable are at risk of removal by Immigration and Customs Enforcement ("ICE"), the immigration enforcement unit within the Department of Homeland Security.[70] ICE often learns about noncitizen criminal convictions through agreements with local law enforcement agencies, called 287(g) agreements.[71] As of August 2018, ICE has "agreements with 78 [local] law enforcement agencies in 20 states."[72] These agreements allow ICE to delegate immigration enforcement authority to local law enforcement agencies; the law enforcement agencies contact ICE when they have a noncitizen in custody and, after the noncitizen has served her sentence, continue to hold her in custody until ICE arrives.[73] Even in the 30 states with no 287(g) agreements, ICE may be physically present at local jails, individuals can report alleged foreign-born persons to ICE, and ICE can learn of charges against and convictions of noncitizens through Secure Communities, a program that automatically sends ICE the fingerprints of individuals taken into law enforcement custody.[74]

Once ICE learns of a conviction with potential immigration consequences, ICE initiates removal proceedings by filing a notice to appear on the noncitizen.[75] ICE has substantial discretion over removal

---

rep_outcome_leave.php [https://perma.cc/D2J4-S8Q6]. In fiscal year 2018, an estimated 67% of noncitizens in removal proceedings will be deported. *Id.*; *see also* Padilla v. Kentucky, 559 U.S. 356, 373–74 (2010) ("The severity of deportation—'the equivalent of banishment or exile'—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation." (quoting Delgadillo v. Carmichael, 332 U.S. 388, 390–91 (1947))); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) ("[D]eportation is a drastic measure . . . . It is the forfeiture for misconduct of a residence in this country.").

70 *See* U.S. Gov't Accountability Office, GAO-17-438, Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges 13 (2017) [hereinafter Immigration Courts]; *see generally* 8 U.S.C. §§ 1182, 1227.

71 *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. Immigr. & Customs Enforcement, https://www.ice.gov/287g [https://perma.cc/7NNT-NMTQ].

72 *Id.*

73 *See id.*; Richard Gonzales, *DHS Publishes List of Jurisdictions That Rejected Immigrant Detainer Requests*, NPR (Mar. 20, 2017, 5:01 PM), https://www.npr.org/sections/thetwo-way/2017/03/20/520851267/dhs-publishes-list-of-jurisdictions-that-rejected-immigrant-detainer-requests [https://perma.cc/LX2Q-SCHY].

74 *See Immigration Detainers: An Overview*, Am. Immigr. Council (Mar. 21, 2017), https://www.americanimmigrationcouncil.org/research/immigration-detainers-overview [https://perma.cc/RV34-2L5H]; *Secure Communities*, U.S. Immigr. & Customs Enforcement, https://www.ice.gov/secure-communities [https://perma.cc/F6XD-23JD].

75 *See* 8 U.S.C. § 1229(a)(1).

proceedings, including whether to issue or cancel detainers,[76] whom to arrest or detain, and whether to issue a notice to appear.[77]

Executive Branch guidance, however, can limit ICE's discretion in initiating removal proceedings. From 2015 through 2017, the Obama administration's removal priorities curbed ICE's discretion.[78] Removal priorities instruct ICE on the categories of noncitizens they should prioritize for removal when resource constraints prevent ICE from entering every legally removable noncitizen into removal proceedings.[79] In January 2017, the Trump administration issued an executive order, *Enhancing Public Safety in the Interior of the United States*, which greatly expands removal priorities beyond the "members of gangs; those convicted of felonies or aggravated felonies; and those suspected of or engaged in terrorist or espionage activity" prioritized by the Obama administration.[80] The Trump administration's removal priorities include, among others, noncitizens who have committed crimes, been charged with a crime, "committed acts that constitute a chargeable criminal offense," or "abused any program related to receipt of public benefits."[81] In contrast with the Obama administration, which prioritized noncitizens convicted of serious offenses, the current removal priorities are much broader and encompass anyone who has taken actions that *could possibly* constitute a crime.[82] ICE thus appre-

---

76 A detainer is what ICE issues to a local or state law enforcement agency so that the noncitizen will be held until ICE can pick her up. *See Immigration Detainers: An Overview*, *supra* note 74.

77 *See* Memorandum from John Morton, Dir., U.S. Immigration & Customs Enf't, on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf [https://perma.cc/8HD8-7PBT].

78 *See Priority Enforcement Program*, IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/pep [https://perma.cc/2KQR-Y75V].

79 *See id.*

80 Anna O. Law, *This Is How Trump's Deportations Differ from Obama's*, WASH. POST (May 3, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/05/03/this-is-how-trumps-deportations-differ-from-obamas/?utm_term=.ca864821f6b8 [https://perma.cc/6STU-5ZXA] (citing Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., on Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [https://perma.cc/627G-ZA5Z]); *see* Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

81 Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

82 *See Fiscal Year 2017 ICE Enforcement and Removal Operations Report*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/removal-statistics/2017 [https://perma.cc/WK2M-EFSD]. *Compare Priority Enforcement Program*, *supra* note 78 (describing the Obama administration's priorities for removal), *with* Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (significantly expanding removal priorities under the Trump administration).

hends more noncitizens under the current Trump administration, which will likely increase the number of people in removal proceedings.[83]

C. An Overview of Removal Proceedings

Once a noncitizen enters removal proceedings, she will be deported unless she can disprove the alleged basis for removal or prove that she is eligible for, and warrants, relief from removal.[84]

The Executive Office of Immigration Review, a Department of Justice agency, oversees removal proceedings that are headed by immigration judges.[85] Removal proceedings begin with a master calendar hearing in which immigration judges "ensure the respondent understands the immigration court proceedings and provide the respondent with an opportunity to admit or deny the charge(s) brought against them."[86] Next, unless the charges are resolved during a master calendar hearing, the noncitizen will have the opportunity to testify and present evidence to rebut the charges of removability and support a claim for relief from removal.[87] Throughout the proceedings, the noncitizen may be held in an ICE detention center if she is ineligible for bond or parole.[88]

A noncitizen can appeal an immigration judge's decision to the Board of Immigration Appeals ("BIA").[89] The BIA reviews questions of fact for clear error and questions of law de novo.[90] After the BIA,

---

83 *See* RANDY CAPPS ET AL., MIGRATION POLICY INST., REVVING UP THE DEPORTATION MACHINERY 1–2 (2018), https://www.migrationpolicy.org/sites/default/files/publications/ImmigrationEnforcement-FullReport_FINALWEB.pdf [https://perma.cc/PWK2-MKL2] (finding that ICE arrests from January 2017, to September 30, 2017, increased by 42% compared to the same period in fiscal year 2016; the number of removals increased by 37% during this same period); *cf. Immigration Court Filings Take Nosedive, While Court Backlog Increases*, TRAC IMMIGR. (Oct. 30, 2017), http://trac.syr.edu/immigration/reports/487 [https://perma.cc/ZEE3-ZPJT] (noting that although ICE apprehensions at the end of September 2017 had increased, the pace of notices to appear issued by the Department of Homeland Security was down).

84 *See* 8 U.S.C. § 1229a(c)(4)(A) (2012); IMMIGRATION COURTS, *supra* note 70, at 15.

85 Exec. Office for Immigration Review, *About the Office*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/eoir/about-office [https://perma.cc/P9QJ-M6WX].

86 IMMIGRATION COURTS, *supra* note 70, at 13. In immigration court, respondents are the noncitizens facing removal.

87 *See id.* at 13–15.

88 *See id.* Moreover, detained noncitizens are ineligible for periodic bond or parole hearings. *See* Jennings v. Rodriguez, 138 S. Ct. 830, 836, 851 (2018) (holding that 8 U.S.C. §§ 1225(b), 1226(a), 1226(c)—provisions of immigration law that govern detention of noncitizens—do not give them the right to periodic bond hearings to reevaluate whether detention is proper).

89 *See* IMMIGRATION COURTS, *supra* note 70, at 18.

90 BD. OF IMMIGRATION APPEALS, U.S. DEP'T OF JUSTICE, PRACTICE MANUAL 7, § 1.4(c) (2017), https://www.justice.gov/sites/default/files/pages/attachments/2017/02/03/biapracticemanu

appeals first go to the circuit court where the immigration court is located and then to the U.S. Supreme Court.[91]

Noncitizens in removal proceedings are entitled to due process regardless of their immigration status and whether they entered the country with documents or without inspection.[92] Because removal is a civil proceeding, however, constitutional protections for criminal proceedings, such as jury trials and appointed counsel, are not available.[93] Noncitizens "have the *privilege* of being represented, *at no expense to the Government*, by counsel of the alien's choosing who is authorized to practice in such proceedings," i.e., noncitizens only have the right to provide their own representation in removal proceedings.[94] Few noncitizens can procure attorneys due to the difficulty of finding representation while in an isolated detention center, and, even if not detained, noncitizens have difficulty affording an attorney given the lack of work authorization and bars against using legal services corporation funding to represent undocumented immigrants.[95] According to an American Immigration Council study of deportation cases between 2007 and 2012, only 37% of *all* noncitizens in removal proceedings had representation and, out of all detained noncitizens, only 14% had attorney representation.[96]

---

alfy2017.pdf [https://perma.cc/9XND-KMEP]. The BIA is an administrative appeals board in the Executive Office for Immigration Review within the Department of Justice. *See Board of Immigration Appeals*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/eoir/board-of-immigration-appeals [https://perma.cc/RQB7-TLGQ].

91 AM. IMMIGRATION COUNCIL, PRACTICE ADVISORY: HOW TO FILE A PETITION FOR REVIEW (2015), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/how_to_file_a_petition_for_review_2015_update.pdf [https://perma.cc/K5GL-VCP2].

92 Reno v. Flores, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles [noncitizens] to due process of law in deportation proceedings.").

93 *See, e.g.*, Immigration & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1038–39 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry, though entering or remaining unlawfully in this country is itself a crime."); Markowitz, *supra* note 26, at 546–47.

94 8 U.S.C. § 1229a(b)(4)(A) (2018) (emphasis added); *see* Markowitz, *supra* note 26, at 546–47.

95 Erin B. Corcoran, *Bypassing Civil* Gideon*: A Legislative Proposal to Address the Rising Costs and Unmet Legal Needs of Unrepresented Immigrants*, 115 W. VA. L. REV. 643, 649, 649 n.34 (2012). Many federally funded legal services organizations are limited to representing certain categories of undocumented immigrants, such as those who have been victims of specific crimes, such as mental or physical abuse. *See About Statutory Restrictions on LSC-Funded Programs*, LEGAL SERVS. CORP., https://www.lsc.gov/about-statutory-restrictions-lsc-funded-programs [https://perma.cc/7DBG-VCGW].

96 EAGLY & SHAFER, *supra* note 29, at 1–2. The Transactional Records Access Clearinghouse ("TRAC") at Syracuse University, a major immigration research center, has found similar statistics: 17% of *detained* noncitizens have representation in removal proceedings. *Details on Deportation Proceedings in Immigration Court*, *supra* note 27.

Attorney representation makes noncitizens "four times more likely to be released from detention" and more likely to apply for and obtain relief from removal than their unrepresented counterparts.[97] But because noncitizens appearing in immigration court frequently lack attorney representation, the presiding immigration judge may need to play the unique role of adjudicator-advisor—while she decides whether to remove the noncitizen, she also may be the only person who can advise the noncitizen of the removal procedures and potential avenues of relief.[98] A noncitizen's criminal record, however, will likely limit the available relief to removal and also influence an immigration judge's use of discretion.

In sum, although attorney representation has a huge impact on whether a noncitizen will be ordered removed, the majority of noncitizens in immigration court do not have an attorney to guide them through the complicated processes.[99]

D. The Impact of Criminal Convictions on Immigration Relief

Regardless of the basis for removal, convictions significantly limit the available defenses to removal and may deter an immigration judge or ICE trial attorney's favorable use of discretion.

Many noncitizens in removal proceedings admit that they have committed a removable offense and instead argue that they should not be deported because they are eligible for relief from deportation.[100] Unfortunately, noncitizens with certain criminal convictions are statutorily barred from pursuing many avenues of relief. For example, noncitizens who have been convicted of a "particularly serious crime" and are deemed to be "a danger to the community of the United States" are held ineligible for asylum even if they meet all

---

97 EAGLY & SHAFER, *supra* note 29, at 2. Thirty-two percent of detained noncitizens with counsel applied for relief from deportation, as compared to three percent of detained noncitizens without counsel. *Id.* Represented noncitizens who were detained were also more than twice as likely to obtain the applied-for immigration relief. *Id.* at 3.

98 *See* Kate Aschenbrenner, *Ripples Against the Other Shore: The Impact of Trauma Exposure on the Immigration Process Through Adjudicators*, 19 MICH. J. RACE & L. 53, 83 (2013) ("In fact, because there is no right to representation at government expense for noncitizens in the immigration process, the adjudicator may be the only helping professional that the noncitizen encounters." (footnote omitted)).

99 *See id.*

100 *See, e.g.*, Immigration & Naturalization Serv. v. Elias-Zacarias, 502 U.S. 478, 479 (1992). Noncitizens may avoid deportation if they qualify for, among others, asylum, cancellation of removal, adjustment of status, or naturalization. *See, e.g.*, 8 U.S.C. §§ 1158(a)(1), 1229b(b)(1), 1255, 1427 (2012).

other statutory requirements.[101] Although this may appear to be a narrow exception, serious crimes under the INA include "aggravated felonies," broadly defined to encompass over twenty categories, including "an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000."[102] Low-level state offenses, such as mail fraud, can be aggravated felonies under immigration law.[103] Similarly, many "crimes involving moral turpitude" ("CIMT") such as reckless driving while evading the police and trafficking in counterfeit goods or services, are removable offenses.[104]

Noncitizens whose convictions are aggravated felonies under the INA are also ineligible for cancellation of removal[105] and voluntary departure,[106] are subject to mandatory detention,[107] and may be subject to expedited deportation proceedings.[108] Similarly, a conviction for violating "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable."[109] Moreover, even if a criminal conviction does not lead directly to removal proceedings, the noncitizen may have difficulty adjusting to lawful permanent residence or naturalizing.[110]

---

101 *Id.* § 1158(b)(2)(A)(ii).

102 *Id.* § 1101(a)(43)(M).

103 *See* Chaidez v. United States, 568 U.S. 342, 345 (2013) (mail fraud); Ponce de Leon, 21 I. & N. Dec. 154 (BIA 1996) (sale of marijuana).

104 *See* Ruiz-Lopez, 25 I. & N. Dec. 551, 556 (BIA 2011) (finding reckless endangerment of others in the course of a police stop that violated Washington state law a CIMT); Kochlani, 24 I. & N. Dec. 128, 132 (BIA 2007) (considering 18 U.S.C. § 2320 (2000)). CIMT is a broad and malleable category primarily defined through common law. The category encompasses "[c]onduct that is contrary to justice, honesty, or morality; esp[ecially], an act that demonstrates depravity." *Moral Turpitude*, BLACK'S LAW DICTIONARY (10th ed. 2014).

105 8 U.S.C. § 1229b(a)–(b) (2018). Cancellation of removal is a form of relief available to noncitizens who, generally speaking, have been in the United States for a set number of years, have not committed certain crimes of inadmissibility or deportability, and, for undocumented immigrants, can prove "good moral character" and that "removal would result in *exceptional and extremely unusual hardship*" for U.S.-citizen parents, children, or spouse. *Id.* § 1229b(1) (emphasis added).

106 *Id.* § 1229c(a)(1). Voluntary departure is a form of relief that allows a person to avoid a mandatory 10-year bar to admission by departing the country without going through a removal hearing. *Id.*; *see id.* § 1182(a)(9)(A)(ii) (describing 10-year bar applicable to any noncitizen who was ordered removed under 8 U.S.C. § 1229a or who "departed the United States while an order of removal was outstanding").

107 *Id.* § 1226(c)(1)(B).

108 *Id.* § 1228.

109 *Id.* § 1227(a)(2)(B)(i). It is also notable that "[a]ny alien who is, or at any time after admission has been, a drug abuser or addict is deportable." *Id.* § 1227(a)(2)(B)(ii).

110 *See id.* §§ 1182(a), 1429. Generally speaking, an inadmissible noncitizen will not be ad-

In addition to the broad categories of crimes and convictions that may constitute a removable offense under immigration law, Congress significantly restricted the forms of relief available to noncitizens with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA")[111] and the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[112] IIRIRA replaced suspension of deportation—which allowed the Attorney General to suspend deportation when deportation would result in *extreme hardship* to the petitioner or U.S.-citizen parents, children, or spouse—with cancellation of removal, which raised the standard to *exceptional and extremely unusual hardship* for U.S.-citizen parents, children, or spouse.[113] Likewise, AEDPA requires detention of noncitizens convicted of a wide range of crimes, such as any aggravated felony, which includes some criminal law misdemeanors, making it significantly more difficult for noncitizens to obtain counsel in removal proceedings.[114]

Even when noncitizens are not statutorily barred from seeking relief under one of the INA's exceptions, criminal convictions may prevent an immigration judge from favorably using his discretion.[115] Immigration judges have several occasions to exercise their discretion during a removal proceeding: granting the removal order, granting voluntary departure, granting a continuance, terminating the hearing on a finding of no grounds for removal, granting relief (e.g., asylum, cancellation of removal, adjustment of status, or naturalization), and closing the case on an administrative matter.[116] Immigration judges

---

mitted as a lawful permanent resident. *Id.* § 1182(a) ("Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States."). "Adjustment of status" is the legal term for the process of becoming a lawful permanent resident. *Id.* § 1255.

111 Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 U.S.C.).

112 Pub. L. No. 104-132, § 107(a), 110 Stat. 1214, 1221 (1996) (codified at 28 U.S.C. §§ 2261–2266).

113 *Compare* 8 U.S.C. § 1254, *repealed by* IIRIRA, Pub. L. No. 104-208, 110 Stat. at 3009-615 (suspension of deportation), *with* 8 U.S.C. § 1229b(b)(1)(D) (2012) (cancellation of removal).

114 Pub. L. No. 104-132, § 506, 110 Stat. 1214, 1265 (codified at 8 U.S.C. § 1536) (1996); *see supra* Section II.C.

115 *See* Office of Immigration Litig., U.S. Dep't of Justice, Immigration Consequences of Criminal Convictions 3-4 (2010), https://www.justice.gov/sites/default/files/civil/legacy/2011/05/03/REVISED%20Padilla%20v.%20Kentucky%20Reference%20Guide_11-8-10.pdf [https://perma.cc/KV72-KCR5]; *supra* Section II.B.

116 *See* Immigration Courts, *supra* note 70, at 15, 27 n.53. *But see* S-O-G- & F-D-B-, 27 I. & N. Dec. 462, 468 (A.G. 2018) (limiting immigration judges' ability to grant continuances).

also have immense discretion to influence removal proceedings and, with that discretion, can deny relief even if a noncitizen satisfies all statutory requirements.[117] Discretionary considerations include, among others, previous criminal convictions, existence of U.S. citizen family members, or any hardship the respondent or her family may face as a result of removal to her country of origin.[118]

The expansive definition of conviction under the INA has significant detrimental effects on removal proceedings, the viability of relief, and an immigration judge's willingness to exercise discretion in favor of the noncitizen.

III. The Right to Adequate Representation

Given the significant detrimental effects that the broad definition of conviction has on removal proceedings, noncitizens need accurate and comprehensive legal advice to avoid convictions of removable offenses.

Under the Sixth Amendment, all criminal defendants, including noncitizens, have a right to counsel.[119] That right, however, extends beyond the right to appointment of an attorney and encompasses a right to "effective assistance of counsel."[120] Counsel is ineffective where an attorney's "conduct so undermine[s] the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[121] The right to effective counsel applies during the pretrial plea negotiation and advice process, during the trial itself, and when the defendant enters a plea.[122] The right to effective counsel also applies when a client relied on her attorney's incorrect advice in

117 *See, e.g.*, Murillo-Gandara, File A028 728 288, 2018 WL 3007186, at *2 (BIA Apr. 16, 2018) (affirming immigration judge's discretionary decision to deny a grant of voluntary departure). "An immigration judge, like other judicial officers, possesses broad (though not uncabined) discretion over the conduct of trial proceedings." Toribio-Chavez v. Holder, 611 F.3d 57, 67 (1st Cir. 2010) (quoting Sharari v. Gonzales, 407 F.3d 467, 476 (1st Cir. 2005)).

118 *See* C-V-T-, 22 I. & N. Dec. 7, 11 (BIA 1998) (citing Marin, 16 I. & N. Dec. 581, 584–85 (BIA 1978)).

119 U.S. Const. amend. VI; *see* Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963).

120 Strickland v. Washington, 466 U.S. 668, 686 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)).

121 *Id.*

122 *See* Lafler v. Cooper, 566 U.S. 156, 168 (2012) (when defendant enters plea); Missouri v. Frye, 566 U.S. 134, 144 (2012) (pretrial negotiation and advice); *Strickland*, 466 U.S. at 685–86 (during trial).

deciding whether to go to trial, *even if* the correct advice had only a small probability of altering the client's conviction.[123]

Claims regarding the adequacy of representation and the unexpected immigration consequences of criminal convictions reach the courts through ineffective assistance of counsel ("IAC") claims. Through these IAC claims, noncitizens can challenge their convictions in a habeas proceeding before a state or federal court if the claim is filed within one year of the date of conviction.[124] When pursuing an IAC claim, noncitizens do not argue innocence but rather argue that the underlying conviction, the basis of the removal proceeding, is improper because their criminal defense attorney's conduct fell below the reasonable standard mandated by the Sixth Amendment.[125]

Under the test set in *Strickland v. Washington*,[126] the paradigmatic decision establishing a constitutional right to adequate counsel, a defendant proves IAC by showing that representation (1) fell below an objectively reasonable standard and (2) prejudiced her case.[127]

The objectively reasonable standard looks to "prevailing professional norms" and "consider[s] all the circumstances."[128] Counsel owes its client basic duties, such as "a duty of loyalty [and] a duty to avoid conflicts of interest"; "[p]revailing norms of practice as reflected in [ABA] standards and the like, *e.g.*, ABA Standards for Criminal Justice . . . , are guides to determining what is reasonable, but they are only guides."[129] Defendants bear a high burden to prevail on an IAC claim because "[j]udicial scrutiny of counsel's performance must be highly deferential" and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[130]

On the other hand, to prove prejudice, a "defendant must show that [the ineffective assistance] actually had an adverse effect on the defense."[131] For this prong of the test, "[t]he defendant must show . . .

---

123 *See* Lee v. United States, 137 S. Ct. 1958, 1968–69 (2017) (holding that the difference between "certain[]" deportation and "almost certain[]" deportation was significant).

124 28 U.S.C. §§ 2254(a), 2255(a), 2255(f) (2012); *see, e.g.*, *Lee*, 137 S. Ct. at 1963; Padilla v. Kentucky, 559 U.S. 356, 359 (2010).

125 *See, e.g.*, *Lee*, 137 S. Ct. at 1963.

126 466 U.S. at 686.

127 *See id.* at 687.

128 *Id.* at 688.

129 *Id.*

130 *Id.* at 689.

131 *Id.* at 693.

a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[132]

When noncitizens successfully argue IAC claims, their criminal convictions are vacated, and the corresponding removal proceeding must be dismissed.[133] However, even if they have a valid claim, most noncitizens do not raise IAC claims because either they lack the resources to assert a habeas petition, or they cannot navigate the respective procedural obstacles.[134] The noncitizens in these cases are left with the collateral consequences of their convictions, likely deportation. The difficulty of winning an IAC claim after receiving ineffective assistance of counsel highlights the importance of holding criminal defense attorneys to high standards of practice through ABA and state-specific rules of professional conduct while they counsel their noncitizen clients.

IV. Ethical Requirements of Attorneys

Organizations such as the ABA and state bar associations promulgate ethical rules to standardize attorney behavior and define an attorney's duties to her clients.[135] Violations of these ethical rules, particularly the binding state rules, may result in discipline (e.g., sanctions or license suspension), disbarment, or a legal malpractice suit.[136] Other rules act as standards of practice and set forth guidelines that attorneys should aspire to incorporate into their practice.[137] In considering the ethical obligations, this Section first examines the ABA's Model Rules of Professional Conduct ("Model Rules") and Criminal Justice Standards for the Defense Function, focusing on those rules applicable to criminal defense attorneys representing noncitizen clients. The Section next surveys state ethical rules and focuses on New

---

132 *Id.* at 694; *accord* Lafler v. Cooper, 566 U.S. 156, 163 (2012); Missouri v. Frye, 566 U.S. 134, 147 (2012); Hill v. Lockhart, 474 U.S. 52, 57 (1985).

133 *See, e.g.*, Adamiak, 23 I. & N. Dec. 878, 880–81 (BIA 2006).

134 *See* Primus, *supra* note 15.

135 *See, e.g.*, Model Rules of Prof'l Conduct (Am. Bar Ass'n 2016); N.Y. Rules of Prof'l Conduct (N.Y. State Bar Ass'n 2017).

136 *See, e.g.*, *In re* Shapiro, 55 A.D.3d 291, 292–96 (N.Y. App. Div. 2008) (finding filing of documents not bearing attorney's true signature to the court violated rules of professional responsibility warranting six-month suspension from practice of law); *see also* Annotated Model Rules of Prof'l Conduct 5 (Ellen J. Bennett et al. eds., 8th ed. 2015) (quoting Lawrence K. Hellman, *When "Ethics Rules" Don't Mean What They Say: The Implications of Strained ABA Ethics Opinions*, 10 Geo. J. Legal Ethics 317, 323–24 (1997)).

137 *See, e.g.*, Criminal Justice Standards for the Def. Function § 4-1.1(b) (Am. Bar Ass'n 2015).

York and California, two states that impose strong ethical—and legal—obligations on criminal defense attorneys.

A. ABA Model Rules of Professional Conduct

National ethical rules developed by the ABA set forth the standards of practice that 49 state bar associations have adopted as their binding ethical rules.[138] Although the Model Rules are nonbinding and the preamble to the Rules states that "[v]iolation of a Rule should not itself give rise to a *cause of action* against a lawyer,"[139] violation of the rules may result in discipline, disbarment, or a lawsuit relating to legal malpractice or breach of fiduciary duties.[140] Moreover, the *state* ethical rules based on the Model Rules are binding, and "the enforcement of the provisions of lawyer codes in disciplinary and other proceedings demonstrates clearly that the codes are legal prescriptions in every conventional sense."[141]

As the preamble to the Model Rules explains, lawyers have both a duty to "further the public's understanding of and confidence in the rule of law and the justice system" and a duty to use professional time and resources to lessen economic and social barriers to representation.[142]

---

138 *See Alphabetical List of Jurisdictions Adopting Model Rules*, A.B.A., https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html [https://perma.cc/HRB9-ZCDB] [hereinafter *State Adoption*]. Only California has not adopted the Model Rules of Professional Conduct. *See id.*

139 MODEL RULES OF PROF'L CONDUCT pmbl. para. 20 (AM. BAR ASS'N 2016) (emphasis added).

140 *See* ANNOTATED MODEL RULES OF PROF'L CONDUCT, *supra* note 136, at 5 (quoting Hellman, *supra* note 136, at 323–24).

141 *See* Hellman, *supra* note 136, at 321 (quoting CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 22–24 (1986)).

142 MODEL RULES OF PROF'L CONDUCT pmbl. para. 6 (AM. BAR ASS'N 2016).

> As a member of a learned profession, a lawyer . . . should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Id.

Of potential relevance to noncitizen defendants, Rule 1 of the Model Rules could be interpreted to contain various obligations to defendants. First, Rule 1.1, "Competence," requires an attorney to have the necessary knowledge of a field of law to represent a client and, if she does not have the necessary knowledge, to study the field until she can competently represent a client.[143] Competent representation requires an attorney to have the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[144] Competent representation does not, however, require an attorney to have "special training or prior experience to handle [unfamiliar] legal problems," but rather the ability to *recognize* when a legal problem requires "specialized knowledge."[145] A lawyer can provide competent representation in an unfamiliar legal area "through necessary study" or consultations with an attorney who already has the specialized knowledge.[146] The present-day competence requirement drew from a rule against failing to act competently in the 1969 Model Code of Professional Responsibility.[147] Although competence was undefined in 1969, the rule now requires knowledge, skill, thoroughness, and preparation.[148] Encompassed within knowledge is the requirement that a lawyer possess basic research skills and the ability to learn about unfamiliar areas of the law.[149]

As relating to the criminal defense of noncitizens, Rule 1.1 indicates that an attorney cannot claim ignorance about the immigration consequences of conviction by claiming to not understand immigration law.[150] To the contrary, an attorney has an obligation to recognize when legal analysis requires "specialized knowledge," such as when a defendant is a noncitizen, and obtain that knowledge through either research and study or consultation with an immigration attorney.[151]

Next, Rule 1.2, "Scope of Representation and Allocation Between Client and Lawyer," requires an attorney to consult with her client and devise a strategy based on the client's objectives.[152] In particular, a criminal defense attorney must "abide by the client's deci-

143 *Id.* r. 1.1.

144 *Id.*

145 *Id.* r. 1.1 cmt. 2.

146 *Id.*

147 *See* ANNOTATED MODEL RULES OF PROF'L CONDUCT, *supra* note 136, at 21.

148 MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2016).

149 ANNOTATED MODEL RULES OF PROF'L CONDUCT, *supra* note 136, at 22.

150 *See id.* at 27–28.

151 *See id.*

152 MODEL RULES OF PROF'L CONDUCT r. 1.2 (AM. BAR ASS'N 2016) (referencing Rule 1.4, which describes requirements regarding attorney-client communications).

sion . . . as to a plea to be entered, whether to waive jury trial and whether the client will testify."[153] Rule 1.2 breaks client representation into objectives and means.[154] While an attorney must *abide* by her client's objectives for representation, she need only *consult* with her client on how to achieve those objectives.[155] Moreover, a criminal defense attorney has a duty to litigate per the defendant's preferences because the client also has a constitutional right to present her own defense.[156]

Rule 1.2 also applies to the representation of noncitizen defendants, because an attorney cannot appropriately decide the means of representation without learning the client's specific objectives.[157] A criminal defense attorney cannot assume that proof of innocence or short sentence length is always a client's objective in criminal proceedings; rather, an attorney must learn a client's primary concerns, such as safeguarding her ability to stay in the United States.[158]

Third, Rule 1.3, "Diligence," requires that an attorney diligently advocate for her client's interests despite opposition or inconvenience.[159] While an attorney has "authority to exercise professional discretion in determining the *means* by which a matter should be pursued," she should advocate for a client's interests "despite opposition, obstruction or personal inconvenience."[160] This diligence requirement operates alongside the Rule 1.1 competence requirement; Rule 1.3 recognizes that an attorney's commitment to his client's interests affects both the client's legal rights and the attorney's integrity.[161] Rule 1.3 obligates a criminal defense attorney to advocate for a client's interests regardless of inconvenience, which further indicates that lack of knowledge or disagreement with the client's stated interests are un-

153 *Id.*

154 ANNOTATED MODEL RULES OF PROF'L CONDUCT, *supra* note 136, at 34.

155 *Id.* Essentially, attorneys must seek their client's end goals but, at least per the model rules, can decide on the method of representation as long as they consult with their clients. *See id.*

156 *Id.*; *see, e.g.*, Jones v. Barnes, 463 U.S. 745, 751 (1983) ("[W]ith some limitations, a defendant may elect to act as his or her own advocate."); United States v. Teague, 953 F.2d 1525, 1533 (11th Cir. 1992) ("[W]hile defense counsel serves as an advocate for the client, it is the client who is the master of his or her own defense.").

157 *See* MODEL RULES OF PROF'L CONDUCT r. 1.2 (AM. BAR ASS'N 2016).

158 *See id.*

159 *Id.* r. 1.3 cmt. 1.

160 *Id.* (emphasis added) (referencing Rule 1.2).

161 ANNOTATED MODEL RULES OF PROF'L CONDUCT, *supra* note 136, at 50.

acceptable reasons for not exploring possible immigration consequences of conviction.[162]

Finally, Rule 1.4, "Communication," in relevant portion, requires an attorney to communicate with her client to understand the client's interests, jointly decide how to achieve those interests, and explain legal considerations so that the client can make informed decisions about legal representation and strategy.[163] A lawyer must consider the "importance of the action under consideration and the feasibility of consulting with the client" in deciding whether she must discuss a matter with her client before acting.[164] Moreover, the attorney must provide the client with "sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued."[165] In deciding when and what to communicate to a client, a lawyer's "guiding principle" is "fulfill[ment] [of] reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation."[166]

Rule 1.4 originally required an attorney simply to "keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."[167] The rule *now* requires an attorney to remain in continual communication with her client regarding means of achieving the client's objectives and to both understand her client's interests and help her client make informed decisions.[168]

As applied to noncitizen defendants, Rule 1.4 clarifies the importance of clear communication to noncitizen defendants about the possible immigration consequences of conviction.[169] A noncitizen defendant cannot make an educated decision on how to plead or whether to go to trial without clear and accurate information on immigration consequences.[170]

Forty-nine states, as well as the Virgin Islands, Guam, Northern Mariana Islands, and the District of Columbia, have ethical rules

---

162 *See* MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2016).

163 *See id.* r. 1.4.

164 *Id.* r. 1.4 cmt. 3.

165 *Id.* r. 1.4 cmt. 5.

166 *Id.*

167 ANNOTATED MODEL RULES OF PROF'L CONDUCT, *supra* note 136, at 59 (quoting MODEL RULES OF PROF'L CONDUCT r. 1.4(a) (AM. BAR ASS'N 1983)).

168 *See* MODEL RULES OF PROF'L CONDUCT r. 1.4 cmts. 3, 5 (AM. BAR ASS'N 2016).

169 *See id.* r. 1.4.

170 *See supra* Parts I, II.

modeled on the ABA's Model Rules.[171] The Model Rules thus significantly influence the quality of representation that states expect from attorneys and set a national standard for ethical obligations.[172] An additional comment to the Model Rules clarifying the obligations of criminal defense attorneys to their noncitizen clients will, at minimum, encourage states to adopt similar, binding obligations.

B. ABA Criminal Justice Standards for the Defense Function

The ABA also promulgates standards specifically for criminal defense attorneys: the Criminal Justice Standards for the Defense Function ("Standards").[173] These Standards "describe 'best practices,' and are not intended to serve as the basis for the imposition of professional discipline, to create substantive or procedural rights for clients, or to create a standard of care for civil liability."[174] Regardless, the ABA promulgates these Standards as ones that all criminal defense attorneys should aspire to achieve.[175] Of relevance to representing noncitizen defendants, the Standards encourage defense counsel to "seek out supervisory advice," i.e., advice from well-informed supervisors or immigration attorneys, and "consider the collateral consequences of decisions and actions, including but not limited to the collateral consequences of conviction," at all stages of representation.[176] This means that criminal defense attorneys should aspire to consider and seek supervisory guidance about the collateral immigration consequences that convictions have on their noncitizen clients.

The ABA recommends, as best practices, that defense counsel "determine a client's citizenship and immigration status, assuring the client that such information is important for effective legal representation" and "should be protected by the attorney-client privilege."[177] The Standards further state that if an attorney determines that a client is a noncitizen she should research the possible immigration consequences of conviction, consulting "with an immigration law expert or

171 *See State Adoption*, *supra* note 138.

172 *See* MODEL RULES OF PROF'L CONDUCT pmbl. para. 20 (AM. BAR ASS'N 2016) ("Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. . . . The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies."); Hellman, *supra* note 136.

173 *See* CRIMINAL JUSTICE STANDARDS FOR THE DEF. FUNCTION (AM. BAR ASS'N 2015).

174 *Id.* § 4-1.1(b).

175 *See id.*

176 *Id.* §§ 4-1.2(c), 4-1.3(h).

177 *Id.* § 4-5.5(a).

knowledgeable advocate" if necessary.[178] "[C]ounsel should [also] advise the client of all such potential consequences and determine with the client the best course of action for the client's interests and how to pursue it."[179] Finally, if the noncitizen client is convicted of an offense bearing immigration consequences, the attorney should advise on consequences for returning to the United States after removal.[180]

Although the Standards are nonbinding, they indicate the ABA's interest in promoting the full representation of noncitizen defendants, to include consideration of the collateral immigration consequences of conviction.[181] Further, the Standards are used and cited by courts in determining whether defense counsel has provided effective assistance.[182] For example, the Supreme Court in *Strickland* referenced the Standards as reflecting "[p]revailing norms of practice."[183] Likewise, in *Padilla*, the Supreme Court again cited to the Standards to support its conclusion that "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation."[184] Federal and state courts alike consider the Standards and the Model Rules in evaluating IAC claims, indicating their national influence and potential use in bolstering criminal defense attorney obligations to noncitizen clients.[185]

C. State Ethical Requirements

Forty-nine of fifty states have adopted rules of professional conduct based on the ABA's Model Rules.[186] Forty-nine states thus could interpret their *binding* ethical codes to include a more comprehensive duty to noncitizen defendants if the ABA adopted the additions this Note proposes.

Although all states must comply with *Padilla*'s requirements regarding deportation consequences of conviction and the constitutional

---

178 *Id.* § 4-5.5(b).

179 *Id.* § 4-5.5(c).

180 *Id.* § 4-5.5(d).

181 *See id.* § 4-1.1(b) (describing Standards as guidance).

182 *See* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, CRIM. JUST., Winter 2009, at 10, 14; *see also, e.g.*, Suits v. State, 257 S.E.2d 306, 308 (Ga. Ct. App. 1979).

183 Strickland v. Washington, 466 U.S. 668, 688 (1984).

184 Padilla v. Kentucky, 559 U.S. 356, 367 (2010).

185 *See, e.g.*, Gentile v. State Bar of Nev., 501 U.S. 1030, 1037 (1991); Nix v. Whiteside, 475 U.S. 157, 167–70 (1986); Frye v. Tenderloin Hous. Clinic, Inc., 129 P.3d 408, 426 n.12 (Cal. 2006); *In re* Haley, 126 P.3d 1262, 1266 (Wash. 2006).

186 California is the only state that has not adopted the Model Rules of Professional Conduct. *See State Adoption*, *supra* note 138.

requirements of effective assistance of counsel,[187] most states have not gone further than *Padilla* to require more comprehensive duties to noncitizen defendants. And in the absence of a comprehensive constitutional requirement regarding collateral immigration consequences, state bar ethical rules should guide the duties around criminal defense representation of noncitizen clients.[188] But because ethical rules can vary across the country absent national rules, the quality of the representation a noncitizen receives is likewise highly variable depending on the state in which she lives.[189] Although punishments for the same crime inevitably will vary by state, the existence of a constitutional right to effective counsel should secure for a noncitizen, such as Padilla, representation that is not drastically different based on whether a police officer pulls him over in Connecticut instead of New York.[190] The potential for variance in the quality of representation, which influences whether a noncitizen enters removal proceedings, makes standardized and quality representation, as sought by the Model Rules, particularly important.

New York and California provide helpful examples of comprehensive and standardized duties to noncitizen clients. New York and California are two of the states with the highest numbers of noncitizens,[191] and both states have taken various steps to protect their

187 *See Padilla*, 559 U.S. at 373–74; *Strickland*, 466 U.S. at 686.

188 State bar ethical rules create punishments for violations and thus can influence an attorney's representation. *See* Hellman, *supra* note 136, at 323–24 (explaining the potential consequences of violations of state ethical rules).

189 *See id.* at 326–27; *State Adoption*, *supra* note 138 (noting the different dates on which each state implemented the Model Rules).

190 "It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the 'mercies of incompetent counsel.'" *Padilla*, 559 U.S. at 374 (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)). *But compare* 2015 REVISED STANDARDS FOR PROVIDING MANDATED REPRESENTATION § I-7(e) (N.Y. STATE BAR ASS'N 2015) (requiring advice on collateral immigration consequences as a minimum obligation of representation), *with* CONN. RULES OF PROF'L CONDUCT (CONN. BAR ASS'N 2018) (providing no requirement on collateral consequences).

191 *See Nativity and Citizenship Status in the United States*, AM. FACTFINDER, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_16_5YR_B05001&prodType=table (under "Table View," select "Add/Remove Geographies," type in the name of the desired states, and select "Show Table") (last visited Nov. 29, 2018); *Population Distribution by Citizenship Status*, KAISER FAM. FOUND., https://www.kff.org/other/state-indicator/distribution-by-citizenship-status/?dataView=1&currentTimeframe=0&sortModel=%7B%22colId%22:%22Non-Citizen%22,%22sort%22:%22desc%22%7D [https://perma.cc/HU2H-D5TU] (showing citizen and noncitizen populations by state as of 2016).

noncitizen residents' rights, including an ethical requirement in New York and a codified version of *Padilla* in California.[192]

New York State's ethical code should act as a standard for the ABA and other states across the country because it explicitly requires attorneys to provide their clients with "full information" on immigration consequences of convictions.[193] "No attorney shall accept a criminal case unless that attorney can provide, and is confident that he or she can provide, zealous, effective and high quality representation," which means providing, among other things, comprehensive information on "immigration . . . and other collateral consequences under all possible eventualities."[194]

California similarly provides an effective model for other states and state bar associations seeking to expand criminal defense obligations to noncitizen clients. California, the only state that has not adopted binding ethical rules based on the ABA's Model Rules, has written an expansion of *Padilla* into its penal code.[195] California Penal Code section 1016.3 states that "[d]efense counsel shall provide accurate and affirmative advice about the immigration consequences of a proposed disposition, and when consistent with the goals of and with the informed consent of the defendant, and consistent with professional standards, defend against those consequences."[196]

New York and California appropriately safeguard the interests of noncitizen defendants by setting high standards for criminal defense attorneys that require counsel to consider, advise on, and defend against collateral immigration consequences of conviction. The ABA's Model Rules of Professional Conduct, the ABA's Criminal Justice Standards for the Defense Function, and state-specific ethical rules all indicate that a binding obligation for criminal defense attorneys to advise their noncitizen clients of collateral immigration consequences already exists and that this obligation should be strengthened with the addition of an explicit comment.

---

192 *See* CAL. PENAL CODE § 1016.3 (West 2018); 2015 REVISED STANDARDS FOR PROVIDING MANDATED REPRESENTATION § I-7(e) (N.Y. STATE BAR ASS'N 2015).

193 2015 REVISED STANDARDS FOR PROVIDING MANDATED REPRESENTATION § I-7(e) (N.Y. STATE BAR ASS'N 2015).

194 *Id.* §§ I-7, I-7(e).

195 *See* CAL. PENAL CODE § 1016.3; *see also id.* § 1016.2(h) ("It is the intent of the Legislature to codify Padilla v. Kentucky and related California case law and to encourage the growth of such case law in furtherance of justice and the findings and declarations of this section.").

196 *Id.* § 1016.3(a).

V. Why the Model Rules of Professional Conduct Already Encompass an Ethical Duty to Noncitizen Clients

Unless and until the Supreme Court decides to revisit *Padilla*, a constitutional imposition of greater legal obligations on criminal defense attorneys representing noncitizens will not exist.[197] And in the current political climate, both Congress and the Trump Administration are highly unlikely to propose a solution that would require greater standards for representation.[198] Thus, criminal defense attorneys should rely on the self-imposed ethical rules that guide the practice of law to establish additional obligations to noncitizen defendants during the criminal trial. Moreover, attorneys representing noncitizens in post-conviction relief claims should argue ineffective assistance when criminal defense attorneys fail to meet those ethical obligations. Ethical obligations should, and arguably already do, require criminal defense attorneys to more fully advise their clients of the immigration consequences of convictions.[199] Such ethical obligations, when adopted by states, are both binding on attorneys and relevant to IAC claims because courts look to ethical rules in determining the "objective standard of reasonableness" in IAC claims.[200]

Binding ethical rules that require criminal defense attorneys to fully advise their clients of the immigration consequences of convictions properly refocus effective representation on the relevant criminal proceedings. An emphasis on criminal proceedings is crucial because removal proceedings are difficult to dismiss given lack of representation and immigration judge discretion.[201] The ABA should reinforce ethical obligations during criminal proceedings by adopting a comment to Model Rule 1.4 that clarifies the obligation to noncitizen defendants.

Past amendments to the Model Rules have addressed inequities and social change; for example, the 2002 amendments to the Model Rules added language to the preamble describing a lawyer's duty to ensure that people can access the legal system regardless of income.[202]

---

197 *But see supra* note 57.

198 *See* Lind, *supra* note 20; Miroff, *supra* note 21.

199 *See supra* Part IV.

200 *See* Padilla v. Kentucky, 559 U.S. 356, 366–68 (2010); *see also* Missouri v. Frye, 566 U.S. 134, 145–46 (2012) (relying on the ABA Criminal Justice Standards); Strickland v. Washington, 466 U.S. 668, 688–89 (1984) (relying on same).

201 *See supra* Sections II.C, II.D.

202 *See* Model Rules of Prof'l Conduct pmbl. para. 6 (Am. Bar Ass'n 2016); Margaret Colgate Love, *The Revised ABA* Model Rules of Professional Conduct*: Summary of the Work of*

The Model Rules also often single out the distinct duties of criminal defense attorneys because of the constitutional requirements of counsel and the particular landscape of criminal trials.[203] The ABA thus can and should adopt revisions to the Model Rules to clarify and emphasize the duty to provide noncitizen clients with comprehensive information on collateral immigration consequences of a conviction.

The Model Rules require lawyers to act competently, to act reasonably diligently, to abide by the objectives their clients decide, and to consult with their clients on the means by which those objectives are pursued.[204] Read in tandem, these rules already hold criminal defense attorneys to a high standard of representation. To meet the required high standard of representation, criminal defense attorneys should fully advise noncitizen clients of possible immigration consequences of conviction, particularly when a client has expressed an interest in avoiding immigration consequences.[205] The client needs to "have sufficient information to participate intelligently in decisions concerning the [client's] objectives of the representation," i.e., the attorney needs to communicate adequately with her noncitizen client to inform her client of the immigration consequences that most concern her.[206] Once the attorney learns about the client's objective, she "should pursue [the] matter on behalf of [her] client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate [her] client's cause or endeavor," i.e., the attorney needs to take whatever actions are necessary to pursue and achieve her client's goal regardless of the inconveniences she experiences.[207] Moreover, the attorney

---

Ethics 2000, 15 GEO. J. LEGAL ETHICS 441, 444 (2002). Similarly, in 2016, after 20 years of failed attempts, the ABA moved language prohibiting discrimination from a comment on Rule 8.4 to the rule itself, affirmatively defining professional misconduct as any "conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law." MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2016); *see* Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195, 196–97 (2017). *Compare* MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 2016), *with id.* r. 8.4(g).

203 *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2016) ("In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.").

204 *Id.* r. 1.1, 1.2(a), 1.3, 1.4(a)(2); *see supra* Section IV.A.

205 *See* MODEL RULES OF PROF'L CONDUCT r. 1.2(a), 1.4(a)(2) (AM. BAR ASS'N 2016).

206 *See id.* r. 1.4 cmt. 5.

207 *See id.* r. 1.3 cmt. 1.

needs to prioritize her client's objectives in representation,[208] regardless of her training or prior experience—lack of knowledge is not an excuse, and the attorney needs to research until she understands the issue.[209] If an attorney is unable to adequately prepare, she must associate with "a lawyer of established competence."[210] Because noncitizen defendants are, in most cases, primarily concerned with deportation and immigration consequences of convictions,[211] criminal defense attorneys are obligated to fully advise on these incredibly important considerations.

By clarifying the obligations of criminal defense attorneys, the ABA can influence multiple states to also require further duties of explanation and advice to noncitizen defendants on the immigration consequences of conviction. This Note's proposed language should be included as a comment to the Model Rules to clarify that the Rules cover collateral immigration consequences.

VI. Proposed Comment to the Model Rules

To clarify that the Model Rules cover all collateral immigration consequences of a conviction, the ABA should adopt a comment to Model Rule 1.4 based on the New York State standard[212] and the ABA's Standards.[213]

The ABA should adopt the following comment to Model Rule 1.4:

> No lawyer shall accept a criminal case unless that lawyer can effectively communicate to the client information and advice on immigration consequences that may arise as a result of a plea agreement or trial decision. A lawyer should thus know the immigration status of the client and, if the client is a noncitizen, determine the possible consequences of criminal proceedings, including removal proceedings, detention, inability to obtain relief from removal, impact on citizenship applications, and consequences for the noncitizen's family. A

208 *See id.* r. 1.2.

209 *See id.* r. 1.1 cmt. 2.

210 *See id.*

211 *See, e.g.*, Padilla v. Kentucky, 559 U.S. 356, 364 (2010) ("These changes [in immigration law] confirm our view that . . . deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." (footnote omitted)).

212 2015 Revised Standards for Providing Mandated Representation § I-7(e) (N.Y. State Bar Ass'n 2015).

213 Criminal Justice Standards for the Def. Function § 4-5.5 (Am. Bar Ass'n 2015).

> lawyer must communicate to the client all possible consequences to the extent reasonably necessary for the client to make an informed decision.[214]

This proposed comment requires criminal defense attorneys to know the immigration status of their clients, ask their clients about their primary interests in resolving the charges against them, determine whether a conviction will have adverse immigration consequences, and, if so, create a strategy to avoid those consequences.

A. Impact of the Proposed Comment to Model Rule 1.4 on State Ethical Rules, Criminal Defense Attorneys, and IAC Claims

If the ABA includes this as commentary to Model Rule 1.4, many states will likely adopt this comprehensive ethical standard for noncitizen criminal representation. This is because the ABA's rules are compelling and persuasive, as shown by 49 states' adoption of binding ethical rules closely based on the Model Rules.[215] Although the Standards represent the ABA's attempt to codify detailed "best practices" beyond the Model Rules,[216] those best practices are not binding on attorneys. Inclusion of an additional comment to the Model Rules will show that the ABA considers advice on collateral immigration consequences not just a best practice but a duty essential to its "goal of assuring the highest standards of professional competence and ethical conduct."[217]

Given how frequently states adopt ethical provisions based on the Model Rules, including this language as a comment to Model Rule 1.4 will normalize the standard so that criminal defense attorneys know they are subject to an obligation to prospectively research collateral consequences. The comment would also open up attorneys to liability after successful IAC claims that assert the attorney did not consider collateral immigration consequences.[218] Although the Model Rules do not dictate the meaning of "prevailing professional norms," the Supreme Court has referenced the Model Rules, as well as the Stan-

---

214 The proposed comment to Model Rule 1.4 is based on the 2015 REVISED STANDARDS FOR PROVIDING MANDATED REPRESENTATION § I-7(e) (N.Y. STATE BAR ASS'N 2015) and CRIMINAL JUSTICE STANDARDS FOR THE DEF. FUNCTION § 4-5.5 (AM. BAR ASS'N 2015).

215 *See State Adoption*, *supra* note 138.

216 CRIMINAL JUSTICE STANDARDS FOR THE DEF. FUNCTION § 4-1.1(b) (AM. BAR ASS'N 2015).

217 MODEL RULES OF PROF'L CONDUCT preface (AM. BAR ASS'N 2016).

218 *See supra* Part III.

dards, in deciding whether an attorney has provided effective assistance of counsel.[219]

Moreover, the proposed comment to Model Rule 1.4 will expand on *Chaidez v. United States* and *Padilla v. Kentucky* by clarifying that, although criminal defense attorneys are only legally obligated to provide advice on clear deportation consequences, the ethical obligation goes much further.[220] A more explicit ethical obligation will require criminal defense attorneys to understand the broad definition of conviction under immigration law and provide advice accordingly.[221] When attorneys adjust their research and advice to comply with Model Rule 1.4, or the potential future state analogues, noncitizens may be able avoid removal proceedings entirely because they will understand the immigration impact of decisions they make during the criminal proceedings.[222] Avoiding removal proceedings is beneficial because noncitizens are able to avoid the difficulties in obtaining relief in these proceedings, including lack of appointed counsel and procedural safeguards, as well as the extreme consequences of criminal convictions on available relief from removal.[223]

The proposed comment to Model Rule 1.4 is aimed at prospectively avoiding removal proceedings or, at minimum, ensuring that noncitizens understand the possible immigration consequences when they accept plea deals or decide to go to trial. The comment this Note proposes both requires criminal trial attorneys to consider collateral immigration consequences during the case *and* bolsters IAC claims when criminal defense attorneys fail to consider collateral immigration consequences.

B. Why Clarifying the Preexisting Ethical Obligation Is Feasible

Adopting the proposed comment to Model Rule 1.4 will clarify the obligation to advise on immigration consequences of conviction, which will result in criminal defense attorneys either researching immigration law to understand its interplay with criminal law or consulting with immigration attorneys. Although this comment may seem to require criminal defense attorneys to spend a lot of time investigating

---

219 *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 688–89 (1984).

220 *See* Chaidez v. United States, 568 U.S. 342, 352–53 (2013); Padilla v. Kentucky, 559 U.S. 356, 364 (2010); *supra* Part I.

221 *See supra* Part II.

222 *See id.*

223 *See supra* Sections II.C, II.D.

what may be, for many, an unfamiliar area of law, this obligation is professionally desirable and practically feasible.

Although some might argue that the immigration consequences of criminal convictions are too complex to expect criminal defense attorneys to fully understand,[224] legal complexity should not deter a genuine ethical obligation. Attorneys are not expected to be immediately proficient in every legal issue they encounter,[225] but attorneys more familiar with other areas of the law cannot ignore relevant legal consequences of proposed courses of action.[226] Lack of knowledge is an unacceptable excuse for not fully researching and explaining to one's noncitizen client the impact of criminal convictions on her immigration status, particularly because attorneys are obligated to competently provide legal advice and, if dealing with an unfamiliar area of the law, learn about the area of the law or consult with an attorney more familiar in the legal area.[227] Attorneys are widely self-regulating and need to hold themselves to a high standard so that the public, and specifically the noncitizen public, feels confident in the quality of the profession and the quality of legal advice regarding collateral consequences.[228]

Moreover, explicitly requiring criminal defense attorneys to provide advice on immigration consequences is feasible because the American Immigration Law Association offers various continuing legal education courses on the immigration consequences of criminal convictions[229] and sets out the state-by-state continuing legal education requirements.[230] State bar associations also offer continuing legal

---

224 *See Padilla*, 559 U.S. at 369 ("Immigration law can be complex, and it is a legal specialty of its own.").

225 *See, e.g.*, MODEL CODE OF PROF'L RESPONSIBILITY Canon 6 n.1 (AM. BAR ASS'N 1980).

> To be sure, no client has a right to expect that his lawyer will have all of the answers at the end of his tongue or even in the back of his head at all times. But the client does have the right to expect that the lawyer will have devoted his time and energies to maintaining and improving his competence to know where to look for the answers[,] to know how to deal with the problems, and to know how to advise to the best of his legal talents and abilities.

Id. (quoting Arthur J. Levy & W.D. Sprague, *Accounting and Law: Is Dual Practice in the Public Interest?*, 52 A.B.A. J. 1110, 1112 (1966)).

226 *See* MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2016).

227 *See id.* r. 1.1 cmt. 2.

228 *See id.* pmbl. para. 6.

229 *See, e.g.*, Mary E. Kramer et al., *Crimmigration 101*, AILA AGORA (Feb. 2, 2016, 2:00 PM), https://agora.aila.org/product/detail/2847?sel=lookinside [https://perma.cc/JUB5-ED3T].

230 *CLE Jurisdiction Information*, AM. IMMIGR. LAW. ASS'N, http://www.aila.org/conferences/cle/cle-by-state [https://perma.cc/B2WS-Y72U].

education on the immigration consequences of criminal convictions.[231] Finally, after the ABA adopts this rule, professional responsibility and ethics courses would likely teach the requirement, and it would likely be incorporated into the Multistate Professional Responsibility Exam and perhaps adjudicatory criminal procedure courses as well. Most importantly, normalization of the duty of criminal defense attorneys to noncitizen clients will eventually lead students to recognize the important intersection between immigration law and criminal law.

Others might argue that criminal defense resources are already limited and that clarifying the ethical obligation will strain resources and lower the quality of representation because attorneys need to devote more time and resources to their noncitizen clients.[232] Cities such as Boston and New York City, however, have successfully implemented *Padilla* practices within local public defense agencies, i.e., immigration attorneys who consult with criminal defense attorneys on consequences of conviction.[233] These practices typically have one or more immigration attorneys on staff who both provide legal advice on immigration consequences of conviction to other attorneys and handle their own immigration cases.[234] Moreover, organizations across the country, such as the Immigrant Defense Project and the Immigrant Legal Resource Center, have created publicly available resources for criminal defense attorneys researching the collateral immigration consequences of conviction, which make it easier to learn about the immigration consequences of conviction and more difficult to argue that immigration law is too complicated a topic on which to provide comprehensive advice during a criminal trial.[235] These resources explain how attorneys can determine whether a conviction will trigger a potential grounds for removal and even provide recommendations on

231 *See, e.g.*, *Crimmigration: Immigration Issues in Criminal Law*, N.C. BAR ASS'N, http://gateway.ncbar.org/store/seminar/seminar.php?seminar=95779 [https://perma.cc/33S5-EW5A]; *Immigration Law 101/What NY Lawyers Need to Know 2017*, N.Y. STATE BAR ASS'N, http://www.nysba.org/store/detail.aspx?id=VES44_10 [https://perma.cc/7XZZ-7T6X].

232 *See* Ronald F. Wright, Padilla *and the Delivery of Integrated Criminal Defense*, 58 UCLA L. REV. 1515, 1535–37 (2011) (describing the impact of *Padilla* requirements on public defense and criminal defense organizations).

233 *See, e.g.*, *Immigration Impact Unit*, COMMITTEE FOR PUB. COUNS. SERVS., https://www.publiccounsel.net/iiu [https://perma.cc/VMS2-QYAX]; *New York Immigrant Family Unity Project*, BRONX DEFENDERS, https://www.bronxdefenders.org/programs/new-york-immigrant-family-unity-project [https://perma.cc/A3F2-CF6A].

234 *See, e.g.*, *Immigration Defense*, BRONX DEFENDERS, https://www.bronxdefenders.org/our-work/immigration-defense [https://perma.cc/5XCM-G24V].

235 *See, e.g.*, *Practice Advisories*, IMMIGRANT DEF. PROJECT, https://www.immigrantdefenseproject.org/practice-advisories-listed-chronologically [https://perma.cc/A4PD-6QYW]; NAT'L IMMIGR. L. CTR., *supra* note 57.

how to avoid collateral immigration consequences.[236] These organizations also provide personal help to attorneys considering questions of immigration law.[237]

Finally, resource-based arguments against enforcing an ethical obligation indicate a funding problem, not an actual reason to maintain a lower standard of noncitizen representation. Predicating ethical obligations on resources would diminish most standard ethical obligations. Reporting an attorney to a state bar for misconduct will always be inefficient because the time spent investigating the issue is time that could be spent on clients. But self-regulation keeps legal standards high and increases public confidence in the profession.[238] Moreover, from a purely economic perspective, more money will be saved nationally by providing quality criminal representation that prevents noncitizens from entering removal proceedings.[239]

Conclusion

Similar to Jose Padilla, who wanted to safeguard his ability to remain in the United States, noncitizens entering the criminal justice system are typically most concerned with the impact of convictions on their immigration status. Unfortunately, not all criminal defense attorneys provide comprehensive and accurate advice on immigration consequences of conviction. Criminal defense attorneys who overlook those collateral consequences betray the interests of their clients, expose their clients to unexpected consequences, and undermine the public's confidence in the system. They therefore should have an obligation to fully inform their clients of *all* possible immigration ramifications so that clients can make educated decisions about whether to plead guilty, accept a plea deal, or go to trial. Although recognition of a constitutional obligation on defense attorneys does not seem likely after *Padilla*, the ABA should adopt a comment to Model Rule 1.4 that emphasizes the clear ethical obligation for criminal defense attor-

236 *See, e.g.*, *Resources: Criminal Defense Attorneys*, Immigrant Def. Project, https://www.immigrantdefenseproject.org/defender-resources [https://perma.cc/G5DB-TGRA].

237 *See, e.g.*, *Legal Advice*, Immigrant Def. Project, https://www.immigrantdefenseproject.org/what-we-do/legal-advice [https://perma.cc/2K67-JKAM]; *Technical Assistance*, Immigrant Legal Resource Ctr., https://www.ilrc.org/technical-assistance [https://perma.cc/55G6-X59P] (providing "case-specific consultations on immigration law and practice").

238 *See* Model Rules of Prof'l Conduct pmbl. para. 6 (Am. Bar Ass'n 2016) ("As a member of a learned profession, a lawyer . . . should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.").

239 *See supra* text accompanying notes 30–33 (describing how removal proceedings cost over $18 billion per year, while criminal defense only costs $2.2 billion).

neys to fully inform noncitizen clients of all possible collateral immigration consequences. This comment draws on the already-existing ethical rules that 49 of 50 states have adopted and would move states toward adopting stronger, binding ethical obligations as well.