

MARKS & KATZ, LLC
ATTORNEYS AT LAW

1400 SPRING STREET
SUITE 410
SILVER SPRING, MARYLAND 20910
(301) 495-4300
FAX (301) 495-8815
justice@markskatz.com
www.markskatz.com

JAY S. MARKS (MD, DC, IL)
JONATHAN L. KATZ (MD, DC, VA)

PROTECTING IMMIGRANTS IN CRIMINAL COURT

By Jon Katz

This article is prompted by the many times I see judges, probation authorities, and civil lawyers improperly ask parties their immigration status; lawyers not sufficiently addressing/finessing the question; and lawyers not sufficiently advising their non-citizen clients about the negative immigration implications from convictions.

Hardly a week passes when our law firm's not tackling an issue about the immigration implications of a potential or imposed conviction for our clients who are not United States citizens. Here are a few critical points to consider when representing non-citizens for criminal matters:

- Don't assume your client is a U.S. citizen, even if s/he speaks like Walter Cronkite. Ask.
- Your non-citizen client will not always know his or her immigration status, in part because immigration laws and procedures are so voluminous and complex.
- Questions about immigration risks from convictions can only sufficiently be answered by going to the primary source, including the immigration statutes, regulations, court opinions, and administrative appeals opinions. You're behind the eight ball if you or your advisory counsel don't learn and go to the primary source to answer your questions on this topic.
- Not all convictions will harm immigration status. However, the law is so complex in this area that any conviction at all might lead to delay and detention of a non-citizen upon re-entry to the United States or upon any other encounter with immigration authorities, until the immigration authorities, immigration court, or federal court sorts out the situation.
- The analysis of immigration risks from convictions ordinarily starts (but does not always end) with the two-part question of whether a conviction will amount to a crime of moral turpitude or an aggravated felony; either one poses negative immigration implications even if the other is absent.

- o "Crime of moral turpitude" remains insufficiently defined. Some crimes fit squarely within the definition (e.g., theft, rape, robbery and murder). However, plenty of crimes fall in a gray area, which might only be resolved by future immigration litigation.
 - o The aggravated felony analysis depends on numerous considerations, including the type of crime.
 - o For the aggravated felony analysis, immigration law is not concerned with whether the criminal law classifies a crime as a misdemeanor.
 - o Other convictions can also raise immigration risks (e.g., repeated convictions for alcohol use crimes).
- Beware counterintuitive results. Simple possession of controlled dangerous substance paraphernalia can make a non-citizen deportable, whereas possession of thirty grams or less of marijuana might have less onerous consequences, depending on the type of hardship the immigrant can show will result for the close family members who will be left behind in the event of deportation. Therefore, think twice before accepting a prosecutor's offer to plead guilty to possessing a pot pipe in exchange for dropping an accusation of possessing thirty grams or less of marijuana.
 - The effect of the conviction might depend on whether the issue involves deportation, exclusion, or adjustment of immigration status, as well as the non-citizen's current immigration status.
 - A probation before judgment (in Maryland) and a suspended imposition of sentence (in Virginia) will likely be considered convictions for immigration purposes.
 - Will judges once and for all stop asking criminal defendants their immigration status? During the in-court guilty plea qualification, all that needs to be asked is: "Do you understand that if you are not a United States citizen, a conviction for this case might cause you immigration problems, including deportation, exclusion, and problems for adjustment of immigration status?"
 - When a judge asks a criminal defendants' immigration status, the criminal defense lawyer must protect the confidentiality of this information. Sometimes it's as easy as saying: "Judge, since immigration status is protected by federal law, I think we can accomplish the same goal by my confirming that I have advised this client and all my clients that if they are not a United States citizen, a conviction for this case might cause them immigration problems, including deportation, exclusion, and problems for adjustment of immigration status." It helps also to be able to tell the judge that you constantly deal with immigration implications of convictions, and that you know the possible immigration implications of the instant criminal proceeding.
 - Will police, parole and probation officers, and court personnel once and for all stop asking people their immigration status? Until that day, it becomes all the more important for us to prepare and join our clients at their probation intake meetings. Maryland probation officers now hand the probationer a form saying that it is required to provide one's immigration status; that flies in the face of the continuing federal law protection of people's immigration status. When one of my clients refused to provide the information

when I told him -- as pre-planned -- in front of the probation officer that he had no obligation to provide the information, the officer asked me to write down that he refused to provide the information; instead, I wrote down that counsel told him he didn't have to provide the information.

- Non-citizens who are in the United States without a visa or other legal authority need all the more to have a qualified attorney with them any time they deal with criminal justice system authorities.

- Immigration status might become a beneficial part of guilty plea negotiations, to seek a plea that will minimize negative immigration consequences. For instance, if your client is charged with assault, consider seeking an amendment of the charge to disorderly conduct (and have the record designate the appropriate subsection of the statute). If your client is charged with felony burglary, consider seeking an amendment to simple breaking and entering (and in Maryland make sure the record makes clear the plea is to subsection (a) of the statute, because some of the other provisions involve a deportable theft intent provision).

- If your client is found guilty of marijuana possession, do all you can to have all docket entries, sentence pronouncements, commitment orders, and probation orders show that less than 30 grams of marijuana was involved.

- Discussing your client's immigration status with a prosecutor can be a double-edged sword if the prosecutor is inclined to report your client to immigration or probation authorities. Get a feel for the inclinations of the particular prosecutor and prosecutor's office in this regard; public defender lawyers are a good place to start.

- When in doubt, call a qualified lawyer with immigration expertise.

It is not enough to minimize immigration risks in criminal court. We must overhaul the immigration laws to make them more humane for immigrants. We must sensitize judges, police, and everybody else to the confidentiality of immigration status information. We must overcome overt and subtle anti-immigrant biases of judges, juries and everyone else, which mushroomed all the more with the fears that too often supplanted reason following the September 11 murders.

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