

6.1 General Rules

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6.1 General Rules

A. Offenses That Do Not Carry Adverse Immigration Consequences

If your client pleads guilty or is found guilty, the most favorable result for the client from an immigration standpoint is a plea and sentence to an offense that does not fall within a crime-based ground of removal (deportability or inadmissibility) or that does not bar immigration relief from removal. For example, if a number of different offenses are charged, it may be possible to identify a charge with less serious immigration consequences. In other cases, it may be possible to negotiate a plea to a lesser included offense, or a related offense, that does not contain an element triggering deportability or inadmissibility.

For example, the offense of indecent liberties with a child is a sexual abuse of a minor aggravated felony. A conviction of sexual battery, however, should not qualify as sexual abuse of a minor because the minor age of the victim is not an element of the offense.

To determine whether an offense and its lesser included and related offenses carry adverse immigration consequences, see *infra* Appendix A, Selected Immigration Consequences of North Carolina Offenses. You should also contact an immigration attorney if you need assistance in a particular case.

B. Deferred Prosecution

A deferred prosecution may or may not constitute a conviction depending on the structure of the agreement. See *supra* 4.2A, Deferred Prosecution. Certain deferrals may be a favorable option from an immigration standpoint.

C. Categorical Approach and Record of Conviction

To determine whether an individual is removable based on a conviction, the immigration court examines the elements of the statute violated, not the individual's conduct. If the statute is divisible and proscribes both offenses that carry an immigration penalty and offenses that do not, then the immigration court is allowed to examine the record of conviction to determine the offense for which the defendant was convicted. See *supra* § 3.3A, Categorical Approach and Variations. If the record of conviction does not establish

all of the elements necessary for a deportable offense, the noncitizen should not be found deportable.

The plea proceedings are considered a part of the record of conviction. In North Carolina, there is generally no transcription of the plea proceedings in district court. The record of conviction in district court is generally composed of the charging document (e.g., warrant), any judgment, and any other documents in the shuck. In superior court, plea proceedings are recorded and, thus, are part of the record of conviction in felony cases and misdemeanors appealed for trial de novo. There is also usually a written transcript of plea in superior court.

There may be steps counsel can take. For example, if your client is pleading guilty under a statute that is divisible, take care to avoid references in the record of conviction—including dismissed counts or during the plea colloquy—to the specific facts listed in the statute of conviction that would establish conviction under the prong of the divisible statute that comes within the removal ground.

Crafting an *Alford* plea where the statute is divisible may be another option. The Fourth Circuit Court of Appeals has held that the State's proffer of a factual basis for an *Alford* plea cannot establish with the requisite certainty that the conviction triggers a federal sentencing enhancement. *See United States v. Alston*, 611 F.3d 219, 227 (4th Cir. 2010). The same rationale may apply to removal consequences based on a conviction. Thus, should your client take an *Alford* plea, he or she may have a solid argument that the government cannot meet its burden of establishing under which prong of a divisible statute your client was convicted (at least in the Fourth Circuit).

Alternatively, where your client is pleading guilty to the non-deportable crime under a divisible statute, and there is no transcription of proceedings, you should try to have the court or prosecutor note this on the shuck or charging document. This will be particularly important if your client will be applying for relief from removal, where the burden is on the noncitizen.

In limited situations, the immigration court may look beyond the record of conviction to determine certain aspects of the crime that go beyond the elements of the offense. For example, decisions have allowed the immigration court to look beyond the record of conviction at the amount of loss to determine whether the offense was an aggravated felony triggered by a loss exceeding \$10,000 and at the relationship between the parties in assault or other violent offense cases to determine whether the offense was a crime of domestic violence. *See supra* § 3.3A, Categorical Approach and Variations. Where the immigration court can look beyond the record of conviction, if possible defense counsel should try to plead affirmatively to an immigration-safe circumstance. For example, if the defendant is pleading guilty to a fraud offense, counsel could try to craft a plea for a sum certain that is \$10,000 or less if appropriate. In other words, defense counsel should work to create a record of conviction that protects the client and negates the need to consider evidence outside the record of conviction.

D. Pleading Not Guilty

If the proposed plea carries adverse immigration consequences, your client may decide to plead not guilty. Even if a plea offer appears favorable in terms of the criminal consequences, the client may decide that the immigration consequences are a more important consideration. In those cases, you need to consider litigating possible suppression issues and other pretrial motions as appropriate. The client may want to take the case to trial to seek acquittal of all charges or at least of charges that carry immigration penalties.

E. Post-Conviction Relief

If a defendant has a final judgment of conviction that carries adverse immigration consequences, he or she may consider filing a motion to vacate the conviction or sentence, if warranted. For example, if trial counsel failed to advise the defendant of the immigration consequences of the conviction and the defendant relied on that information in deciding to plead guilty, the defendant may have grounds to file a post-conviction motion based on ineffective assistance of counsel under *Padilla v. Kentucky*. *See infra* Ch. 8, State Post-Conviction Relief.