

**LEO 1876:**

**ETHICAL OBLIGATIONS OF A PROSECUTOR WHO PLEA BARGAINS WITH AN UNREPRESENTED DEFENDANT WHOM THE PROSECUTOR HAS BEEN INFORMED IS A NONCITIZEN SUBJECT TO DEPORTATION UNDER IMMIGRATION LAW UPON CONVICTION OF THE OFFENSE WHICH IS THE SUBJECT OF THE PLEA OFFER.**

This opinion examines the ethical duties of a prosecutor who offers a plea agreement to an unrepresented defendant whom the prosecutor has been informed is a noncitizen subject to deportation upon conviction under immigration law. Not all Virginia district courts conduct plea colloquies regarding a defendant's understanding of the potential immigration law consequences of a conviction. In jurisdictions where such colloquies are not undertaken, a prosecutor may not knowingly take advantage of an unrepresented noncitizen defendant by making a plea offer which refers only to the state law disposition of the charge, and either makes no statement to the defendant of the defendant's potential need to seek immigration law advice or fails to ask the court to conduct a colloquy with and give an advisement to the defendant in that regard.

**HYPOTHETICAL FACT PATTERN:**

A state prosecutor is contacted by a federal immigration official, and is advised that a particular defendant is a noncitizen subject to deportation upon conviction of certain misdemeanors. The immigration official requests the prosecutor to obtain a conviction of a crime which will subject the defendant to deportation. Before the case is called in court, the prosecutor approaches the defendant and advises him that he, the prosecutor, is willing to advise the court that he will amend the pending charge to a lesser one, and will seek no jail time for the defendant if the defendant is willing to plead guilty to the reduced charge, which the prosecutor knows will subject the defendant to deportation under federal immigration law. The prosecutor knows that the defendant is not entitled to court-appointed counsel and that the general district court judge does not conduct a plea colloquy in cases where the state seeks no jail time. The defendant agrees to the plea offer, pleads guilty without the benefit of counsel, and receives no advisement from the court that he may be subject to immigration law consequences upon conviction.

**QUESTION PRESENTED:**

Has the prosecutor in the hypothetical fact pattern set forth above committed ethical misconduct?

**APPLICABLE RULES OF PROFESSIONAL CONDUCT:**

Rules of Professional Conduct 3.8(b)<sup>1</sup> and 4.3<sup>2</sup> apply to the issues addressed in this opinion.

**DISCUSSION:**

In *Padilla v. Kentucky*, 559 U.S. 356 (2010), the United States Supreme Court held that defendant Padilla was entitled to postconviction relief because he entered a plea based on his counsel's erroneous advice regarding the immigration consequences of conviction. The Court found that Mr. Padilla's counsel's representation was *constitutionally deficient* and that he had been denied effective assistance of counsel.

In *Padilla*, the majority opined that

\*\*\*[W]e have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel. 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. [Citations and footnote omitted; 559 U.S. at 373-74]

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." *Richardson*, 397 U.S., at 771, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763. To satisfy this responsibility, we now

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**<sup>1</sup> Rule 3.8. Additional Responsibilities Of A Prosecutor**

A lawyer engaged in a prosecutorial function shall:

(b) not knowingly take advantage of an unrepresented defendant[.]

**<sup>2</sup> Rule 4.3. Dealing With Unrepresented Persons**

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

(b) A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client.

hold that counsel must inform her client whether his plea carries a risk of deportation. **Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.** [Emphasis supplied; 559 U.S. at 474]

Among other bases for deportation of noncitizens contained in the United States Code are the following at 8 U.S.C. Sec. 1227(A)(2)(A)(I) (“Deportable aliens”),

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

It is thus the case that convictions for certain misdemeanors by Virginia general district and juvenile and domestic relations district courts render defendants deportable.

In Virginia, a defendant charged with a misdemeanor which does not carry jail time is not entitled to court-appointed counsel. Similarly, a defendant charged with a crime which is punishable by incarceration is not entitled to court-appointed counsel if the court states in writing in advance of trial its decision not to impose jail time upon conviction.<sup>3</sup>

Rules 7C:6(a)<sup>4</sup> and 8:18(c)<sup>5</sup> of the Rules of the Supreme Court of Virginia govern general district and juvenile and domestic relations district courts, respectively, in accepting pleas to

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<sup>3</sup> Section 19.2-160 of the 1950 Code of Virginia, as amended, provides, in pertinent part,

[I]f, prior to the commencement of the trial, the court states in writing, either upon the request of the attorney for the Commonwealth or, in the absence of the attorney for the Commonwealth, upon the court's own motion, that a sentence of incarceration will not be imposed if the defendant is convicted, the court may try the case without appointing counsel, and in such event no sentence of incarceration shall be imposed.

<sup>4</sup> **Rule 7C:6. Pleas.**

(a) A court shall not accept a plea of guilty or nolo contendere to any misdemeanor charge punishable by confinement in jail without first determining that the plea is made voluntarily with an

misdemeanor charges “punishable by confinement in jail.” Before accepting a plea in such a case, the court must determine “that the plea is made voluntarily with an understanding of the nature of the charge and the *consequences of the plea*.” (Emphasis supplied.) The determinations required by the court under those Rules have been considered inapplicable not only to charges which carry no jail time, but also to those charges which by statute carry jail time, but for which the court has stated in advance of trial not to impose jail time.

The District Court Judges’ Benchbook<sup>6</sup> addresses the subject of pleas, as follows:

2. While Rule 3A:8 governs plea bargains in circuit court, there is no corresponding rule for the district courts. However, Rule 3A:8 is useful inasmuch as it sets forth accepted legal principles concerning enforceability, choices of the defendant, and options of the judge. Since there is no governing rule, formalities of plea bargains vary across the state. Some judges conduct a more formal inquiry along the lines of the recommended circuit court colloquy, while others conduct no inquiry at all. There is no requirement that the plea bargain be reduced to writing, but the judge could insist on it as a matter of docket administration. It is the better practice to note on the summons or warrant that the judge’s disposition is the result of a plea and recommendation should it become an issue later. Most warrant forms now contain a box to designate whether a plea is the result of a plea and recommendation. [Emphasis in original.]
3. Rule 7C:6 became effective on June 1, 2005 governing the acceptance of pleas of guilty or *nolo contendere* to any misdemeanor charge punishable by confinement in jail.

In regard to *Padilla*, the Bench Book contains, among other provisions, the following:

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understanding of the nature of the charge and the consequences of the plea. Before accepting a plea to such a charge, the court shall inform the accused that such a plea constitutes a waiver of the right to confront one's accusers and the right against compulsory self-incrimination.

<sup>5</sup> **Rule 8:18. Pleas.**

(c) *Determining Voluntariness, Understanding, and Intelligence of a Plea of Guilty by an Adult.* In any case involving an adult charged with a crime, the court shall not accept a plea of guilty or nolo contendere to a misdemeanor charge except in compliance with Rule 7C:6.

<sup>6</sup> Prepared by the Association of District Court Judges of Virginia, and available at: <http://www.courts.state.va.us/courts/gd/resources/manuals/districtcourtbenchbook.pdf>

One potential option to address questions left unanswered by Padilla is to add a Padilla advisement to the colloquy that judges use to accept guilty pleas. Although Padilla does not require this, judges **may conclude** that this would be a prudent addition to the colloquy. The Padilla advisement<sup>7</sup> added to district court form DC-335, TRIAL WITHOUT A LAWYER, **may prove helpful**. [Emphasis supplied.]

Thus, when a misdemeanor charge will not carry jail time upon conviction, Virginia district courts are not required to appoint counsel, determine that a plea is voluntary, or determine that a defendant understands “the consequences of the plea.” What is more, even when a plea colloquy is conducted by a district judge, there are no “suggested questions” prescribed or recommended pursuant to a rule of court. The Benchbook opines that the “recommended” colloquy conducted by circuit judges is “useful.” The “Suggested Questions to Be Put by the Court to an Accused Who Has Pleaded Guilty” (Rule 3A:8) contain no references to the defendant’s understanding of potential immigration consequences flowing from conviction upon a guilty plea. The Benchbook asserts that a district judge “may conclude” that the Padilla advisement contained on form might be a “prudent addition” to a colloquy. **At present, there are no rules of court which require Virginia district or circuit judges to conduct plea colloquies which contain references to a defendant’s state of knowledge regarding potential immigration consequences of a conviction.**

While *Padilla* expanded the definition of ineffective assistance of counsel to include defense counsel’s failure to properly advise his client of the immigration consequences of a guilty plea, it did not at the same time impose any additional duties upon federal or state judges to determine whether a represented or unrepresented defendant received advice regarding the immigration consequences of a guilty plea. Nonetheless, some trial courts, including Virginia district courts, have voluntarily used plea agreement forms making specific reference to immigration consequences and have conducted colloquies which include inquiry into a defendant’s having been afforded the opportunity to receive advice regarding potential immigration consequences. It

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<sup>7</sup> According to the Benchbook:

“The Committee on District Courts addressed one issue related to Padilla through a November, 2012, revision of district court form DC-335, TRIAL WITHOUT A LAWYER, the form created to memorialize a defendant’s waiver of counsel. The language added to the general advisement provisions of the form reads:

I understand that if I am not a citizen of the United States and if I plead guilty or I am found to be guilty, there may be consequences of deportation, exclusion from admission into the United States, or denial of naturalization pursuant to the laws of the United States.”

is anticipated that over time these practices will become more widespread and uniform, either by virtue of rules of court or voluntary measures adopted by trial courts in Virginia.<sup>8</sup>

At present and for the foreseeable future, however, criminal defendants in Virginia who are not entitled to court-appointed counsel are at risk of being convicted upon a plea of guilty or *nolo contendere* wherein either no colloquy is conducted by the court or the colloquy conducted by the court is not geared toward the court's determining whether the defendant has considered, or has had the opportunity to obtain legal advice regarding, the potential immigration consequences of conviction of the crime to which the plea is being tendered. One commentator suggests that *prosecutors* take measures to ensure fairness under these circumstances:

A special situation arises in localities where counsel is not appointed for minor offenses that do not carry the possibility of incarceration but do carry potential immigration consequences \*\*\*. In such localities, prosecutors should consider the role they can play in ensuring compliance with the spirit of Padilla for unrepresented defendants. Lead prosecutors might, for example, require their trial-level prosecutors not to move forward with a plea until the judge has advised the defendant of the possibility of immigration consequences and offered her the option of consulting with an attorney.<sup>9</sup>

Such a suggestion is laudable, and consistent with the prosecutor's role as "a minister of justice."<sup>10</sup> However, there is no Rule of Professional Conduct which mandates that a prosecutor take such a position. Furthermore, in jurisdictions where plea colloquies are not conducted in every case or do not uniformly contain immigration consequence advisements, any method of determining which defendants should be accorded the benefit of such an advisement would be inappropriate if it compelled an unrepresented defendant's self-incriminating disclosure of his citizenship or immigration status before entering a plea.<sup>11</sup>

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<sup>8</sup> See, Altman, Heidi, *Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 Geo. L.J. 1 (November, 2012): "Prior to Padilla, approximately half of the fifty states already had a statute on the books requiring judges to issue advisals regarding immigration consequences to noncitizen defendants entering a plea of guilty, and this number has subsequently increased."

<sup>9</sup> Heidi Altman, *Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Noncitizen Defendants*, *supra*.

<sup>10</sup> See, Comment [1] to Rule of Professional Conduct 3.8.

<sup>11</sup> The Committee received thoughtful comments from non-profit organizations which protect and advance the rights of immigrants. The Committee was urged to issue an opinion which declares it to be a violation of Rules 3.8 and 4.3 if a prosecutor "proceeds with the prosecution of an unrepresented indigent

This Committee opines that even if a prosecutor has no general affirmative duty to ensure that the court gives an unrepresented noncitizen defendant an immigration consequences advisement, he nonetheless takes advantage of the unrepresented defendant and violates Rule 3.8(b) if he

- a) has been informed that the defendant is a noncitizen;
- b) maintains a criminal charge which does not entitle the defendant to court-appointed counsel;
- c) knows that conviction of the crime to which a plea offer pertains is a deportable offense;
- d) knows that the court does not conduct plea colloquies which include an advisement regarding the defendant's opportunity to understand, or to obtain legal advice regarding, immigration law consequences of the plea; and
- e) offers a disposition of a criminal charge to the unrepresented defendant in exchange for a guilty plea when
  - 1) the "plea bargain" omits reference to the defendant's potential need to obtain legal advice regarding immigration law consequences, and identifies only the disposition to be imposed by the state court; and
  - 2) the prosecutor fails to request that the court conduct a colloquy with the unrepresented defendant to determine if the defendant has had an opportunity to understand, or to obtain legal advice regarding, the immigration law consequences of the plea.

Conviction of a crime carries with it a host of potentially adverse collateral consequences, but deportation cannot be characterized as merely "collateral." The *Padilla* majority held that

Deportation as a consequence of a criminal conviction is, because of its **close connection to the criminal process**, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. *Strickland* applies to *Padilla's* claim. [Emphasis supplied; 130 S. Ct. 1482]

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defendant [whom the prosecutor] has reason to believe was born outside of the United States unless and until counsel is appointed." The Committee believes that neither Rule imposes such a duty upon a prosecutor, that "reason to believe" is an inappropriate standard to employ and enforce, and that such a requirement would deviate from the present statutory scheme governing an indigent defendant's entitlement to court-appointed counsel.

The Committee believes that a prosecutor's plea "bargain" with an unrepresented defendant, known by the prosecutor to be a noncitizen at risk of deportation upon conviction, and who will participate in no colloquy regarding potential immigration consequences, is no bargain at all when the defendant fails to appreciate that the benefit of "no jail time" is of little import in light of the draconian consequence of deportation. The Committee does not here opine that a prosecutor would "take advantage of an unrepresented defendant" if the prosecutor failed to alert, or have the court alert, the defendant to the possible need to seek legal advice regarding other collateral consequences to a plea. Conviction of a crime may, and normally does, carry with it a host of adverse consequences which have nothing whatever to do with any issue of constitutional proportions as addressed in *Padilla*.

Nor does this opinion suggest that a prosecutor may not bargain with an unrepresented noncitizen defendant. Indeed, Comment [2] to Rule 3.8 validates "discussions" between a prosecutor and an unrepresented criminal defendant:

[2] \*\*\* Nor does [Rule 3.8(b)] apply to an accused appearing *pro se* with the ultimate approval of the tribunal. Where an accused does appear *pro se* before a tribunal, paragraph (b) does not prohibit discussions between the prosecutor and the defendant regarding the nature of the charges and the prosecutor's intended actions with regard to those charges. It is permissible, therefore, for a prosecutor to state that he intends to reduce a charge in exchange for a guilty plea from a defendant if nothing in the manner of the offer suggests coercion and the tribunal ultimately finds that the defendant's waiver of his right to counsel and his guilty plea are **knowingly made** and voluntary. [Emphasis supplied.]

Lastly, the Committee observes that it would be ethically improper for any prosecutor to give a noncitizen defendant legal advice under Rule 4.3. Accordingly, a prosecutor should constrain his discussions regarding immigration law consequences with an unrepresented noncitizen defendant to the admonition that the defendant consult or retain counsel in regard to immigration matters related pending charges. Alternatively, or in addition to such a discussion, the prosecutor should request that the court conduct a colloquy with the unrepresented defendant to contain an advisement in regard to potential immigration law consequences. A prosecutor does not violate Rule 3.8(b) under the facts set forth in the above hypothetical when he requests that the court conduct a colloquy with the unrepresented defendant which contains an immigration advisement when the prosecutor does not, himself, address with the defendant the potential need to seek the advice of counsel regarding immigration consequences of a plea bargain.

Nothing in this opinion should be construed to suggest that a prosecutor may not have arms-length discussions with an unrepresented noncitizen defendant who is, or claims to be,

knowledgeable regarding potential immigration consequences of a criminal conviction. As could be the case were the defendant represented by counsel, the prosecutor might agree to a disposition of the charge, or an amended charge, which the defendant believes will insulate him against an adverse immigration law consequence.

### **CONCLUSION:**

Under federal law, a noncitizen defendant is exposed to deportation for conviction of certain offenses, including misdemeanors for which he is not entitled to court-appointed counsel. Virginia district courts do not uniformly conduct plea colloquies which include inquiry into whether a defendant tendering a plea is doing so with an understanding of the potential immigration consequences of a conviction. A prosecutor knowingly takes advantage of an unrepresented defendant in violation of Rule of Professional Conduct 3.8(b), if the prosecutor:

- a) has been informed that a defendant is a noncitizen;
- b) maintains a criminal charge which does not entitle the defendant to court-appointed counsel;
- c) knows that conviction of the crime to which a plea offer pertains is a deportable offense;
- d) knows that the court does not conduct plea colloquies which include an advisement regarding the defendant's opportunity to understand, or to obtain legal advice regarding, immigration law consequences of the plea; and
- e) offers a disposition of a criminal charge to the unrepresented defendant in exchange for a guilty plea when
  - 1) the "plea bargain" omits reference to the defendant's potential need to obtain legal advice regarding immigration law consequences, and identifies only the disposition to be imposed by the state court; and
  - 2) the prosecutor fails to request that the court conduct a colloquy with the unrepresented defendant to determine if the defendant has had an opportunity to understand, or to obtain legal advice regarding, immigration law consequences of the plea.

This opinion is advisory only and not binding on any court or tribunal.

Committee Opinion  
March 19, 2015