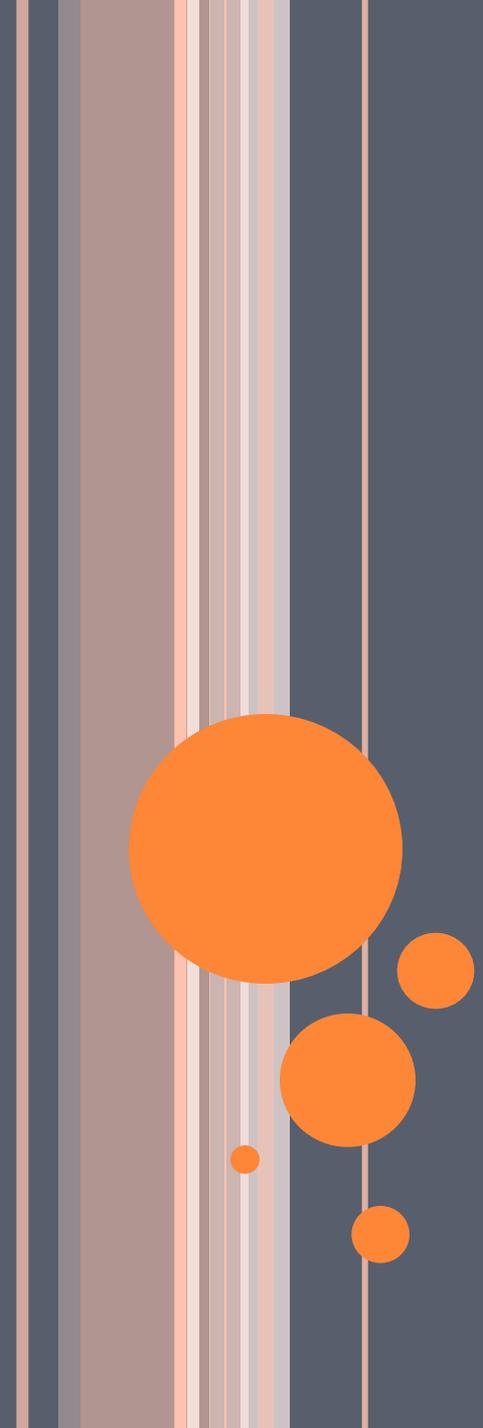


## **CREATING A RECORD**

**Getting a Hearing, Conducting a Hearing, and  
Making a Record in the Absence of a Hearing**



# IMMIGRATION CONFUSION

Unique Issues Involved in Creating a Factual  
Record in *Padilla* Motions

# THE BASICS

- To succeed on any *Padilla* motion need BOTH:
  - Deficient Performance: Counsel failed to provide complete and accurate advice regarding immigration consequences in a manner the client could understand.
  - Prejudice: Had client been properly advised, there was
    1. An available, substantial **defense**
    2. A reasonable probability a **different plea** could have been negotiated to avoid the consequence
    3. **Special circumstances** such that she would have rolled the dice and gone to trial even though there was no substantial defense



# DEFICIENT PERFORMANCE

- Don't Forget! Articulate what the correct advice should have been.
  - Back up with authority
    - case law or citations
  - If necessary, get an expert



# DEFICIENT PERFORMANCE

## ○ Witness: Trial Counsel

- Issue: TC doesn't remember case
  - Reviewed file – generally included notes re: advice/warnings given prior to plea?
  - Reviewed file – no record advice was given?
  - Reviewed file – no record of client's immigration status? (Failure to inquire is deficient performance. See *Clarke*)
  - TC's practice at the time – At the time, TC was only giving general immigration warnings? No warnings?
  - TC's practice at the time – What was TC's knowledge of immigration law at the time? Was TC even capable of providing sufficient advice?



# DEFICIENT PERFORMANCE

- Witness: Trial Counsel
  - Issue: TC won't respond to requests for affidavit
    - Document all efforts to get affidavit in your own affidavit
      - *Commonwealth v. Martinez*, 86 Mass. App. Ct. 545 (2014)
  - Summons into court and prepare for . . .



Call Me Maybe?



# DEFICIENT PERFORMANCE



## ○ Witness: Trial Counsel

- Issue: TC is hostile
  - Impeach with lack of effort to determine consequences: How did you figure out the consequences? (risk – maybe they took appropriate steps!)
  - Impeach with lack of knowledge of immigration law (risk – do they lack knowledge?!)
    - What is an aggravated felony? How do you determine if something is an aggravated felony?
    - What is a crime involving moral turpitude? How do you know if an offense is a CIMT?
    - What are the immigration consequences of *this* case?



# DEFICIENT PERFORMANCE

## ○ Witness: Client

- Issue: Nobody believes our clients!
  - Obviously: prepare client beforehand
  - To extent possible, client should be prepared to include as much detail as possible.
    - More vivid – more believable
  - Corroborate with testimony re: special circumstances
    - Ex.: I had a new baby and a new job and I had been in the U.S. for 20 years. Of course he didn't tell me the consequences. If he had, I wouldn't have pled.





Make sure you listen to the **plea colloquy** if available and prepare client to address issues raised.



# DEFICIENT PERFORMANCE

- **Corroborate** by pointing to the disposition
  - Does the disposition indicate ignorance of immigration consequences?
    - Ex. 11 month CWOFF
    - Ex. 1 year suspended sentence on larceny
  - Where there obvious alternative immigration-safe dispositions?
    - Ex.: One year in HOC on larceny. What about 364 days??
    - Ex.: CWOFF on ABDW (first offense). What about guilty on A&B?
- Remember: **Failure to advocate for disposition that would mitigate consequences is DP.**



# PREJUDICE – BUT WHAT *ARE* THE CONSEQUENCES?

- Unlike alien warnings motions (MGL 278/29D), no need to show client is *currently* facing consequences.
- BUT must show that the criminal disposition made things worse.
  - Most likely an issue for undocumented/out of status/already deportable non-citizens.
  - Overlaps with deficient performance – what are the consequences trial counsel should have explained?



# PREJUDICE – ALREADY DEPORTABLE NONCITIZENS

- Generally, need to show that they had some path to lawful status/defense to deportation that was barred by criminal disposition.
- May need **expert testimony** from immigration attorney.
- May need **evidence** of eligibility for path to lawful status (absent conviction).
  - Ex. Cancellation of removal may provide green card to undocumented person
    - Evidence of “exceptional and extremely unusual hardship” to US citizen/green card holding spouse/parent/child if deported.
    - Evidence of 10 years residence



# PREJUDICE – AVAILABLE DEFENSE

- Viable **motion to suppress?**

➔ Introduce police report and be prepared to argue

- Viable **legal** defense?

- Mostly argument

- Viable **factual** defense?

- Investigate! Corroborate!



## PREJUDICE – DIFFERENT PLEA

- The Law: “[T]he defendant must demonstrate a reasonable probability that the prosecution would have made an offer, that the defendant would have accepted it, and that the court would have approved it.” *Commonwealth v. Marinho*
- Witnesses: Prosecutor would have made/Judge would have approved
  - Trial Attorney?
  - Trial ADA?!
  - Other defense attorneys – testify to practice in that court/with that ADA/before that judge



# PREJUDICE – DIFFERENT PLEA

- Witnesses – Defendant would have accepted
  - Defendant (duh)
  - Other witnesses who can corroborate defendant's testimony that he would have taken harsher plea to avoid immigration consequences.
    - Family, Friends, Colleagues, etc.
    - Evidence may overlap with “special circumstances”
- Argue Reasonableness: If an alternative plea seems obvious (364 days v. 1 year), judge should not credit ADA testimony otherwise.



# PREJUDICE – SPECIAL CIRCUMSTANCES

- Almost always present evidence of special circumstances (if they exist).
- Ties to US:
  - Client's testimony
  - Testimony from people **other** than client.
    - family, friends, co-workers
  - Employment records
  - School records



# PREJUDICE – SPECIAL CIRCUMSTANCES

- Consequences of Being Deported
  - Country conditions evidence, if helpful
    - Expert??
    - Were they a refugee/asylee?
  - Proof of date of entry to US
  - Testimony that client doesn't speak the language
  - Evidence of support client provides to family
    - Medical records if relevant
    - Pay stubs/child support



# UNIQUE ISSUE: MISSING CLIENT

- Getting Client from ICE Custody
  - Contact IIU for assistance
- Client Deported
  - Not *required* to be present. Rule 30(c)(6)
  - But must meet burden
    - Where IAC is clear from disposition, easier to win.



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