



Model Prosecutor Policies & Practices on Immigration Issues

By Rose Cahn¹

At a time of unprecedented immigration enforcement where the federal government heavily relies on the criminal legal system to target immigrants and their families and communities, prosecutors play a critical role in determining immigrants' fates in this country. The prosecution of a case and the resulting conviction and sentence determines whether a long time lawful permanent can retain their legal status and stay in the U.S., whether an undocumented immigrant can ever legalize in the country through familial ties such as a U.S. citizen spouse and children, or whether an asylee escaping persecution from their home country will be forcibly returned to harm.

Prosecutors across the country are beginning to recognize the important role they play as gatekeepers to the deportation pipeline. Many are looking for policies and practices they can adopt that will take into account the specific concerns of immigrants and help mitigate the drastic immigration consequences that can attach to a variety of convictions. The below represent best practices that should be foundational elements of any immigration-informed prosecutorial policy platform.

An informed reader will note that many of the below recommendations represent cutting edge thinking about criminal justice reform strategies that increase safety and decrease incarceration rates. It is notable that many policies that keep immigrants out of the deportation pipeline are also helpful to ensuring that U.S. citizen defendants don't recidivate and are able to avoid or overcome the longstanding consequences of criminal convictions.

Reduce prosecutions for low-level offenses. Prosecution of “quality-of-life” crimes exposes noncitizens to deportation for offenses such as urinating in public, driving without a license, failing to pay a public transportation fee, or possessing small quantities of marijuana. It is questionable whether any public safety benefits of prosecuting these quality-of-life crimes outweigh the disproportionate impacts on poor people, people of color, and noncitizens. Prosecutors should support reducing enforcement of low-level offenses, whether by decriminalizing certain offenses, refusing to arrest and prosecute for certain offenses, or utilizing civil enforcement options. It is important that these policies do not disqualify or create insurmountable barriers for immigrants by, for example, requiring certain forms of identification that some immigrants may not possess. These options will not only keep people out of the criminal justice system, but mitigate deportations. They also may allow noncitizens to access important treatment services, which may be otherwise available if they enter the system.

¹ Please reach out to Rose Cahn, rcahn@ilrc.org with questions about this advisory.

Promote pre-arrest and pre-plea diversion programs. Expanding access to diversion programs can also help mitigate against the “severe penalty” of deportation. Many applications for immigration benefits ask whether a person has ever been arrested. If an applicant answers “yes” that can negatively impact access to certain discretionary immigration statuses. Pre-arrest diversion programs help people avoid a “yes” answer and provide meaningful opportunities to address the root causes of certain conduct. Once a case is charged, it is essential that the diversion program occur pre-plea. Federal immigration policies can use post-plea diverted convictions as grounds for deportation, despite a state court’s subsequent dismissal. In contrast, pre-arrest and pre-plea diversion programs allow prosecutors to address the drivers of crime, such as substance use and mental health issues, thereby promoting public safety while also minimizing immigration consequences for noncitizens. These programs also allow noncitizen defendants access to important treatment services, which may be unavailable if they enter the justice system. Diversion programs—both pre-booking and pre-plea—can also minimize the amount of courthouse contacts and may increase participation by noncitizen defendants in treatment programs.

Create an office-wide policy requiring Deputy District Attorneys to consider the avoidance and mitigation of immigration consequences in their charging, plea negotiation practices, sentencing recommendations and post-conviction practices. Many offenses, including common misdemeanors or infractions, such as drug possession, and petty theft, can lead to deportation or erect a bar to legal status. Thus, the decisions that prosecutors make during the charging and plea bargaining stages can result in overly harsh and unintended consequences for immigrant defendants and their families, results that are often far more punitive than for U.S. citizen counterparts. The U.S. Supreme Court of the United States has encouraged both the defense and the prosecution to consider immigration penalties in the plea bargaining process in order to “reach agreements that better satisfy the interests of both parties.” *Padilla v. Kentucky*, 559 U.S. 356 (2010). Defense counsel and prosecution were encouraged by the Court to work together “to plea bargain creatively . . . in order to craft a conviction and sentence that reduce the likelihood of deportation.”

DA offices should develop flexible guidelines that allow consideration of immigration consequences in a range of criminal cases and consider the individualized circumstances of the defendant and the impact of their deportation on family and/or the community so that justice is best served. In particular, DAs should aim to offer an appropriate disposition or recommend a sentence that serves the interests of justice and protects public safety, yet does not lead to deportation or any other disproportionate effect. This will often involve considering alternative offenses that the defendant can plead to or providing modifications to the sentence recommendation. DAs can charge an alternative disposition that is similar in type of offense, sentencing exposure, and priorability to that which they offer U.S. citizen defendants. Considering immigration consequences during plea bargaining does not necessarily mean forgoing a felony conviction, offering a light sentence, or giving special treatment to noncitizen defendants. In more serious cases, DAs may retain the discretion to mitigate dire immigration consequences on a case by case basis by requiring noncitizen defendants to “plead up” to a more serious offense or to receive a longer sentence or additional penalties to avoid mandatory deportation. To further create parity across U.S. and noncitizen defendant cases and streamline the plea bargaining process, the DA can

come up with standard plea offers to commonly charged offenses that do not result in or mitigate immigration consequences and make these offers available to all defendants.

DAs should not impose stringent requirements as a prerequisite for charging an immigration-neutral disposition. For example, it is inappropriate for prosecutors to ask immigrant defendants to complete a questionnaire, provide immigration documentation, expert declarations, or support letters. It shall suffice for the defendant to provide a general summary about the immigration consequences of the case and the individual impact to the individual, their family, and/or the community.

Streamline clean slate and post-conviction relief practices. Many noncitizens are not adequately advised by defense counsel of the immigration consequences of their guilty pleas and are subject to unanticipated mandatory deportation after completing their criminal sentences. Prosecutors should streamline internal legal processes for handling requests to vacate convictions where the immigrant defendant was not aware of, or able to defend against, the immigration consequences of a conviction. Prosecutors can work with advocates to create streamlined and transparent post-conviction practices by, for example, establishing an office point person who reviews motions and, when appropriate, agrees to stipulate to such motions. The post-conviction practice for noncitizens can mirror the charging practice—i.e., if the DA would have agreed to the alternative immigration neutral disposition on the front end because it satisfies the objectives of protecting public safety, sentencing exposure, and priorability, then, when the defendant raises the same alternative as an immigration-neutral resolution on the back end, there should be no objection to substituting the charge. Some prosecutors have also worked with community groups to run community record-clearing events to help vacate damaging convictions from the records of citizens and immigrants. This work acknowledges rehabilitation and the importance to individuals and the community of granting second chances.

Designate an office point person to be accessible for defenders and community members raising immigration concerns. As essential to an office-wide immigration policy is the designation of an office point person to be responsible for the implementation and accountability for that policy. That point-person does not have to be an expert in immigration law, but should be attentive to ensuring that the deputy district attorneys are acting in compliance with the office policy. This point-person should be available if defenders or advocates have concerns that the office immigration policy is not being effectuated. This point-person can act as a liaison, facilitating dialogue with the community and discussing ongoing immigration issues and community concerns that arise.

No prolonged pre-trial detention, cash bail, or increased bail for noncitizens. Every time an individual is booked, that information is sent to Immigration and Customs Enforcement. Prolonged pre-trial detention through cash bail or other mechanisms increases the likelihood that immigrants will be targeted by ICE upon release from criminal custody. Because cash bail keeps poor people in jails and jails are the primary targets for immigration enforcement, if a noncitizen cannot pay, they will sit and wait in jail, which makes it more likely that ICE will find and deport them. Prosecutors should adopt a policy of releasing an individual in certain cases on their own recognizance. Even when they ask for cash bail, prosecutors should prohibit the use of immigration status as a factor in arguing for higher bail, no bail, or a harsher sentence. There is no empirical evidence that noncitizens are a more dangerous or a greater flight risk due to their immigration status. When minors

are being released, prosecutors should institute flexible policies on the types of identification that are accepted. Policies that limit the acceptable forms of identification can result in the children of immigrants being detained rather than released when noncitizen parents or guardians can't provide that identification.

No reporting to ICE. Where local and state laws allow, prosecutors should adopt a policy of not reporting individuals to ICE as it undermines access to justice for immigrant communities and further erodes already fraught community trust in the system. Elected prosecutors should also use their leadership voice at the county, state, and national level to push back on policies that entangle local law enforcement in immigration enforcement activities. Their role is particularly paramount as they are often the only law enforcement officials with the legal know-how to understand legal and constitutional issues arising against noncitizens. As one key example, prosecutors can stand up against the detention of noncitizens based on the illegal detainers.

Establish the DA office as a safe space for immigrant victims of crimes. Prosecutors can promote their offices and the courthouses as “safe places” for the immigrant community, and partner with community groups and other stakeholders to create alternate systems for crime reporting if immigrants victimized by crime are reluctant to engage law enforcement. Prosecutors should support efforts to create protections in the courthouses against immigration enforcement so that noncitizens can feel safe coming to and appearing in court. Prosecutors can also support efforts to combat immigration attorney fraud by establishing hotlines and other mechanisms that provide defrauded immigrants with a place to turn and prosecute practitioners that are routinely defrauding the community. Prosecutors can also certify victims of crimes for U, S, or T-Visas, or other forms of humanitarian immigration relief, that are crucial pathways for immigrants to legal their status.

Institutionalize community involvement. As part of the effort to understand and engage the immigrant community to ensure safety and pursue justice, prosecutors should institutionalize a practice of engaging with impacted communities through regularly held community forums and town halls. These can be valuable opportunities for community members to voice pressing concerns and fears, share the real impact of the prosecutor's office practices and policies on community members, and for elected officials to address those concerns.