

Protocols for Ensuring Effective Defense of Noncitizen Defendants in California

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The Immigrant Legal Resource Center
www.ilrc.org

Introduction

Most public defenders know that for a noncitizen defendant, the immigration consequences of a conviction can be terribly damaging, often far worse than the criminal penalties. As such, in *Padilla v. Kentucky*, 559 U.S. 356 (2010), the U.S. Supreme Court established what California jurisprudence had affirmed for years, that criminal defense counsel have a Sixth Amendment duty to address the immigration consequences facing noncitizen defendants. Defense counsel's duty is not just to advise but also to defend against adverse immigration consequences. This duty encompasses both avoiding deportability and preserving eligibility to apply for relief from removal.

For these reasons, defenders want to be able to advise their clients of adverse immigration consequences, and if possible identify a disposition that would avoid or minimize them. But how do defenders do this? Immigration law is complex, with its own language and concepts. It is hard for line defenders to get enough time to handle the "regular" aspects of their criminal cases, much less research immigration consequences.

For this article, the Immigrant Legal Resource Center interviewed defenders from four counties in California, each with a different model. The models include having a full-time or a part-time in-house immigration specialist; contracting with an outside organization; having an in-house specialist supported by a contract; and having a full-time in-house specialist who also provides deportation defense. The defenders discuss the elements of these models, how they are funded, what the day-to-day work is like, and advice they would give to others starting such a program.

At the time of this writing, several counties in California have some system in place, and many others are actively considering their options. The purpose of the article is to support conversations about how more defender offices can establish systems to support their line attorneys in providing effective assistance of counsel. While this can be a challenging task, the rewards are enormous. In many but not all cases, felony or misdemeanor, it is possible to work out some disposition that satisfies the prosecution yet avoids or minimizes immigration penalties. With the right information, you can save an individual and a family.

The Models

- *The full-time immigration specialist
- *The part-time immigration specialist
- *The part-time immigration specialist with a contract
- *Contracting with an outside organization
- *The full-time immigration specialist providing deportation defense

The part-time immigration specialist: Graciela Martinez

Los Angeles County Public Defender

Graciela has been with the Los Angeles Public Defender's office for more than 20 years. Prior to that, Graciela practiced briefly with Legal Aid.



Tell us about your position?

I am assigned to our appellate unit, where we do a lot of writs, training, and research, but no trial rotation. Within my unit there are 12 lawyers, all with different specialties – for example, juvenile, police misconduct, etc. I'm the immigration point person. Currently, about 80% of my time is spent on immigration matters. A majority of my time is spent on immigration consultations. Although I devote a significant amount of time to keeping the attorneys updated on immigration law - I do in-house trainings via webinars and in-person trainings. We also have a portal with an immigration page that I regularly update with advisories and other publications.

How and why was your position created?

It's really evolved. I've been in appellate for twelve years and when I first started it was about 50% of my time. Since then, we've seen many more resources dedicated to the topic. Today, it's 80% of my time. We have a dedicated training program on the topic, and our lawyers are much more knowledgeable about immigration consequences. This is in alignment with the holistic approach our office has taken in responding to client needs.

How do attorneys request an analysis from you and about how many requests do you receive a week?

We have over 800 lawyers, including managers. I get around 100 requests a week. We have a system where attorneys can call me, e-mail me, or even text me with questions. People can contact me any time, there's no special process or form. We're pretty flexible and try to be accommodating to the individual attorney's needs.

What kind of information do you include in your final analysis to a public defender?

It really varies and can include a bevy of information such as pleading tips or alternative offenses, depending on what's happening in the case. So the response is very customized. In an office of our size, you have to be flexible. After the consultation about the immigration consequences of the proposed disposition and possible alternative dispositions, it's the lawyer's responsibility to document the response in the case file.

What type of response have you received from public defenders in your office?

The attorneys are really grateful – absolutely – and not just for the advisals but also for connecting them with partners outside of the office. For example, we've had success in getting some clients released with the help of the ACLU.

How did your office fund this position?

It is part of the existing office budget.

The part-time immigration specialist: Graciela Martinez

What is your response to offices that say they don't have the resources to have immigration resources?

The U.S. Supreme Court has spoken pretty clearly on the issue. It's important to get office buy-in and to create a cultural shift in the importance of this topic.

Second, it's doable if you start off small and grow slowly. Designate at least one or two lawyers who can be the point people on immigration. If there's resistance and you have to start with smaller steps, just have those people be in charge of distributing immigration law updates created by other organizations. Eventually, you can create internal expertise. Here, start off with one person and create time in their schedule to learn immigration law. It would be difficult for someone who's in court constantly. It's too much for one person to take on.

Finally, it's important to have outside support. There are organizations like the Immigrant Legal Resource Center who create immigration materials tailored for defenders and can help build internal expertise.

What's your advice on choosing the right person for this position?

It depends on the office. In a bigger office, it's probably better to hire from within and get the person trained on immigration law. In a smaller office, it may be easier to bring in someone from the outside. It also depends on the structure of the office. A less centralized office might be better equipped to absorb someone from the outside.

If you're bringing in an immigration attorney, make sure it's someone with deportation defense experience in immigration court. You also need someone who understands criminal procedure, ideally someone who knows how things work in your county so that they can make realistic recommendations in their advisals. Having someone who already knows the office culture is a big plus. You need someone more senior too – you need credentials for the more senior lawyers.

The full-time immigration specialist: Daniel DeGriselles

San Bernardino County Public Defender

Dan has been practicing law for 34 years, with 15 of those at the San Bernardino Public Defender's office.



Tell us about your position?

I'm a Level 5, senior deputy public defender and subject matter expert on immigration. The deputy position is full-time but technically a temporary assignment which is reviewed every 12-18 months pursuant to our MOU. My deputy five position includes responding to questions from defenders regarding immigration consequences, a large variety of immigration trainings for seasoned and new attorneys in our office, and sending immigration law updates regularly to the entire office. Also, noncitizen clients and their families are often referred to me by staff and management when issues arise. I'm often asked to speak with family members, and sometimes clients themselves, to assist with immigration issues and location of immigration documentation. I've been busy lately re-establishing connections with persons and agencies in the community, such as local consulates of foreign nations and the ACLU. The list goes on.

The full-time immigration specialist: Daniel DeGriselles

When was the position established?

I officially started as the immigration advisor for the office in 2008. I had been working in the public defender's office with a full felony calendar since 2000. I had been reading immigration law for a number of years and I advised clients on immigration consequences in my private practice in Big Bear before joining the public defender's office, and my public defender clients thereafter. My chief asked me to accept appointment to a Deputy Level 5 subject matter expertise position, and I was appointed in 2008. I have been reading immigration law more broadly since. I was relieved of my felony case load and asked to handle this along with writs and appeals in 2013, but there wasn't enough time for all that so in a couple of years, the immigration position went full-time. Today, I'm handling this full time, and have expanded the list of projects I handle. The position is in line with our holistic approach adopted by Ms. Morris, our public defender, focused toward meeting all of our clients' needs.

What's the process for responding to immigration questions from defenders and about how many questions do you get a week?

We have about 120 deputy public defenders, I believe, and I have an average of 30 pending questions in my inbox at any given time, with currently 1,054 requests completed the last two years. I have a questionnaire that defenders fill out, they send it to me, and I then calendar it for review. Sometimes I get emergencies and for those I drop everything. I also answer questions through office visits, which I just started. During the visits I get to talk to deputies in person, and even judges and DAs. I also interview clients as needed for deputies.

How do deputies know to submit questions to you?

I did several trainings in the beginning and talked up the position. I regularly circulate the immigration questionnaire and about two to three times a week I send out legal updates and advisories on topics such as the immigration consequences of DUIs. I also send out memos on how to talk to DAs and judges about immigration, so I stay on their minds. The public defender also signed and issued an office wide protocol on immigration consequences recently, which requires deputies to ask each client about citizenship, and to contact me if the client might not be a citizen, which is helping immensely.

What kind of information do you include in your final analysis to a public defender?

I provide a lot of detail since I also use it as a teaching tool. I cover points such as immigration status, reasons why I'm making certain suggestions, and I try to give defenders various pleading options. I often discuss, at least briefly, the consequences of a win, or a loss, at trial, and what the record will look like if the client chooses trial and loses. I'll cover things like travel restrictions, green card issuance and renewal requirements, how convictions can affect various forms of status such as TPS or asylee, how to create a safer record, and such. I always tell them to archive the worksheet and my response in the client's file.

What was involved in funding this position?

It was funded from the existing budget and I count as a regular felony deputy. I'm in the Human Services unit now, which seems an excellent fit. Deputy fives of every sort have to re-interview every 12-18 months, including me, but I'm just funded from the existing budget, and have been since 2008.

What do you think is the biggest benefit of the model your office has adopted?

I have about 30 years of criminal law background, a number of years reading immigration law, and I've been in the county, both as private counsel and as a public defender, a long time. This all carries weight and the deputies listen to me. I know many judges and district attorney deputies, and many in law enforcement. Having me available in-person is also a big benefit. I'm able to answer questions at office visits and also offer a lot of in-person trainings.

The full-time immigration specialist: Daniel DeGriselles

What is your response to offices that say they don't have the resources to have immigration resources?

Have you no concern for your deputies? How does a deputy who's handling twenty pre-preliminary hearing files a day study a foreign body of law and advise clients in that area of law? Individual deputies can't be expected to do this on their own, on top of their caseload. The deputies are on the line if they don't advise on immigration consequences, both through state bar proceedings for handling cases without having an objectively reasonable level of competence, and for lawsuits for malpractice. More importantly, the client's status is at risk if we don't take this seriously. It's a lawsuit waiting to happen and it's not going away anywhere. You can't afford not to invest.

What's your advice on creating a position? What about funding and choosing the right person?

If you don't have the money to create a new position, you can do it within existing budgets. You can cut down one person's caseload and create internal expertise. Plenty of training materials and practice advisories and experienced lawyers, are available as resources. That way, you don't need more money, you're just redistributing some cases to others. If you have the budget, hiring from outside is good too.

In terms of finding the right person, I would look for two things. One, experience in criminal law. The person must be able to communicate with experienced public defenders and be able to understand their concerns as criminal law defenders. Two, pick someone who knows immigration law or is interested in learning it. This is important, as you can't force it on someone if they're not interested. Send out an office e-mail and find someone who's interested. Lighten their caseload to give them time to start learning immigration law. Send them to trainings. Hold off on new assignments! The downside of this approach is that the person you choose probably hasn't practiced in immigration court, but there's a good number of attorneys who are willing to lend assistance and to mentor.

If you need someone to help close the deal in creating this position, I'm happy to go in person and talk to your office.

The contract model: Paulino Duran

Sacramento County Public Defender

Paulino is the Public Defender in Sacramento County and manages an office of 157 people, including 103 attorneys.



Tell us about your model?

We contract with the Immigrant Legal Resource Center (ILRC) to provide immigration consultations for our cases. I learned about the ILRC through local partners and became more familiar by attending their trainings. Through the ILRC, we have trained immigration attorneys responding to each question. The support has been invaluable. It's too difficult for each attorney to keep up with an additional area of law that is volatile and different in many ways to criminal law. It's unrealistic to expect deputies to understand immigration law at the level required to assess the immigration consequences, and keep up with a heavy criminal caseload. The contract with ILRC provides this expertise for us.

How do you ensure that your deputies use the contract?

Supervisors emphasize that it is ineffective assistance of counsel not to advise clients of the immigration consequences. Supervisors hold deputies accountable by asking if they've secured an advisal on a case if we know that the client is a foreign national. Attorneys also receive training on immigration law. We've worked hard to change office culture on the issue and appreciate that this has created much better resolutions for our clients.

The contract model: Paulino Duran

How do you fund this contract?

We had some Ineffective Assistance of Counsel claims – not many, but the County saw how even a small case can alter someone’s life through the immigration consequences. I went to the county and pushed that this was an area that needed improvement, that clients were not being effectively represented in this regard. The county listened and I obtained authority to enter into a contract with ILRC.

What’s the benefit in contracting with an outside immigration organization?

You get a sophisticated understanding of immigration law from an organization where that's their specialty. Immigration law is much more complex than many criminal attorneys realize so this is important. Moreover, you are not limited to the services of one immigration specialist. You get the services of whichever specialists are available.

How do attorneys submit a request for an immigration analysis?

We treat immigration requests the same way that we treat requests for other experts needed in a case. We have a budget for retention of experts and a deputy has to get approval from a supervisor to secure an expert, so it’s done by need. Immigration requests are automatically approved. Deputies are trained as to what information to provide in submitting a request and how.

Why is it important to have a model in place to address immigration consequences?

Ineffective assistance of counsel. If you don’t do a decent job on immigration, IAC will come back to haunt you. Forget the IAC claim, you are hurting an individual and a family and a community. The financial cost isn’t that much considering the cost to the community.

This is just another form of expertise. We all use experts in our cases, medical doctors, DNA experts, etc. You need to get an expert for the immigration consequences too. It’s our responsibility to prove effective assistance of counsel and we can’t be afraid to ask for more money to get it.

The full-time immigration specialist: Raha Jorjani with select representation in immigration court



Alameda County Public Defender

Prior to the defender’s office, Raha worked for eight years as a deportation defense attorney, including six years as faculty at the U.C. Davis School of Law Immigration Clinic. The Alameda County Public Defender's Office is the first on the West Coast to provide representation for immigrants in deportation proceedings, with San Francisco County Public Defender’s office being the second. Alameda County expanded their model by hiring a second immigration attorney in the summer of 2015.

Tell us about your position?

There are two main parts. First, I am responsible for providing advisals on immigration consequences to over 100 attorneys in office. I respond to about 15-20 requests a week. I also conduct office-wide and county-wide trainings, not just at the public defender’s office but also to judges and even the DA’s office. Other county offices, such as the Sheriff’s Office and Probation have used me as a resource as well.

The full-time immigration specialist: Raha Jorjani

with select representation in immigration court

Second, I provide immigration representation in limited cases for current or former clients of our office. After the criminal cases, noncitizen clients often need immigration counsel. In the absence of a statutory right to appointed counsel, our office has stepped up to try to make a difference in cases where our immigration representation can impact outcomes. This representation is before the Immigration Courts, the Board of Immigration Appeals, the Ninth Circuit, or before Citizenship & Immigration Services. I also represent juvenile clients in state court proceedings on immigration issues. Not every client can be represented in immigration court, but every client has the opportunity to get competent immigration advice in the criminal case.

How and why was your position created?

Five years ago I started doing immigration advisals at the public defender's office part-time. Over the years, office culture began to change on the topic of immigration consequences and great attention was paid to the particular needs of non-citizen clients. We were eventually able to expand to representation in immigration court. This was an important step. If advising on immigration consequences is part of effective representation, then what happens to our clients based on the dispositions that we negotiate is also critical. The only way to ensure that our work isn't for naught is for clients to have counsel in immigration court. Educating counties about that last piece makes a huge difference – that representing clients in immigration court is (in certain instances) a continuation of the defense case.

Another reason the position was created is that our Public Defender emphasizes holistic defense. Our office aims to address client needs holistically, by bringing in social workers or helping people sign up for medical benefits. Immigration representation naturally fit into this holistic approach.

What obstacles existed to creating the position?

The key was starting off slow. I worked with the Public Defender's Office in a part-time advising-only capacity for five years before I was able to propose and implement our immigration representation unit. By the time the full-time immigration attorney position was being introduced, public defenders in our Office saw the need for a full-time immigration consultant and defense attorney. In terms of funding, there was no new money or grant. Instead, my position is funded by the regular budget.

How does a public defender submit a request for an immigration analysis and what kind of information do you include in your response?

Defenders fill out a page-long intake form that helps me gather all basic information needed for a competent assessment. I use this same form to screen for possible immigration representation thereafter. There are also last minute calls from court, but I try to keep responses in writing. After a call, I'll memorialize the conversation in an e-mail.

In my responses I include alternative charges, plea language, pleading tips, etc. I also include arguments regarding how to plea-bargain with the DA. I explain how to use immigration law in the bargain process.

The full-time immigration specialist: Raha Jorjani

with select representation in immigration court

What type of response have you received from public defenders in your office?

The response has been overwhelmingly positive. Alameda County public defenders care deeply about clients and want to protect their rights as much as possible. I regularly hear attorneys express how happy they are to have access to an immigration specialist as a part of their daily defense practice.

Can you tell us about a success story from one of your cases?

The Defenders Office had previously represented a juvenile client, charged as an adult. After pleading, he served his sentence in criminal custody only to be detained anew in immigration custody. He was fighting his immigration case pro se and contacted our office for help. I took his case and we won through a motion to suppress, after we discovered that probation had communicated his information to ICE in violation of state juvenile confidentiality laws. My position within the office helped me better understand the criminal process and more easily access information; both of which contributed to the success of this case.

What would you say to other offices that don't currently have a model to address immigration advisals?

It is more doable than you think. At a minimum, every public defender office should have a plan in place for complying with *Padilla v. Kentucky*. Having an immigration attorney embedded in a public defender office not only allows you to meet the specific needs of noncitizen clients, but also allows your office to stay on top of rapidly changing immigration laws, policies, and enforcement trends that impact communities that your office serves. It's hard to even know what the needs are if there are no resources to monitor, investigate and explore what is happening at the intersection of criminal and immigration laws within your county. I believe that adopting a model to provide immigration advisals is inevitable. You want your office to be proactive about it as opposed to addressing it on the back end while facing an ineffective assistance claim.

What's your advice on choosing the right person for this position?

In an ideal world, you would want someone with both criminal defense and immigration defense experience. I tend to think that choosing an attorney with deportation defense experience is particularly beneficial since that attorney will be familiar with the actual and practical consequence of criminal convictions; having had to defend against such consequences on the removal defense side. Sometimes, knowing what the case law says and knowing how convictions are actually being treated by Immigration Judges are two different things. Thus, you might get more realistic and updated advice.

Next steps: How do I turn this into action?

1. Decide which model is best for you.

This assessment can vary from office to office and can change over time. Importantly, providing accurate advice regarding immigration consequences is the constitutional mandated floor, not the ceiling. Thus, at a base minimum, any model should ensure that noncitizen defendants are properly advised, and that adverse immigration consequences are defended against. Providing legal representation in deportation proceedings is not a constitutional mandate, but may still be a goal in certain offices.

In your personal assessment, consider if the best fit is the full-time immigration specialist, the part-time specialist, the full-time with deportation defense, the part-time with a contract, the contract model exclusively, or some hybrid? In choosing a model, consider the size of your office, the number of noncitizen clients in your office's caseload, existing staff with interest and/or expertise in this area, and your budget.

You can revise your goals as funding, political support, and defense needs change.

2. Consider funding.

The biggest roadblock in establishing protocol for immigration advisals is often funding. Consider, can additional time be allocated to existing staff to assist, whether a line attorney or a research attorney? Can you use resources that are earmarked for experts? Are there other funding sources that can be leveraged to hire someone, even on a part-time basis or for a limited scope contract?

3. Consider a short term and long term strategy to obtain your goals.

For example, your ultimate goal may be to obtain a full-time in-house immigration specialist. Short-term steps to achieve this goal might include, identifying someone on staff who wants to gain immigration expertise and create room in their workload to start building expertise; shift office culture to appreciate the importance of guarding against immigration consequences; create a part-time position; ensure that the position is plugged into statewide crim/imm networks to continue building expertise; document impacted clients and success stories if needed for funding; and finally, expand the part-time position to full time.

4. Ensure that whatever position you create, whether great or small, has sufficient support to develop immigration expertise.

Immigration law is extremely complex and unless the individual in your immigration position is already an expert in deportation defense, immigration law, and in particular "crim/imm," you should ensure that there are adequate resources from within and/or outside to build this expertise. If you are building this expertise in-house, make sure to create sufficient room on the attorney's plate to gain expertise in this complex area of law. The ILRC hosts an active network of crim/imm experts and is available to support internal development.

5. Get help!

Rome was not built in a day and neither were any of the highlighted models. The right model will take time and as you broach the task, the ILRC is here to provide support.



About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) is a non-profit organization, based in San Francisco, California that is recognized as a national leader in the field of the immigration consequences of crime. Since 2002, ILRC has coordinated the California Defending Immigrants Partnership (Cal-DIP) a program designed to facilitate the necessary collaboration between public defense counsel and immigration law experts to effectively and efficiently help defenders represent noncitizen clients.

The ILRC offers defender offices and individual defense counsel critical resources and training about the immigration consequences of crimes. Our goal is to actively encourage and support development of in-house immigration specialists in defender programs, forge connections between local criminal defenders and immigration advocates, provide defenders with technical assistance in criminal cases, and develop and implement models and best practices. The ILRC also has taken the lead in critical litigation, and works on policy and public education initiatives.

We are available to assist your office in building, or expanding, immigration advisals and other services to your noncitizen clients. For inquiries, please contact Angie Junck at ajunck@ilrc.org

ILRC resources that are available to California criminal defenders include:

Free Online Resources

The ILRC is the author of the Quick Reference Chart and Notes for Determining Immigration Consequences of Selected California Offenses, an abbreviated immigration consequences guide written specifically for criminal defense counsel. The most current version of the Chart and Notes can be downloaded at www.ilrc.org/crimes.

The ILRC coordinates a national and comprehensive online resource library on the immigration consequences of crime for criminal defenders at www.defendingimmigrants.org (registration is required but free). The library contains numerous practitioner quick-reference guides, as well as in-depth practice advisories, with resources available for both beginning and advanced criminal defenders including: quick reference/cheat sheets on immigration consequences of crimes, lists of key strategies to effectively defend noncitizen clients, materials on immigration enforcement in the criminal justice system, know your rights materials for defendants, and defense of noncitizen juveniles.

Print Resources

The ILRC is the author of the definitive print resource on immigration and criminal law in the Ninth Circuit and California entitled *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws*, written by Katherine Brady with Norton Tooby, Michael K. Mehr and Angie Junck. This is an excellent resource to have in defender libraries as it provides accessible and in-depth analysis on immigration consequences of crimes, including defense strategies in criminal court and techniques on creating immigration-safe factual bases and pleas based on California criminal law and procedure. To order a copy go to: <https://www.ilrc.org/publications/>

Mentorship and support of in-house experts in public defender offices

The ILRC convenes in-house experts across on California on a monthly basis to share and discuss legal and policy updates and strategize on issues arising in the intersection of immigration and criminal law. We work individually with in-house defender experts to provide them training, technical assistance, materials, and other assistance as needed to help them support their office in the effective representation of noncitizen defendants. If you are interested in becoming an in-house expert or obtaining internal support for your office contact Angie Junck at ajunck@ilrc.org.



About the Immigrant Legal Resource Center

A statewide interactive listserv

The ILRC maintains a free listserv where beginning and advanced in-house experts, and immigration experts, can connect. This is a place to share developments in the law and in the field, to share court strategy in pleading cases, to post questions regarding individual cases, and to share other news and trends. This listserv is a small listserv with limited activity; generally only a few postings per month. If you are interested in joining the listserv contact Angie Junck at ajunck@ilrc.org.

Technical Assistance in Individual Noncitizen Cases

For a fee, the ILRC offers consultations to public defenders in individual criminal cases through the Attorney of the Day Program. This service saves defenders time from researching complex immigration issues on their own and ensures that they are providing effective assistance to noncitizens on what, in some cases, is the most crucial aspect of the case. Through this service, ILRC attorneys are available for consultation four days a week. To learn more about this service, visit: www.ilrc.org/AOD. For any questions or to sign up, contact Phil Garcia at pgarcia@ilrc.org.

Trainings and Webinars

The ILRC provides webinars, podcasts, and full day, in-person trainings on various immigration criminal topics during the year. A schedule can be downloaded at www.ilrc.org/seminars. The ILRC may also provide some free training to individual offices at request. To inquire about this, contact Angie Junck at ajunck@ilrc.org.

Other Resources

For an in-depth discussion of how to launch a program in your office, see Protocol for the Development of a Public Defender Service Plan by New York State Defenders Association, Immigrant Defense Project, and Peter Markowitz, Cardozo School of Law, 2009 <http://immigrantdefenseproject.org/wp-content/uploads/2011/03/Protocol.pdf>

Tooby's Guide to Criminal Immigration Law: How Criminal and Immigration Counsel Can Work Together in Criminal Cases (2008). This 230 page volume, being offered for downloading free of charge by the Law Offices of Norton Tooby, includes strategies for avoiding deportation at each stage of a criminal case: investigation, consultation, plea, sentence, post-conviction relief. <http://nortontoby.com/free/ToobysGuide.pdf>

To learn more about the ILRC please visit www.ilrc.org