IMMIGRANTS & PLEAS IN PROBLEM-SOLVING COURTS: A GUIDE FOR NONCITIZEN DEFENDANTS & THEIR ADVOCATES

Prepared by the New York State Defenders Association Immigrant Defense Project
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This guide is for information purposes only and is <u>not</u> a substitute for legal advice.
The information here may no longer be up-to-date.
You should talk to a qualified immigration expert before agreeing to enter any plea or program.

Problem-solving courts can give some defendants a chance to participate in rehabilitation programs and rejoin their communities rather than face time in jail or prison.

However, if you are a noncitizen, you might face deportation or other negative immigration consequences if you participate in certain problem-solving court programs. This guide explains why you are at risk, and what you and your attorney or reentry service provider can do to help you avoid these risks when working with problem-solving courts.

What are problem-solving courts and how do they work?

"Problem-solving courts" are courts that focus on treatment and rehabilitation rather than long prison sentences. Examples of "problem-solving courts" are drug courts, domestic violence courts, mental health courts, and community courts.

Defendants who participate in these special courts are often required to plead guilty to the criminal charges against them and/or admit to committing a crime. Instead of being immediately sentenced to prison, however, the defendant is ordered to attend a program (for example, drug treatment or anger management/batterer classes). The court carefully monitors the defendant's progress. In some courts, if the defendant completes the program successfully, the criminal charges are reduced or even dropped. In other courts, the defendant may end up with a low-level criminal conviction or non-criminal violation or regulatory offense.

If my charges are dismissed or if I only end up with a non-criminal violation or offense, why would participation in a problem-solving court lead to deportation or other negative consequences for me?

The definition of "conviction" in immigration is law is broader than the definition of "conviction" in criminal law. Immigration law defines a conviction as:

> "A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where:
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> > (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, AND
> > (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed."

This definition of "conviction" for immigration purposes can cover some charges or offenses that are not even considered "crimes" in criminal law. Furthermore, even if your charges are dropped because you successfully participated in a program, immigration law might still treat the combination of your plea in court and the court order requiring you to attend a program as a "conviction" for immigration purposes. That "conviction" might make you deportable or unable to get permanent resident status or citizenship.

Before you plead guilty to anything, you should check with an immigration attorney to find out if there are immigration consequences to your plea. If you already pled guilty to something, check with an immigration attorney to find out whether you are deportable and if you might have a way to fight deportation.

What if I didn't have to plead guilty or admit any guilt to a crime?

If you are told that you do not have to plead guilty or admit guilt to any crime, then you probably will not have a "conviction" for immigration purposes. An Adjournment in Contemplation of Dismissal (ACD) in New York law is an example of the kind of result that will not lead to deportability if you did not have to plead guilty. However, you should be careful about what you do before your case is actually dismissed.

Even if you are not deportable, any interaction with the criminal justice system, even an arrest or case not yet dismissed, can give the Department of Homeland Security a reason to scrutinize your application for permanent residence or citizenship more closely, or cause problems when you are trying to travel to and from the United States. Always talk to an immigration attorney to be sure about what to expect, and if possible, avoid traveling or submitting applications to the Department of Homeland Security until your case is actually dismissed.

What if I have old convictions?

Any old convictions might get you into trouble, even if your current court case results in an outright dismissal or an Adjournment in Contemplation of Dismissal (ACD). Immigration law has changed in recent years, and some old convictions are now deportable offenses even though they were not deportable offenses in the past. You should talk to an immigration attorney to find out what risks you face now.

How can I, or my attorney, find out whether my case in problem-solving court or old convictions will cause immigration problems?

You or your lawyer should speak to an experienced immigration attorney to find out whether what's happening in court (the plea offer, an agreement to attend a program, etc.), or old convictions you already have, will result in immigration problems. As explained above, even pleas to some misdemeanors and non-criminal violations might result in deportation or other immigration problems. Your risk of being deported might also depend on your immigration status (whether you are a greencard/permanent resident card holder, a refugee/asylee, or undocumented), your criminal record (even if your convictions are very old), how many years

you had been living in the United States before committing any crimes and/or whether you have relatives in the United States.

You or your advocate can get free advice from the NYSDA Immigrant Defense Project, (718) 858-9658 ext. 201. For more written information, please see "Understanding the Immigration Consequences of Your Criminal Charges" by the NYSDA Immigrant Defense Project.

When might the government start deportation proceedings against me if I've already pled guilty to a deportable offense in a problem-solving court or have an old conviction that makes me deportable?

Even if your case is going to be dismissed and sealed, you may still be at risk for deportation if you pled guilty or admitted that you committed a crime in court and then are ordered into a program, or have an old conviction that makes you deportable. The government might find out about the current plea/admissions of guilt or the old conviction in the following circumstances:

(1) When you are in jail or prison, even if only for a short period of time (including if you are imprisoned for a few days as a "sanction" for failure to comply with the rules of your treatment program)
(2) If you are returning to the United States from an international trip
(3) If you apply for a lawful permanent resident card (greencard) or citizenship
(4) If you renew your greencard
(5) If you have other interactions with government officials (including police, border agents, and others)

If you do not follow the rules of your court-ordered program, the court might send you to jail for a few days (this is a common sanction in drug treatment courts, for example). Many jails permit immigration officials to interview people being held there. You should not answer any questions without your lawyer present, but you can avoid this situation altogether if you comply with the rules of your court-ordered program, so that you are not sent back to jail or prison. Also, before you decide to travel outside the U.S. or submit any immigration/citizenship applications to the government, you should consult with an immigration attorney to find out if you could face deportation or other negative immigration consequences.

What are some examples of how noncitizen defendants have been placed in deportation proceedings following participation in problem-solving courts?

Consider these examples, taken from New York State law:

Example 1: Jane is a lawful permanent resident (i.e., a green card holder) and has been charged with Criminal Possession of a Controlled Substance in the 5th degree, a class D felony (NYPL 220.06). She pleads guilty to this charge as part of a drug court program and is ordered into drug treatment. Upon her successful completion of the program requirements, the charges are dismissed. She believes that she does not have a conviction on her criminal record. A year later, Jane applies for citizenship. The application form instructs her to disclose if she has ever been placed in a rehabilitative or diversion program. She explains the

drug treatment order. The Department of Homeland Security initiates removal proceedings against her, saying she can be deported because of her conviction.

Example 2: John is a noncitizen and does not have legal status. He has been married to a United States citizen for five years. John has been charged with Aggravated Harassment, 2nd degree, a Class A misdemeanor. He pleads down to Harassment in the 2nd degree (Penal Law 240.26), a violation. It is his second such conviction. He is sentenced to a conditional discharge and a batterer program. He completes the program successfully and receives a discharge. A few months later, his wife sponsors his adjustment of status application so that he can receive lawful permanent resident status (a green card). He is placed in removal proceedings, and told that he might be deported on the basis of his status and his convictions.

What options in problem-solving court will give me the best chance of rejoining my family and community in the U.S. rather than being deported?

Some problem-solving courts and prosecutors may be willing to consider certain alternative arrangements for noncitizen defendants who want to preserve their opportunity to rejoin their families and communities. These alternatives help fulfill the objectives of problem-solving courts because they permit the defendant to seek rehabilitation and return to his or her family as a law-abiding caretaker and wage earner.

You can ask your criminal defense attorney and/or reentry advocate to approach the court with the following alternatives:

1. Ask to enter the program without pleading guilty

Some courts will permit defendants to participate in court-ordered treatment without pleading guilty to the initial criminal charges (for example, through an Adjournment in Contemplation of a Dismissal (ACD)). Your criminal defense attorney should ask the court to consider that option in your case. If the court seems unwilling to drop the plea requirement, your attorney can offer something else instead of a guilty plea or on-the-record admission. For example, with the assistance of your attorney, you could sign a contract with the prosecutor in which you agree to give up certain trial rights in exchange for entering the court-ordered program without any admission of guilt.

For examples of the kinds of alternative arrangements that have been successfully used in problem-solving courts, contact the Immigrant Defense Project at (718) 858-9658 ext. 201.

2. Ask to plead to a different charge

Some courts will not be willing to consider letting you participate in the treatment program without some kind of guilty plea. In that case, you should talk to your criminal defense attorney about whether another plea might be appropriate given the facts of your case. For example, while a plea to a drug offense will almost certainly make you subject to possible deportation, a plea to another charge in your case might leave you in a better position to face

any future immigration issues (such as a low-level simple trespass or resisting arrest offense, which might be a safer option in some states).

Contact the Immigrant Defense Project at (718) 858-9658 ext. 201 for advice about possible alternative pleas in your case.

3. Ask to enter the program without a court order requiring your participation

If you are never formally ordered by the court to attend a program as part of your criminal case, you might be able to argue that you do not have a "conviction" for immigration purposes. Some courts may permit you to enter a program voluntarily or through an off-the-record agreement with the prosecution, and then later will dismiss the charges without having ordered you to do anything. Thus, you may be able to argue that there is no court-ordered "punishment, penalty or restraint on liberty" in your case, and thus it is not a "conviction" under immigration law. However, there has not been much litigation on this issue, so we do not know if you will be safe from deportation simply by entering a program on your own or through an off-the-record agreement. But, if the court is willing to let you enter the program without a court order and either does not require a plea or allows an alternative plea, you will be in a strong position to argue that you do not have a "conviction" for immigration purposes.

The law on these issues is not fully developed. You should always contact an immigration attorney for advice before accepting any plea or diversion program. We are available to help you make these decisions. Contact the Immigrant Defense Project at (718) 858-9658 ext. 201.