

## Virginia Lawyers Weekly, December 12, 2014

### Prosecutors would have duty under VSB proposal; LEO takes ‘Padilla’ case into account

Peter Vieth, December 12, 2014

A new effort to ensure that immigrant criminal defendants don’t unwittingly risk deportation would impose an ethical burden on prosecutors.

Prosecutors are expected to question whether they should be put in the position of advising defendants about their rights under a proposed Virginia State Bar ethics guideline.

Proposed Legal Ethics Opinion 1876 would bar Virginia prosecutors from making plea offers to unrepresented noncitizen defendants without mentioning the possible immigration consequences.

The proposal from the VSB ethics committee grew out of concern about some general district proceedings in which defendants were allowed to plea bargain without legal advice, putting them unwittingly at risk of deportation.

In 2010, in *Padilla v. Kentucky*, the U.S. Supreme Court said bad legal advice on immigration consequences amounted to a violation of the constitutional right to counsel.

The issue arises because seemingly innocuous convictions – shoplifting or marijuana possession for instance – can lead to a one-way ticket out of the country for some immigrants.

Under federal law, aliens can be deported for crimes involving dishonesty or crimes punishable by a year or more in jail. Many such cases are heard in Virginia general district and juvenile and domestic relations courts.

Despite the risk of deportation, under Virginia law many such defendants are allowed to approach the judge without a lawyer because they are not facing jail time. Based on a prosecutor’s offer, they might agree to plead guilty to a misdemeanor to avoid the risk of a felony conviction.

What happens next, when the defendant stands before the bench, differs depending on who wears the robe. There is no Virginia rule to tell district level judges how to handle plea agreements.

“Since there is no governing rule, formalities of plea bargains vary across the state,” according to the District Court Judges’ Benchbook distributed by the Supreme Court.

Some judges conduct a more formal inquiry following the recommended circuit court colloquy set forth in Rule 3A:8, while others conduct no inquiry at all, the Benchbook said.

The Benchbook, prepared by the Association of District Court Judges of Virginia, says “judges continue to consider whether some judicial response to *Padilla* is appropriate.”

A district court form for guilty pleas, DC-324, provides notice that a person pleading guilty waives the right to confront accusers and the right against compelled self-incrimination.

That form does not mention any possible immigration consequences, however.

Another form was revised in 2012 to provide a *Padilla* notice when a criminal defendant proceeds without a lawyer.

Form DC-335 now includes this language: “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.”

The form is available in both Spanish and Vietnamese translations.

For several years, some lawyers have questioned whether *Padilla* protections were being undermined by fast-paced court proceedings in Prince William County.

“This really frustrates me,” said lawyer Mark R. Voss, who often represents immigrants in his Manassas practice.

He said what seems like a great plea deal for a first-offense marijuana-possession defendant – a deferred disposition with the expectation of dismissal – still can lead to deportation.

Allowing an immigrant to take such a deal without considering deportation is a clear *Padilla* violation, Voss said.

Alexandria civil rights lawyer Victor M. Glasberg asked then-Chief Judge Peter W. Steketee of Prince William County General District Court to help make sure noncitizen defendants were advised about deportation risks. Glasberg said his letters to the judge were ignored.

“I wrote the guy a half a dozen letters and never got an answer,” Glasberg said.

On another front, Glasberg urged officials at the Supreme Court of Virginia to revise the form for unrepresented defendants to add a *Padilla* notice. The notice was added, but he remained frustrated that judges continued to allow noncitizen guilty pleas without anyone raising the immigration issue.

Unable to marshal any impetus for judicial oversight, Glasberg requested a VSB legal ethics opinion that prosecutors have a role to play in guarding against unwitting immigration blunders.

“I am hoping that acting on the prosecutors will carry the day,” Glasberg said.

Glasberg said he expects opposition at first from prosecutors, but he hopes they will come around. He says the issue “is so obviously clear.”

“This is a no-brainer, so I think the prosecutorial climate will change. I’m just sorry the judiciary does not weigh in,” Glasberg said.

Immigration issues have driven politics in Prince William County for years.

The “Hispanic or Latino” population in the county was 21.5 percent in 2013, according to U.S. Census data. Some government leaders openly sought to limit the impact of a large number of

immigrants in the region. Tensions mounted between immigrant advocates and those who blamed immigrants for new social problems.

The Hispanic Bar Association of Virginia publicly opposed a judicial candidate for Steketee's bench seat in September, claiming that W.S. "Wally" Covington III had displayed a bias against Latino immigrants.

Covington was elected to the bench by the General Assembly Sept. 18.

The anti-immigrant sentiment in the county reached high levels, Voss said.

"It's vicious, it's horrible and it's infected the judiciary in some sense and some prosecutors," he said.

The right to be advised of unforeseen adverse consequences of a guilty plea should reach beyond non-U.S. citizens, contends Manassas lawyer Lisa Johnson-Firth.

"Every person should be warned that they might want to consult a lawyer before they just plead out," she said.

The temptation is to fast-track the minor cases, both Voss and Johnson-Firth said. Sometimes the prosecutor does not even get involved – the judge just makes a proposal for the defendant as a case is called.

Richmond lawyer David P. Baugh questioned the adequacy of Virginia general district plea colloquies – or the lack thereof – in a Henrico County case this year. The judge rejected Baugh's constitutional challenge to Virginia practice.

Now, the VSB ethics committee says prosecutors should play a role in avoiding defendants' immigration blunders.

"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 panel wrote in proposed LEO 1876.

The prosecutor would be taking advantage of an unrepresented defendant in such a circumstance, the LEO states.

LEOs are considered ethical guidance for attorneys. They do not have the force of court rules.

The VSB will receive comments on the proposed LEO through Jan. 5. Comments can be sent to VSB executive director Karen Gould at [publiccomment@vsb.org](mailto:publiccomment@vsb.org).

Steketee declined to comment for the record.

Chesapeake Commonwealth's Attorney Nancy G. Parr, current president of the Virginia Association of Commonwealth's Attorneys, said the VACA board discussed the proposed LEO this month and plans to submit a comment to the VSB. The group had "several concerns," Parr

said.