



Practice Pointer

When a Referral to Deferred Prosecution IS NOT Enough: Representing Immigrants Charged With Domestic Violence

By: Anthony Delyea*

A deferred prosecution agreement (DPA) that requires the defendant to enter a guilty plea is a conviction under immigration law, even without entry of a judgment of conviction (JOC). Immigration law defines “conviction” more broadly than Wisconsin’s law. Immigration’s definition is found in 8 USC § 1101 which reads in pertinent part:

(48) (A) The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—

(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.

The defense bar must fashion pleas that allow the client to obtain the benefits of a negotiated plea, without collateral –immigration convictions– and consequences that outweigh the sentence imposed in state court pursuant to joint recommendations.

The task is amazingly simple; we can draft “Stipulations of Law and Fact” that exclude allegations and elements relating to violence. See sample “[Stipulation of Law and Fact](#)” that follows this article. The sample provides a format for factual and legal basis to support a conviction under state law, without providing a basis for deportation under 8 U.S.C. § 1227 General classes of deportable aliens, which reads in pertinent part:



***Anthony C. Delyea** is a criminal defense attorney practicing in state and federal court. Approximately one-half of his practice is devoted to Spanish speaking clients. Mr. Delyea is a staunch supporter of the rights of Spanish speaking defendants. He successfully fought several expulsion cases, until the Dane County Deferred Prosecution program provided correspondence in Spanish. Currently, he is working to encourage the Dane County District Attorney to provide victim rights correspondence in Spanish. Mr. Delyea is a board member of the Wisconsin Association of Criminal Defense Lawyers.

(a) Classes of deportable aliens. Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

...

(2) Criminal offenses.

...

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children [and].

(i) Domestic violence, stalking, and child abuse. Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term “crime of domestic violence” means any crime of violence (as defined in section 16 of title 18, United States Code) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual’s acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

Stipulations that remove the domestic relationship described above are best. In practice, it is easier to negotiate the factual basis as it relates to a “crime of violence” as defined in 18 USCS § 16 (2004). A crime of violence is defined as:

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another,
or

(b) any other offense that is a felony...

If your case is not a DPA case, it still benefits the client to negotiate a stipulated plea. However, clients that are not U.S. citizens find DPA especially desirable as they avoid returning to jail or registering for probation, where they risk law enforcement officers investigating their immigration status.

Nonetheless, if your client contests the facts in the state’s criminal complaint, a DPA is never appropriate. Dane County relies exclusively upon the facts in the state’s criminal complaint. It is critical for clients to do the same during the initial interview and treatment to ensure success.

A stipulation and DPA is not enough; counsel must make a record at the plea hearing. Clarify the defendant is only pleading to the legal and factual basis in the stipulation, not the criminal complaint. Finally, ensure the stipulation is included in the court file. ■

STATE OF WISCONSIN

CIRCUIT COURT BRANCH

COUNTY

STATE OF WISCONSIN

Plaintiff,

vs.

Client Name

Case No.

Defendant

**STIPULATION AS TO
APPLICABLE LAW AND FACTS**

To: *District Attorney name and address*

On *date*, *client name* intends to enter of plea of “guilty” or “no contest” to *count 2* of an orally amended criminal complaint in *county* Circuit Court Case *case number*. *Client name* stipulates that *he/she* did commit acts that would entail criminal liability under the amended 2, *Wisconsin’s Disorderly Conduct statute*. The relevant law and a stipulated factual basis follows:

RELEVANT STATUTE AS TO COUNT 2:

947.01. Disorderly conduct.

Whoever, in a public or private place, engages in ~~violent, abusive, indecent~~, profane, boisterous, unreasonably loud or ~~otherwise~~ disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.

STIPULATED STATEMENT OF FACTS COUNT 2:

In *county* Wisconsin, on *month, day, year*, *client name*, did yell at *victim name* about her using the telephone, and aggressively questioning her regarding who she was calling. Yelling he had a right to know because he had to pay for the telephone.

Attorney Name
Firm Name
State Bar No.
Attorney for Client Name

Attorney address and phone