

# Best Practices Guide to Screening for Immigration Consequences In New York Family Court<sup>1</sup>

## I. Introduction

Family court defense attorneys have an important responsibility to consider the immigration consequences of adjudications in family court. Actions taken in family court, including admissions to non-citizen status, findings that the respondent has violated an order of protection, or findings of abuse and neglect, may lead directly to immigration consequences. Respondents in family court may also suffer immigration consequences through criminal proceedings that are concurrent to the family court case.

Immigration law is complex and it can be overwhelming for counsel to navigate a client's potential immigration consequences while managing the complexities and urgent issues of a family court case. However, by consulting with an immigration expert early in a case, counsel need not be an expert in immigration law to provide accurate and valuable advice to their clients. This guide is designed to help family court counsel to identify when to work with an immigration attorney to provide the best advice for clients and navigate the complexities of incorporating immigration concerns into their representation.

Below, Part II provides a brief overview of the potential serious consequences of a family court proceeding. This information illustrates the importance of working with an immigration expert to avoid risks to a client's current immigration status and/or options for immigration status in the future. Part III describes a three-step process for how family court counsel can quickly identify and advise a client who should be immediately concerned about immigration consequences, particularly stemming from an Article 10 child protective proceeding in New York Family Court. Part IV explains how to conduct a follow-up immigration intake to gather more details about the client's immigration history and current status.

## II. Potential immigration consequences of family court proceedings

The outcome and content of a family court proceeding has the potential to cause serious consequences for an individual's current immigration status or future immigration options. It could prevent a person from becoming a U.S. citizen, block them from obtaining a status that allows them to work, or start a process that results in their deportation from the country. This guide is not intended to provide a comprehensive explanation of all the potential risks to a noncitizen client; however, a general understanding of the potential risks for a noncitizen client can help counsel

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<sup>1</sup> By Em Puhl and Marie Mark, Immigrant Defense Project. Special thanks to Jorge Guerreiro and Genia Blaser (Immigrant Defense Project), Danny Alicea (Center for Family Representation), and Roshell Amezcua (The Bronx Defenders) for providing valuable input on the contents of this guide.

prioritize avoiding immigration consequences when possible. For more details about the possible impact of New York Family Court proceedings on a non-citizen, see the New York State Advisory Council on Immigration Issues in Family Court’s *Memorandum on Adverse Consequences to Family Court Dispositions*.<sup>2</sup>

The Advisory Council on Immigration Issues lays out four types of legal immigration consequences as a result of a New York Family Court proceeding. Broadly speaking, these immigration consequences can fall into four categories of legal risks to a client:

- 1) Some family court outcomes, such as a finding that an individual violated an order of protection, might cause a client to become **deportable** and lose an immigration status that they currently have.
- 2) A client could be denied future access to a visa or green card because certain admissions during or outcomes of a family court case have caused the applicant to become **inadmissible**.
- 3) An immigration agency may deny future applications for statuses such as U.S. citizenship, asylum, or cancellation of removal because certain admissions during or outcomes of a family court case have made the client otherwise **ineligible** for the immigration status.
- 4) Findings by a family court can also be used by an immigration agency to deny any benefit based on the agency’s **discretion** authority.

In addition to these legal risks, a family court case may cause a client to face a practical risk of being arrested and detained by ICE (and subsequently deported). This risk increases if family court proceedings trigger collateral criminal court proceedings or if the client is arrested by local police as a result of not complying with family court orders.

A client may face one or many of these consequences, which require in-depth knowledge of the interaction between immigration law and family law. For counsel who do not have the time or resources to gather this knowledge independently, it is important to consult with an immigration expert to provide accurate and timely advice to a client. By incorporating immigration concerns into family court practice, counsel can better provide diligent, zealous, and creative representation.

### III. First intake

There are, of course, many tasks to complete in an initial meeting with a client who has a pending abuse and neglect proceeding. These first conversations may be constrained by time and the emotional trauma of the client, whose primary concern is reuniting with the child. Because of this, counsel’s primary goal during the first intake is to determine whether the client is a U.S. citizen.

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<sup>2</sup> Advisory Council on Immigration Issues in Family Court, *Adverse Consequences to Family Court Dispositions* (Oct. 27, 2017), available at <https://www.immigrantdefenseproject.org/wp-content/uploads/AdverseConsequences-GuidanceMemoChartGlossary1.pdf>.

If a client is not a U.S. citizen, counsel should identify if there are other legal processes happening in the client's life, to understand how urgently the client's family court case might impact the client's immigration situation. It will also help determine whether it is necessary to seek immigration advice immediately. If the client also has an open criminal case or a pending immigration matter, counsel should collect contact information for any attorneys who are representing the client in those matters. Finally, an initial intake should include brief introductory advice flagging that the client's immigration situation might be impacted by the family court case and needs to be discussed with counsel in more detail in the future.

### **Step 1: Determine whether the client is a U.S. citizen**

The accompanying flowchart contains questions to help counsel identify relevant urgent immigration issues in each client's case. In particular, counsel should ask where the client was born (Question 1) and, if not born in the United States, whether the client currently has any immigration status (Question 2).

**IMPORTANT:** The only way to determine if a client is a U.S. citizen is to ask every client the open-ended question: "Where were you born?" This is important, because, other than a birth certificate, U.S. passport, or certificate of naturalization/citizenship, there are no external indicators of U.S. citizenship.

**It is important not to assume** that a client is or is not a U.S. citizen because of their preferred language, their education level, their perceived race or ethnicity, or because they might have a driver's license or social security number. Conversations about immigration status can be uncomfortable, especially in the context of the current political climate. Because of this, it is important to ask each client "Where were you born?" and to try to avoid sending any implicit negative messages that might be received by the client who hears this question.

Any person who is born in the United States or U.S. territories is a U.S. citizen and so should not be concerned with immigration consequences. Additionally, a person born outside of the United States may become a U.S. citizen by going through the legal naturalization process or by acquiring or deriving U.S. citizenship through their parents. It is important for counsel to build trust with the client by explaining why this information is necessary and that it is essential for protecting their interests in family court.

**NOTE:** While naturalized U.S. citizens generally are not at risk of immigration consequences, there are special considerations for respondents who have naturalized during the period of time during which conduct against a child is alleged in family court proceedings. Counsel should be aware of the date when the client naturalized to become a U.S. citizen as well as the dates of alleged

conduct by the client in any family court documents. It is important to speak with an immigration expert on how to best advocate for immigration-safe findings for clients whose naturalization post-dates the alleged conduct.

If an individual is unsure about their immigration status or whether they are a U.S. citizen, counsel can consult with an immigrant expert. If necessary, counsel can later refer the client to a legal services provider to do a consultation. In most situations, counsel should simply trust the client's statement that they are a U.S. citizen.

### **Step 2: Identify pending criminal or immigration matters**

If the client is not a U.S. citizen by birth or other means, counsel should next screen for any current pending matters in the client's life that might be complicated by an on-going family court proceeding. Question 3 of the flowchart has a series of brief sub-questions to identify these issues. In general, counsel should confirm whether the client is subject to any criminal proceedings in connection to or separate from the family court case, in order to coordinate with criminal defense counsel. A pending family court case could also impact a variety of pending immigration proceedings, such as applications for an immigration benefit (see sidebar for an explanation of immigration benefits), a removal case in Immigration Court (colloquially called a "deportation" case), or an upcoming appointment to check in with an officer at Immigration and Customs Enforcement (ICE) or Customs and Border Protection (CBP or "Border Patrol"). Family court counsel should coordinate with the client's immigration representative to help litigate the family court case in a way that addresses any urgent immigration timelines.

**NOTE:** There are many types of immigration "benefits" that people could already have or be eligible to receive in the future. The most well-known is lawful permanent residence, otherwise known as a "green card." Other common benefits include asylum, Deferred Action for Childhood Arrivals (DACA), the U visa for victims of crimes, the T visa for victims of trafficking, or protection under the Violence Against Women Act (VAWA). A lawful permanent resident can also apply to become a U.S. citizen through a process called "naturalization." This is not an exclusive list of possible benefits and clients should consult with an immigration attorney for a full consultation regarding their eligibility for immigration benefits.

Finally, counsel should ask the client if they have plans to travel outside of the United States or if they plan to submit an application with an immigration agency while the family court case is pending. This is an important question to ask because abuse and neglect proceedings may cause immigration authorities to take action that negatively affects their immigration status.

**Step 3: Provide initial advice client about immigration consequences and identify relevant counsel for coordination**

If any of the above issues are present in a noncitizen client's situation, it is important for family court counsel to reach out to any criminal or immigration counsel involved in those matters as soon as practicable to start coordinating the family court strategy with those in the concurrent matters. Counsel should also provide initial advice to the client that explains how a family court case could impact the relevant issue in their situation and give the client the general advice handout at Appendix D. This advice might change throughout the course of proceedings and counsel should continue to advise the client on these issues as the case progresses. The appendix of this guide contains advice handouts that counsel can provide to the client on the issues relevant to their case. It is important for Family Court counsel to meet with the client at a later time to interview them about their immigration history and to reach out to the Immigrant Defense Project or other relevant immigration counsel to seek advice on possible immigration consequences.

If an initial intake does not identify any urgent criminal or immigration issues for the client, the consequences of the Family Court case are less immediate but should still factor into the long-term strategy of the proceeding. Counsel will need to provide specific advice on the immigration consequences of the family court contact later in the case, especially while advising on any pivotal decisions during the case and prior to accepting any negotiated disposition. During the initial intake, counsel can inform the client that they will be discussing their immigration situation in more detail in the future to minimize any potential impact on the client's immigration situation. Counsel should also advise the client to inform them of any new developments in their immigration situation during the case, including contemplating filing an immigration application, plans to travel abroad, or an arrest by police or immigration officers. Family court counsel should also schedule a subsequent appointment as soon as practicable to meet with the client to gather more complete details about the client's immigration history. Counsel should then coordinate with the Immigrant Defense Project or other relevant immigration counsel to seek advice on immigration consequences and follow-up with the client to provide immigration advice throughout the case.

**REMEMBER:** There are important steps to take for all noncitizen clients, regardless of their immigration situation:

- Avoid stating on the record that the client is not a U.S. citizen and do not state their specific immigration status or place of birth.
- Avoid the issuance of an order of protection against the client, if possible. Instead, negotiate for a "short order" to be issued.
- Set up a time to do a complete intake as soon as possible.

#### IV. Follow-up immigration intake

Immigration laws are complex and a client may be unable to share all relevant details about their immigration history and current status during the brief initial intake. Therefore, it is important for family court counsel to schedule a follow-up appointment with the client to have a more detailed conversation about their immigration history. The information collected during this client intake will enable family court counsel to later get accurate advice from an immigration attorney about the immigration impact of decisions made during the client's family court case. If counsel has identified urgent issues in the client's situation during the initial intake, the follow-up intake should be scheduled as soon as possible. This intake might be scheduled later on in the family court case for clients who do not have any urgent criminal or immigration issues to resolve during the pendency of the Article 10 case in New York Family Court; regardless, it is still important to involve an immigration attorney early in the case.

The goal of the follow-up immigration intake is to learn more details about the client's immigration history and current status. In general, family court counsel should gather information about all of the client's entries into the United States, including the dates and how they entered the country. While the most recent entry is typically the most relevant, prior entries may also be pivotal to assessing the client's immigration options.

**NOTE:** There are many possible ways to enter the United States through a port of entry (i.e. an airport, a land border crossing, or seaport with a customs post), with or without some type of visa.

A person may have:

- entered the country through an official port of entry with a temporary visa (e.g. tourist visa, student visa, etc.), as a refugee, or as a lawful permanent resident with an immigrant visa;
- entered through an official port of entry without a visa because they are Canadian or are a citizen of a country that participates in the Visa Waiver Program;
- been "waived" through an official port of entry without being required to show an immigration document, either on foot or in a car (this is more common for people who came as children) or at an airport (this is more common for people who came many years ago and traveled as children with an adult holding a temporary visa);
- Traveled to a port of entry and asked the customs official if they could apply for asylum;

Alternatively, a person may have crossed the border without passing through an official port of entry, either on foot or in a vehicle.

Counsel should also learn more about the client's current immigration status, including if they are currently undocumented because they entered without inspection, overstayed a visa, or had a previous status taken away by an immigration judge. If the client currently has a valid visa, green

card or other lawful status, counsel should ask how and when they obtained it. It is also important to ask all clients if they plan to apply for any immigration benefit in the future, including applying for naturalization to become a U.S. citizen. Finally, it is important to get the client's full criminal history, including any arrests or tickets, and the outcomes of any criminal cases, including those which have been sealed. An intake script has been provided at Appendix B as a starting point for this conversation.

Note that every person's immigration situation is different and counsel should dedicate a block of time to conduct this intake. Counsel should use the intake script at Appendix B as a guide and prepare for a conversation where the client may not be able to provide linear or straight-forward answers to many of the questions in the intake script. Some clients may have entered the United States through a lawful process and maintained an immigration status throughout this time. Others may have always been undocumented in the United States and might not have any options for obtaining an immigration status in the future. Others may have had different types of immigration status or been in and out of immigration status, which may have involved a variety of applications submitted to immigration agencies or in immigration court proceedings. Some clients might not know what type of application was filed on their behalf or what was the outcome of said application, either because a family member or caretaker filed applications when they were children or because of a lack of communication with the representative who prepared the application.

It is important for family court counsel to gather copies of any documents related to any current or past immigration status and any pending or past proceeding with an immigration agency, if the client has these. Many times these documents will help immigration counsel determine the client's immigration history and fill in information gaps that may be caused by the client's confusion or lack of memory. The resource at Appendix C contains some sample documents that clients (or their immigration attorney) might have depending on the client's immigration history.

At the end of the meeting, counsel should explain the relevant next steps for counsel and the client. The client may need to obtain additional immigration documents to provide to family court counsel in order to get complete immigration advice for the case. Counsel should remind the client to notify counsel if any new information develops in their immigration situation or if they remember any of the information differently. Finally, counsel should reach out to immigration counsel to receive more detailed advice about incorporating immigration consequences into the strategy for the family court case.<sup>3</sup>

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<sup>3</sup> Generally speaking, the Rules of Professional Responsibility allow counsel to share confidential information when it is "impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community." NY Rule 1.6(a)(2). Family court counsel may wish to inform the client that they will be consulting with an immigration attorney to understand how to minimize or avoid immigration consequences in their specific situation, to the extent that it helps build rapport with the client.

## V. Appendix

- A. [Initial Intake Flowchart](#) - includes advice for clients depending on immigration risk
- B. [Family Court Immigration Intake Worksheet](#)
- C. [Immigration Status Guide for Assigned Counsel with sample documents \(ID cards, USCIS notice, NTA, IJ removal order, expedited removal order\)](#)
- D. Advice handouts (in English and Spanish):
  - [Will a Family Court Case Affect My Immigration Status? Issues to Consider for Immigrant Clients in Family Court](#)
  - [Tengo un caso en el Tribunal de Familia. ¿Eso afectará mi estado migratorio? Temas que deben considerar los clientes inmigrantes en el Tribunal de Familia](#)