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Virginia State Bar
1111 East Main Street, suite 700
Richmond, VA 23219-3565

Re: Comment on Proposed Legal Ethics Opinion 1876

January 5, 2015

Dear Ms. Gould and Members of the Standing Committee on Legal Ethics:

We write first to commend the Standing Committee for recognizing the grave failings of procedural justice in Virginia's misdemeanor courts, where noncitizen Virginians routinely go unrepresented in criminal proceedings that result in devastating and disproportionate immigration penalties. We also commend the Standing Committee for recognizing the vital role that prosecutors play in achieving just and proportionate case outcomes for noncitizen defendants. While proposed LEO 1876 is an important starting place, it does not fully address the ethical obligations of the prosecutor in the hypothetical presented. This Comment includes proposed amendments to the LEO and descriptions of the legal and ethical considerations behind the proposed amendments.

Signatories to this comment include the Capital Area Immigrants' Rights (CAIR) Coalition, the National Immigration Project of the National Lawyers Guild (NIPNLG), and the Immigrant Defense Project (IDP).

CAIR Coalition is a non-profit organization whose mission is to ensure that all immigrants are treated with fairness, dignity, and respect for their human and civil rights. CAIR Coalition's Virginia Justice Program offers resources and support to Virginia's indigent defense bar concerning the immigration consequences of criminal convictions. The goal of the program is to minimize disproportionate immigration penalties that often accompany criminal convictions for noncitizen residents of Virginia, including prolonged immigration detention and deportation.

IDP is a non-profit legal resource center that provides judges, defense attorneys, immigration attorneys and immigrants with expert legal advice and training on issues involving the interplay between criminal and immigration law. Since 1997, IDP has worked to promote fundamental fairness for immigrants accused or convicted of crimes, seeking to minimize the harsh and disproportionate immigration consequences of contact with the criminal justice system.

NIPNLG is a nonprofit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. For thirty years, NIPNLG has provided legal training and technical assistance to the bar and the bench on immigration consequences of criminal conduct. The NIPNLG has a strong interest in ensuring that

noncitizens defendants are accurately informed of the immigration consequences of criminal convictions and given the full benefit of their constitutional and statutory rights.

I. Summary of Proposed Amendments to LEO 1876

We urge the Committee to amend the LEO to reflect that a prosecutor acts in violation of her ethical obligations under Rules 3.8 and 4.3 if she proceeds with the prosecution of an unrepresented indigent defendant she has reason to believe was born outside of the United States unless and until counsel is appointed.

We therefore urge the Committee to:

1) Amend the four circumstantial requirements labeled (a) through (d) in lines 158 through 165 of the proposed LEO as follows: with regard to (a), amend the requirement to include any circumstance where the prosecutor "has reason to believe the defendant was not born in the United States;" and remove the requirements at (c) and (d).

2) Amend the obligation triggered when these circumstantial requirements are met (labeled (e) and found in lines 166 through 169 of the proposed LEO) by clarifying that prosecutors in such circumstances violate their ethical obligations by proceeding with the prosecution unless and until counsel is appointed.[1]

We also take this opportunity to emphasize that a prosecutor may never inquire in any way into a defendant's citizenship or immigration status, on or off the record. In the context of this proposed LEO, such an inquiry would violate Rule 4.3 regarding unrepresented defendants and, if on the record, implicate Fifth Amendment concerns.[2]

II. Rules 3.8 and 4.3 preclude a prosecutor from ethically moving forward with the prosecution of an unrepresented indigent noncitizen defendant unless and until counsel is appointed

The Committee has pointed out that under the Virginia Code of Professional Conduct the prosecutor's ethical obligation to serve as a "minister of justice" requires that she "see[] to the

[1] In order to pursue prosecution in these cases in a manner compliant with their ethical obligations, prosecutors might, for example, move the court to appoint counsel. Defendants still retain the right, of course, to waive the appointment of counsel pursuant to Virginia Code § 9.2-160. The undersigned recognize that challenging legal issues are presented by the question of whether a prosecutor's ethical obligations are different when she has reason to know that a defendant is a noncitizen but the defendant nevertheless seeks to waive the right to defense counsel. As a general matter, we believe there are few, if any, circumstances when a waiver would be "knowing" in this context given the extremely complex array of issues that are relevant to a noncitizen's guilty plea. Further exploration of whether a waiver can be knowing in this circumstance is beyond the scope of this comment.

[2] The very real conflict of interests between a prosecutor and an unrepresented defendant renders nearly any communication suspect under Rule 4.3, and inquiring directly as to an unrepresented defendant's citizenship or immigration status would violate Rule 4.3 because it would almost certainly lead to misunderstandings regarding the role of the prosecutor. Furthermore, any such inquiries when made on the record could infringe on Fifth Amendment rights against self-incrimination by resulting in oral statements about alienage that the government could use as evidence in support of other criminal charges for offenses involving immigration status as an element. See U.S. Const. amend. V; *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

defendant's receipt of 'procedural justice.'"[3] This obligation simply cannot be met when a noncitizen defendant is unrepresented, regardless of the plea offered or the warnings given by the court. In *Padilla v. Kentucky*, the Supreme Court of the United States found that criminal defense attorneys are required to inform noncitizen clients of the immigration consequences of a plea *because of* the severity of the penalty of deportation.[4] What *Padilla* tells us, therefore, is that the procedure afforded a noncitizen defendant is inherently unjust if no counsel is appointed to provide this advice.[5]

The practice of pursuing misdemeanor charges without appointed defense counsel is rooted in the Supreme Court's finding in *Scott v. Illinois* that the requirements of the Sixth and Fourteenth Amendments to provide appointed counsel do not extend to an indigent criminal defendant not facing imprisonment.[6] The *Scott* decision rests on the rationale that "actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment."[7] But the Supreme Court has since stated in *Padilla* that deportation too is a penalty different in kind – "indeed, sometimes the most important part – of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[8] Subsequent to *Padilla* prosecutors continue to rely on *Scott* to pursue prosecution of an unrepresented defendant when jail time is off the table because the stakes are relatively minor for the defendant and do not include any possible deprivation of liberty. But this rationale drops away when prosecuting noncitizen defendants, where the possible penalty includes deportation, "the equivalent of banishment or exile."[9]

As the Standing Committee has already recognized, deportation stands as a possible penalty for noncitizen defendants not just in circuit court but also in minor misdemeanor prosecutions in Virginia's District and Juvenile and Domestic Relations Courts.[10] Last year, for example, the Washington Post reported on the story of a 19 year old man named Luis Bladilir Lopez who was deported as the result of an uncounseled plea in Prince William County to a

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[3] See Proposed LEO 1876 at 206 – 210; Rule of Professional Conduct 3.8, Comment [1] ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice…").

[4] *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) ("…we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.").

[5] This Comment is purposely limited to the specific question of a prosecutor's ethical obligation as relating to noncitizen defendants because that is the subject matter of the proposed LEO. However, undersigned signatories believe that *Padilla* implies greater obligations for all parties in the criminal justice system beyond those facing deportation and extends to many other severe and certain consequences of convictions such as eviction or loss of employment. For a fuller discussion, see Margaret Colgate Love, Collateral Consequences after Padilla v. Kentucky: From Punishment to Regulation, 31 St. Louis Univ. Pub. L. Rev. 87 (2011).

[6] 40 U.S. 367, 373 (1979).

[7] *Id.* (citing *Argersinger v. Hamlin*, 407 U.S. 25 (1972)). And, as one commentator has noted, the removal of noncitizens on the basis of one misdemeanor conviction for which jail time was never on the table, while commonplace today, was "extremely rare" at the time *Scott* was decided. See Alice Clapman, Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation, 33 Cardozo L. Rev. 585, 590 (2011).

[8] *Padilla*, 559 U.S. at 364.

[9] *Id*. at 373 (internal quotations omitted).

[10] See Proposed LEO 1876 at 64 – 65 ("It is thus the case that convictions for certain misdemeanors by Virginia general district and juvenile relations district courts render defendants deportable.").

misdemeanor marijuana charge with an accompanying sentence of a $189 fine and six month driver's license forfeiture.[11] Mr. Bladilir's story is not uncommon. Even a minor misdemeanor conviction such as driving on a suspended license can trigger significant immigration penalties.[12]

The prosecutor must ask: What does procedural justice require in a case such as Mr. Bladilir's? We must draw the conclusion from *Padilla* that procedural justice requires the appointment of counsel so the defendant can be advised regarding the immigration consequences of a proposed plea. Appointment of counsel also ensures that noncitizen defendants have a representative able to plea bargain on their behalf in pursuit of a disposition that does not trigger deportation. The *Padilla* Court in fact encouraged defense counsel and the state to work together "to plea bargain creatively … in order to craft a conviction and sentence that reduce the likelihood of deportation."[13] Immigration law is notoriously complex.[14] We cannot expect that an uncounseled noncitizen defendant – even the most savvy – identify the immigration consequences of the charges against him, craft an alternative plea deal that would mitigate deportation exposure, *and* advocate for that position with a prosecutor.

Procedural justice therefore requires appointment of counsel to advise noncitizen defendants about the immigration penalties associated with a plea and to advocate for an immigration-neutral plea during plea bargaining.[15] However, the proposed LEO, as written, obligates prosecutors to refrain from pursuing a prosecution against an unrepresented noncitizen defendant unless the prosecutor has mentioned to the defendant that he might want to seek legal advice regarding immigration consequences.[16] This obligation to "mention" is insufficient to meet the prosecutor's obligation to "see[] to" procedural justice for all defendants to the best of her ability.[17] As a practical matter, the Standing Committee should be reminded that there is no right to appointed counsel in removal proceedings and most indigent defendants will be hard pressed to find the resources to pay for a private attorney. Furthermore, by providing information

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[11] Jeremy Borden, "Immigrants take guilty pleas without lawyers and can later be deported," Washington Post (Jan. 27, 2013).

[12] A noncitizen defendant's second conviction for driving while on a suspended license pursuant to Virginia Code § 46.2-301, for example, constitutes grounds for revocation of Temporary Protected Status, potentially leading to immigration detention and removal. See 8 CFR § 244.4(a). Additionally, the new Executive Action announced by President Obama on November 20, 2014 adds another layer of analysis when examining whether a minor offense may lead to immigration penalties. The newly announced programs provide that any "significant misdemeanor" offense will render a noncitizen an enforcement priority for Immigration and Customs Enforcement and bar temporary protection under the new Deferred Action for Parental Accountability program. The category of "significant misdemeanors" includes, for example, even one driving under the influence conviction. See http://www.uscis.gov/immigrationaction for descriptions and links to the memos governing the new programs.

[13] *Padilla*, 559 U.S. at 373.

[14] See, e.g., *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003) (describing "the labyrinthine character of modern immigration law").

[15] The American Bar Association's Criminal Justice Section has in fact endorsed and expounded upon the language in *Padilla*, encouraging the prosecution to work with defense counsel to "to identify a plea – to a felony or misdemeanor offense – that is roughly equivalent to the one charged but is safer for immigration purposes." See ABA Criminal Justice Section, Recommendation Adopted by the House of Delegates No. 100C, 4 (2010).

[16] See Proposed LEO 1876 at 12 – 13 (when requirements are met to trigger obligation, prosecutor may not "make[] no mention of the defendant's potential need to seek immigration law advice"); at 166 – 169 (when requirements are met to trigger obligation, prosecutor may not "…omit reference to the defendant's potential need to obtain legal advice regarding immigration law consequences…").

[17] See Rule of Professional Conduct 3.8, Comment [1].

or inquiring *in any way* regarding the individual's immigration circumstance, the prosecutor risks violating Rule 4.3 by encouraging the unrepresented defendant to misunderstand the prosecutor's role as that of an advocate for the defendant.[18]

This Comment therefore urges the Committee to take the position that a prosecutor acts in violation of her ethical obligations when prosecuting an indigent noncitizen defendant unless and until counsel is appointed to fulfill the requirements of *Padilla*. (The requirements that trigger this obligation are discussed in section III below).

The ethical obligation of the prosecutor to pursue justice is already heightened in the context of plea bargaining, where the prosecutor's discretion is paramount.[19] This power imbalance is even greater when plea bargaining with an unrepresented noncitizen defendant – the defendant is unrepresented, triggering Rule 4.3, and he faces potential immigration penalties, implicating the Supreme Court's holdings in *Padilla* regarding the unusually harsh nature of the deportation penalty. We believe that these three layers of imbalance –taken in their totality – tip the scales such that under Rule 3.8 the prosecutor simply cannot move forward until counsel is appointed for the defendant.

III. The Committee's proposed criteria for circumstances triggering the obligation discussed in section II should be replaced with the sole requirement that the prosecutor have reason to believe the defendant was born outside the United States

In lines 237 through 244 of the Proposed LEO, the Committee sets forth the four circumstances that must be present before an ethical obligation arises on the part of the prosecutor. We fear that the practical implication of these four criteria, however, is that the obligation contemplated by the LEO is overly narrow and therefore excludes many instances in which a prosecutor acts inconsistently with her ethical obligations. Furthermore, a defendant's access to procedural justice should not vary depending on the prosecutor's awareness of his citizenship or immigration status.

We propose that the only practicable threshold requirement is the prosecutor's reasonable belief that the defendant was born outside the United States. The prosecutor may have access to place of birth information for defendants, but is prohibited from inquiring further as to specific citizenship or immigration status by Rule 4.3 (see note 2 above). This proposed standard may be overbroad by including defendants who are naturalized U.S. citizens, but the severity of the consequences facing noncitizen defendants demands a standard that is sure to protect procedural justice in every case where the defendant may face exposure to immigration penalties.

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[18] See Rule of Professional Conduct 4.3(a) ("When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.").

[19] See Ellen Yaroshefsky, Keynote Address: Enhancing the Justice Mission in the Exercise of Prosecutorial Discretion, 19 Temp. Pol. & Civ. Rts. L. Rev. 343, 350 (2010) ("Our system is akin to an administrative law model where the prosecutor acts in an investigative and ultimately quasi-judicial capacity because the prosecutor makes the decisions as to charging, plea bargaining and therefore ultimate disposition. We need to consider the ramifications of this administrative system of criminal justice and adopt transparency and accountability mechanisms to ensure fair processes." (footnote omitted)).

Specifically, we urge the Committee to consider the following concerns with regard to the criteria set forth in the proposed LEO:

Requirement (a) – line 237:

Before any obligation is triggered, the proposed LEO requires that the prosecutor "…knows that a defendant is a noncitizen." It is the experience of the signatories to this comment that a state prosecutor rarely knows with certainty if a defendant is a noncitizen and, as stated above, it would constitute a violation of Rule 4.3 for the prosecutor to inquire as to any defendant's citizenship or immigration status.[20] Given the severity of the procedural injustices unrepresented noncitizen defendants face, the prosecutor can best serve as a minister of justice by considering immigration-related issues any time she has reason to believe the defendant was born outside of the United States, without inquiring further as to citizenship or status.

Requirement (c) – line 240 – 241:

Before any obligation is triggered the proposed LEO requires that the prosecutor "…knows that conviction of the crime to which a plea offer pertains is a deportable offense…" This requirement both places an inappropriate burden on the prosecutor and is under-inclusive in its reach.

First, this requirement is inappropriate because prosecutors should not, and usually cannot, conduct the legal analysis necessary to determine whether a plea offer constitutes a deportable offense for any given defendant. Pursuant to the criminal grounds of deportability and inadmissibility found in sections 237 and 212 of the Immigration and Nationality Act, the analysis of whether a conviction is a deportable offense requires a thorough understanding of the individual defendant's prior criminal history, prior immigration history, and personal details such as the extent of the individual's community ties to the United States.[21] For the same reasons as described above, a prosecutor would violate Rule 4.3 by following any of these necessary lines of inquiry with an unrepresented defendant.

Second, this requirement is under-inclusive in that it refers only to "deportability," a term of art describing the grounds used to support charges of removability for those lawfully admitted to the United States.[22] Restricting the applicability of the opinion to those facing the grounds of deportability will omit many circumstances in which the prosecutor's ethical obligations are implicated by other types of immigration penalties that may also result in immigration detention

[20] See note 2 above.

[21] For example, determining whether a conviction for a Virginia class 1 misdemeanor constitutes a deportable offense for a lawful permanent resident (a.k.a. "green card holder") requires knowing the date of the individual's admission to the United States as well as all previous criminal dispositions. This conviction would render a lawful permanent resident deportable if it was his first crime involving moral turpitude committed within five years after the individual's date of admission to the United States, but not if it was subsequent to those five years. See 8 USC § 1227(a)(2)(A)(i). Further, if the defendant had a previous conviction for an offense categorized as a crime involving moral turpitude, the second such offense would lead to deportability regardless of the date of admission. 8 USC § 1227(a)(2)(A)(ii).

[22] See 8 USC § 1227(a)(2).

and removal, including: inadmissibility; mandatory immigration detention; ineligibility for various forms of relief from removal such as asylum or cancellation of removal; ineligibility for citizenship; and ineligibility for temporary protections against deportation such as Deferred Action for Childhood Arrivals or Deferred Action for Parental Accountability.[23] In *Padilla v. Kentucky*, the Court affirmed the importance of "preserving the right to remain in the United States and preserving the possibility of discretionary relief from deportation" for noncitizen defendants,[24] a crucial element of procedural justice relevant to the prosecution and defense alike.

For these reasons, we urge removal of this required criterion.

Requirement (d) – line 242 – 244:

Before any obligation is triggered the proposed LEO requires that the prosecutor "…knows that the court does not conduct plea colloquies which include an advisement regarding the defendant's opportunity to understand, or to obtain legal advice regarding, immigration law consequences of the plea." While judicial warnings can play a role in supporting the noncitizen defendant's procedural rights, such warnings are no replacement for meaningful advice by counsel, which is what procedural justice truly demands for noncitizen defendants.[25] First, an unrepresented defendant accepting a plea in front of a criminal court judge is likely to be nervous and unable to properly articulate a response to such a warning. Second, and as stated above, even if an indigent noncitizen defendant were to internalize such a warning and possess sufficient poise to request a continuance to speak to counsel, he would be unlikely to have the financial resources to do so.

For these reasons, we urge removal of this required criterion.

IV. Summary

In conclusion, we urge the Committee to amend its proposed LEO to state that a prosecutor acts in violation of her ethical obligations under Rules 3.8 and 4.3 if she proceeds with the prosecution of an unrepresented indigent defendant she has reason to believe was born outside of the United States unless and until counsel is appointed.

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[23] See relevant provisions of the Immigration and Nationality Act including 8 USC § 1182(a)(2) (criminal grounds of inadmissibility); 8 USC § 1226(c) (grounds of mandatory detention); 8 USC § 1158(b)(2)(B)(i) (criminal grounds barring eligibility for asylum); 8 USC § 1229b(a)(3) (criminal grounds barring eligibility for cancellation of removal for long time lawful permanent residents); 8 CFR § 316.10(b) (listing criminal conduct that precludes eligibility for naturalization). See also http://www.uscis.gov/immigrationaction for recently issued guidance providing the criminal bars to eligibility for the newly announced deferred action programs known as expanded Deferred Action for Childhood Arrivals and Deferred Action for Parental Accountability.

[24] See *Padilla*, 559 U.S. at 357 (internal ellipses and quotations removed) (quoting *INS v. St. Cyr*, 533 U.S. 289, 323 (2001).

[25] See, e.g., ABA Pleas of Guilty Standard 14-3.2, Commentary (stating that the court's "inquiry is not, of course, any substitute for advice by counsel"); ABA Pleas of Guilty Standard 14-3.2(f), Commentary ("[O]nly defense counsel is in a position to ensure that the defendant is aware of the full range of consequences that may apply in his or her case.").

We greatly appreciate your attention to this important issue as well as your time and consideration of this comment. Please direct any questions to Heidi Altman at 202-331-3320 x 20 or haltman@caircoalition.org.

Sincerely,

Capital Area Immigrants' Rights (CAIR) Coalition

Immigrant Defense Project (IDP)

National Immigration Project of the National Lawyers Guild (NIPNLG)