

**Defending Noncitizens Charged With Washington Misdemeanor Assault<sup>1</sup>**

**RCW 9A.36.041, Assault in the Fourth Degree (A4), or any municipal code assault with the same common-law elements, should not by itself trigger a conviction-based ground of inadmissibility or deportation, even with a DV designation.**

**I. STEP ONE: IDENTIFY IMMIGRATION STATUS & DEFENSE GOALS**

| Status  | Goals   |
|---|---|
| <p><b>Undocumented Person (UP):</b></p> <ul style="list-style-type: none"> <li>Entered without inspection and never had status.</li> <li>Came lawfully with temporary visa (e.g. student or tourist) that has since expired.</li> <li>Identify how long they have been in the U.S. and if they have LPR/USC family.</li> <li>Identify prior deportations &amp; ICE contact.</li> </ul> <p><i>Note:</i> Many UPs, especially if without prior deportations, have paths to lawful status.</p> | <ul style="list-style-type: none"> <li>A UP who goes to jail for even a day risks exposure to ICE, having (illegal<sup>2</sup>) communication with ICE occur, and ending up in ICE custody &amp; removal proceedings.</li> <li>Preserve paths to legal status (relief). There are waivers of deportation for long-term resident UPs who meet certain conditions, including having a qualifying relative.<sup>3</sup> Family relationships help identify “qualifying relatives” for relief.</li> </ul> |
| <p><b>Lawful Permanent Residents (LPR or green card holders); Asylees and Refugees; COFA (Pacific Island Compact nation) residents:</b> Identify how long person has had lawful status.</p>   | <ul style="list-style-type: none"> <li>An A4 conviction will not trigger deportation or inadmissibility, by itself.</li> <li>For LPRs, preserve “good moral character” for naturalization (US citizenship). LPRs cannot apply for US citizenship while on probation.</li> </ul>   |
| <p><b>Visa Holders (e.g. business, student &amp; tourist visas):</b> If current, goals = LPRs &amp; refugees. If expired, goals = UPs. <i>See above</i></p>   |   |
| <ul style="list-style-type: none"> <li><b>DACA holders:</b> Third misdemeanor is a bar, A4 + DV is probably a bar;</li> <li><b>TPS holder:</b> Second misdemeanor is a bar.</li> </ul>  |   |

<sup>1</sup> This advisory is meant to be a quick-reference guide for defenders with noncitizen clients. Defenders are advised to consult with WDA’s Immigration Project on individual cases by completing an intake form online at: <http://www.defensenet.org/immigration-project/case-assistance>. Immigration attorneys or representatives are encouraged to contact us for possible legal arguments to challenge a removal charge or other consequence in an immigration matter. When in doubt, don’t concede!

<sup>2</sup> See RCW 10.93.160

<sup>3</sup> See our advisory on “10-year cancellation of removal,” the principal form of relief, but there can be others: <https://defensenet.org/resource-category/cancellation-of-removal-for-undocumented-persons/>

***Criminal History is Critical*** – Obtaining a complete criminal history, including sentences, is essential to provide accurate advice.

**II. STEP TWO: MISDEMEANOR ASSAULT DEFENSE STRATEGIES**

| An A4 Conviction Will Not Trigger a Conviction-Based Ground of Removal  |
|---|
| U.S. Supreme Court decisions in 2012, 2013, and 2016 restored <i>elements-based</i> analysis. An A4 conviction should not trigger any statutory, conviction-based grounds of deportation or inadmissibility, and should not create a <i>per se</i> bar to paths to lawful status, even with DV designation. <sup>4</sup> As best practice, we still recommend defenders try and do the following: |
| <ul style="list-style-type: none"> <li>• <b>Ensure that plea is a straight plea</b> (not <i>Alford</i> plea) that does not incorporate police reports, or the certification for determination of PC, nor stipulates to such as providing the factual basis (especially if those relate to a more serious, original charge); and</li> </ul>  |
| <ul style="list-style-type: none"> <li>• <b>Obtain, if possible, a sentence of 180 days or less</b>, regardless of time suspended. For A4 this is normally preferable, but <i>not</i> critical. However, if any client’s lifetime, aggregate total of all (non-concurrent) sentences, regardless of suspension, reaches 1825 days (5 years), it will trigger criminal inadmissibility.</li> </ul> |
| <ul style="list-style-type: none"> <li>• Following the rule that it is always better to plead to the least culpable conduct under a statute, whenever possible ensure that the plea statement language is carefully crafted to <b>an assault only by an “unconsented” or “offensive” touching</b>; and</li> </ul>   |
| <ul style="list-style-type: none"> <li>• It is always preferable when possible to <b>unlabel A4 as “DV,”</b> if you can; and to leave out age of alleged victim if a minor.</li> </ul>  |
| <b>Safe (non-triggering) misdemeanor alternatives, include:</b><br>criminal trespass, disorderly conduct, malicious mischief, obstructing, attempted A4   |

| On Felony Assault in the Fourth Degree:   |
|---|
| <b>A4 can become a class C felony, with certain prior “DV” convictions.<sup>5</sup></b>   |
| <p>Because the elements of felony A4, other than recidivism, are the same common-law assault elements as for misdemeanor A4, the pleading advice should be essentially the same.</p> <p>Pleading and proving the DV relationship does not change the minimum <i>actus reus</i>, or culpable conduct into more than unconsented or offensive touching, does not add intent to harm, actual injury, endangerment, or an especially close relationship of trust, as elements.<sup>6</sup> Nor does it add any statutory element of increased knowledge or specific intent.</p> |

<sup>4</sup> For information on the immigration consequences of a sexual motivation enhancement, see WDAIP’s Sexual Motivation advisory at: <https://defensenet.org/wp-content/uploads/2017/11/Sexual-Motivation-Advisory.pdf>

<sup>5</sup> “[W]here domestic violence was pleaded and proven after July 23, 2017, if the person has two or more prior adult convictions within ten years for any of the following offenses where domestic violence as defined in RCW 9.94A.030 was pleaded and proven after July 23, 2017” RCW 9A.36.041(3)

<sup>6</sup> See WDAIP advisory on Felony Assault at <https://defensenet.org/wp-content/uploads/2017/11/Short-Felony-Assault-Advisory.pdf>