



**Practice Advisory**  
**Representing Incarcerated or Detained Noncitizens in Dependency Actions**

**This practice advisory reviews practical considerations for attorneys representing incarcerated or detained noncitizens in supporting child-parent relationships and access to services in dependency actions.**

**Purpose of this Practice Advisory<sup>1</sup>**

The purpose of this practice advisory is to discuss how basic immigration law concepts and procedures intersect with the practice of legal representation of parents and children in child welfare proceedings. This advisory will also inform child welfare lawyers of the ways in which child welfare orders (as well as child welfare agency actions) may have devastating *direct* immigration consequences for noncitizens. Recent federal executive orders and federal immigration enforcement practices have prompted additional need to ensure all dependency clients are receiving effective and zealous legal representation.<sup>2</sup>

A noncitizen means anyone who is not a U.S. citizen or U.S. national.<sup>3</sup> Both children and parents of any age might be noncitizens. It should also be noted that the children of noncitizen parents may have only U.S. citizenship; may have dual nationality with the United States; or may have dual nationality with one or more foreign countries. Some noncitizen parents and children may also be stateless.<sup>4</sup>

**Ongoing Duty of Diligence in Advising Clients Regarding Immigration Consequences**

Public defenders are often reminded about the devastating immigration consequences of criminal convictions. Child welfare attorneys should *also* take great care to ensure they provide ethical legal representation, which includes competent, diligent counsel and advice. Such representation helps clients make informed, intelligent, and voluntary decisions in their child welfare cases.<sup>5</sup> Child welfare attorneys should strongly consider seeking consultation with immigration law experts in order to correctly advise their clients about the direct and collateral immigration consequences of the child welfare intervention.<sup>6</sup> Child welfare attorneys should assist their clients in obtaining direct legal immigration advice and/or representation as soon as possible, particularly when they are unrepresented in potential or existing immigration proceedings or when they are in custody.<sup>7</sup>

## Practice Tips:

- WDA's Immigration Project offers technical case assistance to attorneys seeking immigration consultation regarding immigration consequences. Please contact WDA's Immigration Project, [here](#).
- Noncitizen clients may also contact [Northwest Immigrant Rights Project](#) ("NWIRP"), a free or low cost legal agency providing comprehensive direct legal immigration representation in Washington State.
- If convicted of serious crimes, noncitizen clients may be a priority target for ICE enforcement from the prison or jail where they are being held. Getting *immigration* representation early in the criminal defense representation is critical.
- Court orders outlining child-parent visitation should include frequent telephone calls, video calls, and in-person visits.
- Contacting the facility directly is the best way to investigate and apply for the visitation to occur.
- Always check with the adult or juvenile facility to determine how to gain legal access for clients to have child-parent visits and calls.
- Consider arranging for remedial services to occur while they are incarcerated, but be cautious about arranging services for clients in immigration custody.

## Noncitizen's Detention Will Likely Cause Familial Separation

Noncitizen parents and children can be civilly detained for immigration reasons at any time during their dependency action. Without immigration relief, the threat of arrest and removal (deportation) is ongoing. Criminal incarceration for these noncitizen clients also hampers their likelihood of keeping their family together. Other consequences for noncitizen parents and children, who are subject to criminal incarceration or civil immigration detention, may include, but are not limited to: total or partial disruption to court-ordered in-home placement with their parent; total or partial disruption to court-ordered visitation designed to maintain the child-parent relationship due to the placement of the noncitizen child in a facility at great distance from her/his family members; limited access to school and other (court-ordered) remedial services in ICE detention centers; and limited access to remedial services, even if court-ordered, in juvenile prison facilities.

## No Washington State Felony Sentencing Alternatives Are Available

Noncitizens are as a practical matter not eligible to have their children placed with them while under DOC custody or at local federal ICE detention facilities. The Sentencing Reform Act (SRA) has

options that are alternative to confinement based on drug abuse and parenting. These alternatives are not available to noncitizens who are facing prison length sentences.

## **Getting & Supporting Court-ordered Visitation Matters**

Whether a noncitizen parent or child is incarcerated or detained, the dependency attorney should assist them in obtaining court-ordered child-parent visitation. Court orders should include frequent telephone calls, video call, and in-person visits. The detention or incarceration of a parent in a facility does not necessarily mean that child-parent visitation or other contact is prohibited. Federal, state and local detention facilities, including those run by private corporations, should provide child-parent visitation and other methods of contact. Contacting the facility directly is the best way to investigate and apply for the visitation to occur.<sup>8</sup>

## **Special Rules May Hinder Noncitizen Parents Visits With Their Detained Minor Children**

The visitation rules for a parent to visit with incarcerated or detained minor children often require parents to provide photo identification and to submit to screening for warrants or ICE holds. Child welfare attorneys should always check with the adult or juvenile facility to determine how to gain legal access for their clients to have child-parent visits and calls.

## **Considerations for Service Provision While Incarcerated or Detained**

When advocating for incarcerated parents at local jails and state prisons, attorneys should take steps to have the court-ordered forensic providers approved for entry into the facility where the parent is being held. Attorneys should also consider arranging for remedial services to occur while the noncitizen parent is incarcerated.<sup>9</sup> Unlike in criminal facilities, applications for all visitors in immigration detention may become part of the client's official immigration file (or "A file"). Noncitizens and their advocates should be cautious about what types of *professional* visitors they receive. A noncitizen parent being held in an ICE detention center may decide strategically not to arrange remedial services to occur there.

**Please consider reviewing more practice advisories related to representing noncitizens in dependency actions, or contact the Incarcerated Parents Project for more information at [dadre@defense.net](mailto:dadre@defense.net).**

Dependency Immigration Basics (Part I)

Mitigating Negative Findings for Noncitizens in Dependency Actions (Part II)

Immigration Relief for Noncitizens With Dependency Actions (Part III)

---

<sup>1</sup> This advisory is authored by D'Adre Cunningham, the Washington Defender Association's Incarcerated Parents Project Attorney, in consultation with Sara Sluszka WDA's Immigration Project. More information and resources for both projects can be found at: [www.defensenet.org](http://www.defensenet.org).

<sup>2</sup> See resources under the heading, *Immigration Enforcement Issues & Presidential Executive Orders of January 25, 2017*, at <http://www.defensenet.org/immigration-project>.

<sup>3</sup> The term, noncitizen, is used by immigration advocates to describe anyone who is not a U.S. citizen. In international treaties, a noncitizen is labelled a "foreign national," which is defined as a person who is not a citizen or national of the country in which they are living. The term "national" means "a person owing permanent allegiance to a state." 8 U.S.C. 1101(a)(21). Foreign nationals may or may not have lawful immigration status. See also definitions contained at:

[https://travel.state.gov/content/dam/travel/CNAtrainingresources/CNA\\_Manual\\_4th\\_Edition\\_August2016.pdf](https://travel.state.gov/content/dam/travel/CNAtrainingresources/CNA_Manual_4th_Edition_August2016.pdf).

The term "national of the United States" means "(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States." See 8 USC 1101(a)(22). Examples of U.S. nationals who are not U.S. citizens are persons born either in American Samoa or on Swains Island to parents who are not U.S. citizens.

<sup>4</sup> "A stateless person is someone who, under national laws, does not enjoy citizenship – the legal bond between a government and an individual – in any country. While some people are de jure or legally stateless persons (meaning they are not recognized as citizens under the laws of any state), many people are de facto or effectively stateless persons (meaning they are not recognized as citizens by any state even if they have a claim to citizenship under the laws of one of more states.)" U.S. Department of State webpage, <https://www.state.gov/j/prm/policyissues/issues/c50242.htm>. Stateless persons can still be detained and ordered deported, but usually will not be subject to physical deportation from the U.S.

<sup>5</sup> Rules of Professional Conduct 1.1 (Competence); Rules of Professional Conduct 1.2 (a) (Scope of Representation, *inter alia*); Rules of Professional Conduct 1.3 (Diligence); Rules of Professional Conduct 1.4 (b)(Communication).

<sup>6</sup> Indeed, criminal defense counsel's failure to correctly advise, or seek consultation to correctly advise, her client about the impact of a criminal conviction on that client's immigration status falls below the standard of "reasonableness under the prevailing professional norms" enunciated in *Strickland v. Washington*. *Padilla v. Kentucky*, 559 U.S. 356, 368-69 (2010); see also *State v. Sandoval*, 171 Wn.2d 163, 171-72 (2011). [WDA's Immigration Project](#) offers technical case assistance to attorneys seeking immigration consultation regarding collateral immigration consequences.

<sup>7</sup> Under federal law, any legal aid or nonprofit legal association receiving Legal Services Corporations funding are prohibited from using the funds to represent people who are undocumented, or are incarcerated in federal, state, and local prisons (including jails). 45 CFR 1637.1. There are limited exceptions. In 2017, some local jurisdictions created funding sources to pay for immigration representation for detained residents of their cities or counties.

<sup>8</sup> WDA's Incarcerated Parents Project has a list of detention and visiting rules information. The information can be accessed by contacting the project at: [www.defensenet.org](http://www.defensenet.org).

<sup>9</sup> See Part II of IV of Noncitizen in Dependency Action Series: Mitigating Negative Findings for Noncitizens in Dependency Actions.