

**DEFENDING NONCITIZENS CHARGED WITH RECKLESS DRIVING (RD)<sup>1</sup>**

**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; never had status.</li> <li>Came lawfully with temporary visa (e.g. student or tourist) that has since expired.</li> </ul> <p>Identify how long they have been in the U.S., if any LPR or USC family, and prior deportations or ICE contact.</p>	<ul style="list-style-type: none"> <li>Avoid jail. UPs in jail for even a day risk exposure to ICE by (illegal<sup>2</sup>) jail communication, and risk ICE enforcement.</li> <li>Preserve paths to legal status (relief).<sup>3</sup> Convictions and some conduct can bar relief.</li> <li>Asylum-seekers must avoid conviction for “particularly serious crimes”</li> </ul>
<p><b>Currently admitted in lawful status:</b></p> <ul style="list-style-type: none"> <li><b>Lawful Permanent Residents</b> (LPR or green card holders);</li> <li><b>Asylees and Refugees;</b></li> <li><b>COFA residents</b> (from a Pacific Island Compact nation)</li> </ul> <p>Identify <i>how long</i> person has had lawful status.</p>	<ul style="list-style-type: none"> <li>Avoid triggering deportation grounds.</li> <li>Avoid triggering inadmissibility.</li> <li>Preserve paths to LPR and relief from deportation.<sup>4</sup></li> <li>Preserve eligibility for naturalization. (LPRs cannot get US citizenship while on probation, and certain crimes bar “good moral character”)</li> </ul>
<p><b>Visa Holders (e.g. business, student, temporary employment or tourist visas):</b></p>	<ul style="list-style-type: none"> <li>If current, goals = LPRs &amp; refugees.</li> <li>If expired, goals = UPs. <i>See above</i></li> </ul>
<p><b>DACA recipients:</b> Felony, 3<sup>rd</sup> misd., or 1 “significant misd.” is bar; (“DV” + any GM is probably a bar)  <b>Temporary Protected Status (TPS) holders:</b> Any second misdemeanor is a bar.  <b>Non-citizen US Nationals</b> (American Samoa): Not “aliens,” not deportable; need GMC for citizenship.</p>	

**STEP TWO: DEFENSE STRATEGIES FOR RD CHARGES**

Immigration Consequences of RD
<ul style="list-style-type: none"> <li>❖ If UP client is applying for/renewing Deferred Action for Childhood Arrivals (DACA), a RD conviction is safer than DUI or Negligent Driving.</li> <li>❖ No court has held that WA RD is a crime involving moral turpitude (CIMT). It is not currently prosecuted as a CIMT. The arguments are strong that RD is not a CIMT, which is likely why DHS has not charged it. However, there is a small risk that it could be.</li> </ul>

<sup>1</sup> This advisory is intended to serve as a quick-reference guide for defenders representing 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>. When submitting an intake, **obtaining a complete criminal history, including sentences, is essential** for us to provide accurate advice. 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. If in doubt, don’t concede!

<sup>2</sup> See RCW 10.93.160

<sup>3</sup> UPs may have paths to lawful status. See, e.g., WDAIP advisory on “10-year cancellation of removal,” the principal form of relief, but there are many others: <https://defensenet.org/resource-category/cancellation-of-removal-for-undocumented-persons/>

<sup>4</sup> There are waivers for some crimes, for LPRs with 7 years residence, and refugees/asylees seeking LPR status See our advisory on Cancellation of Removal for Lawful Permanent Residents: <https://defensenet.org/resource-category/cancellation-of-removal-for-lawful-permanent-residents/>

- ❖ If it classified as a CIMT, it would trigger the CIMT inadmissibility ground. For LPRs this would result in obstacles to applying for citizenship and re-entering the country after travel abroad. Any 2 CIMTs will trigger a deportation ground. For UPs, a single CIMT could bar paths to lawful status.

### Best Alternatives to Avoid Immigration Consequences

*Viability of any alternative depends upon defendant's specific immigration status & criminal history.*

- ❖ **Misdemeanor alternatives:** Disorderly Conduct; Malicious Mischief; Obstructing.

Note: all convictions are a negative discretionary factor in an application for immigration benefits. For that reason, an immigration-safe deferred adjudication<sup>5</sup> can be a better outcome if successfully completed.

### Best Plea Practices If Pleading to RD

- ❖ **Plead to the minimum conduct of the statute only.** A plea statement setting forth the elements of the statute provides a sufficient factual basis to make the plea knowing, voluntary & intelligent under WA law.<sup>6</sup> Elaborating additional specific facts is not required and should be avoided.
- ❖ It is best practice to **avoid incorporating the charging documents, police report, or CDPC** as the basis for the plea. For this reason, you should generally avoid *Alford* pleas.<sup>7</sup> This is especially important if the police report contains allegations of gang involvement or drug activity.
- ❖ **Best plea language:** If possible, plead to the racing prong, otherwise: "I drove in *willful* disregard for the safety of *property*."
- ❖ **If pleading to RD down from DUI, it is best to obtain a "dry" reckless.** Ideally, the court would dismiss the DUI and it would be refiled as RD (as opposed to amending down). If pleading to an amended charge, avoid language in the plea that admits to involvement of drugs or alcohol. This language should no longer be required to make it a prior for purposes of felony DUI.<sup>8</sup>
- ❖ If no CIMT priors, **negotiate a sentence of 180 days** imposed with time suspended<sup>9</sup> to guard against triggering the CIMT inadmissibility ground if RD were subsequently classified as CIMT.

**Warning!** Advise *all* noncitizen clients (undocumented and LPRs, etc.) not to leave the U.S. or apply for LPR status/citizenship without first consulting an immigration attorney.

<sup>5</sup> See our page on immigration-safe deferred adjudication agreements, at <https://defensenet.org/resource-category/deferred-adjudication-agreements>

<sup>6</sup> *In re Pers. Restraint of Thompson*, 141 Wash.2d 712, 720-721 (2000) (citing *In re Personal Rest. of Hews (Hews II)*, 108 Wash.2d 579, 589 (1987)). *State v. Codiga*, 162 Wash.2d 912, 923-924 (2008); *State v. Zhao*, 157 Wash.2d 188, 200 (2006). See also, RCW. 9.94A.450(1).

<sup>7</sup> If there is a compelling reason for such a plea in your case, please contact us.

<sup>8</sup> See *State v. Wu*, 453 P.3d 975 (Wash. 2019) (To elevate misdemeanor DUI to felony DUI based on prior conviction, the involvement of alcohol or drugs in prior conviction was not essential element; *abrogating State v. Mullen*, 186 Wn. App. 321, 345 P.3d 26 (Div 2, 2015))

<sup>9</sup> See WDAIP's *Negotiating a 180 Day Sentence Advisory*, at <https://defensenet.org/resources/negotiating-a-180-day-sentence-practice-advisory/>