IMMIGRATION

# Representing Your Non-Citizen Following President Trump's New Executive Orders

By David M. Sperling

President Trump has issued two wide-sweeping executive orders that will require criminal-defense attorneys to re-think their strategies for representing non-citizen clients.

The first executive order — "Enhancing Public Safety in the Interior of the United States" — outlines new enforcement priorities for deportation, or removal, as it is technically known. A second memorandum orders the Executive Office for Immigration Review to prioritize docketing for detainees in federal custody. Furthermore, the Trump administration has stressed the importance of police cooperation with immigration, and its willingness to punish so-called "Sanctuary Cities" that shield defendants from inquiries by Immigration and Customs Enforcement (ICE).

Under the Obama administration, any non-citizen who entered the U.S. prior to Jan. 1, 2014 and did not have a serious criminal record, was not a priority for deportation enforcement and could reasonably believe they were safe from deportation. Under the new administration, under a literal reading of the order, virtually every undocumented immigrant who entered the U.S. illegally, which is a crime, is subject to deportation.


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What does this mean for the criminal-defense attorney? The practice of "crimmigration" — involving the intersection of criminal and immigration law — is highly complex and rapidly changing, especially in the Trump administration. It is well beyond the scope of this brief article.

But as a threshold issue, attorneys should first ascertain the legal status of their clients. Looks are often deceiving. Many immigrants came to the U.S. at an early age, speak English flawlessly, and appear completely "Americanized." But if they were not born or naturalized in the United States, they are potentially subject to deportation.

It is also important to collect information about the client's equities, including length of time in U.S. and U.S. citizen relatives. These factors will be useful if, in the worse-case scenario, the client is placed into deportation proceedings as a result of a guilty plea or conviction after trial. Knowledge of these equities and potential immigration remedies could help a savvy lawyer craft a plea agreement that would preserve the client's eligibility for relief in Immigration Court.

For example, imprisonment for more than 180 days will render a non-citizen client ineligible for cancellation of removal, even if he meets the other statutory requirements, including 10 years of physical presence in the United States and a "qualifying relative" who is a U.S. citizen or legal permanent resident.

In light of the new guidelines, an attorney's top priority must be to keep their non-citizen clients out of jail. Once a non-citizen defendant lands in jail, the government's machinery falls into place, often with an immigration "detainer." The detainer prevents a defendant from bonding out, and in many cases, insures that the non-citizen will be transferred to ICE custody, most likely in New Jersey or some other venue that separates him from legal counsel. Anyone in ICE custody will now have his case expedited in Immigration Court, reducing the chances he will be able to obtain legal counsel and fight deportation in Immigration Court.

Upon issuance of a "Notice to Appeal" by ICE, non-citizens who do not have prior deportation orders and who reside in the United States, have the right to seek relief in Immigration Court. However, it will be virtually impossible for a recently convicted detainee to obtain legal counsel and to show "rehabilitation," which is a key discretionary factor in many criminal immigration cases.

The first executive order specifies not only that anyone charged or convicted of "any criminal offense" is deportable, but, also anyone who has "committed acts that constitute a chargeable criminal offense." A favorite question for ICE attorneys during Immigration Court proceedings is: "Have you ever committed a crime for which you were not charged."

Long-settled immigration law provides that certain crimes — including rape, murder, other violent offenses, sexual abuse of a minor and drug trafficking — are "aggravated felonies" for which there is no relief.

The new guidelines for priority enforcement also include "fraud or willful misrepresentation" in connection with any official matter, abuse of public benefits, and failure to depart after a final order of deportation. Anyone convicted of drug or alcohol-

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FAMILY

# The 'F'-bomb: Pulling Back the Curtain on Forensic Custody Reports

By Vesselin Mitev

Mom and Dad are in a furious custody battle; standard, old-hat allegations are flung about by the attorneys in chambers, e.g., Dad has a regular internet porn habit, leaning towards barely albeit legal amateurs (curiously this was OK with Mom until Mom filed for divorce), Mom is a frigid narcissistic alcoholic with rage issues (Dad seemed to have dealt OK with same for the past 12 years), and both parents are on heavy dosages of prescription medications that allegedly do not interfere with their amazingly high-paying jobs.

The f-bomb is then dropped by Mom's attorney, who thinks she has a leg up, to get a forensic evaluator appointed to conduct an analysis and issue a forensic report as to custody. Dad's attorney agrees to a "neutral," with the caveat that each side can bring in their own expert to contradict the court-appointed "neutral" expert. A forensic evaluator is appointed, both parents spend a good deal of money, and a thick, single-spaced report is ultimately generated.

Saving for the moment the germane question of whether the MMPI 2 is capable of measuring one single trait relating to parenting (that's a topic for another column), after a good long while, the report is announced to have appeared in the court's chambers. Both attorneys go in, take a look, and (depending on the judge) either receive a copy or agree to only look at the report in the penumbra of the courtroom, take notes, but not to quote specific findings or conclusions and to discuss the terms with their clients in broad generalities.


Vesselin Mitev

If this seems like an absurd level of secrecy — shrouding from a party the very essence of a report that was generated specifically *for and about* that particular party and which very well may determine the future of that party's relationship and access to that party's child — it is. Now, Dad's attorney wishes to demand the internal file of the evaluator, including his notes, memos, etc., so that he can be properly prepared to cross-examine the forensic. Mom's attorney has a meltdown in chambers, arguing that this is preposterous, obscene, and an affront to Lady Justice herself. The court, having a good bit of sense (and not sure of the law, to be honest), tells both sides to brief the issue.

First, as the product of an expert witness, the report and its admissibility is governed by 22 NYCRR 202.16(g), which provides that reports "shall be exchanged and filed with the court no later than 60 days before the date set for trial" and that at the discretion of the court the report "may be used to substitute for direct testimony" with the expert witness available for cross-examination. 22 NYCRR 202.18 also allows the court to appoint an "appropriate" expert to testify to the issues of custody or visitation.

It is also beyond cavil that the report of an expert witness (and said witness' testimony) is but one factor to be considered and while entitled to some weight, are not meant to usurp the judiciary's role as ultimate fact-finder and decision-maker, see *Baker v. Baker*, 66 AD3d 722 [2d Dept 2009]).

Thus, at first blush, it would seem that an expert's report (and the basis on which it was reached, including notes, memos and that perfect buzzword "raw data") would be easily discoverable under Article 31 of the CPLR (indeed, even 22 NYCRR 202.16 (g) explicitly references this at (g)(1). In a somewhat logically infirm 2002 decision, a Westchester court opined that although broad discovery was the best tool for sharpening the issues for trial, the potentially deleterious effects of releasing the report's underlying data would not be in the best interest of the children and adopted a hazy "special circumstances" (undefined) test that a party seeking discovery would have to show, see *Ochs v. Ochs*, 193 Misc. 2d 502 (Sup. Ct. Westchester County, 2002).

Twelve years later in a pair of decisions out of Nassau County, the special circumstances test was rejected in favor of a "rebuttable presumption of pre-trial discovery of the forensic report and the evaluator's entire file, including raw data, notes, tests, test results and any other materials utilized and same should be provided in every case, unless a specific motion is made to restrain the release of those materials based upon a showing of substantial prejudice," *JFD v. JD*, 45 Misc. 3d 1212(A) (Sup. Ct., Nassau County, 2014) citing to its earlier decision on

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thereafter," as the court had previously held in *Solazzo v. New York City Tr. Auth.*

Therefore, the precise time when the storm ends is of great import to the doctrine's applicability. According to the court, when "precipitation was falling at the time of claimant's accident and had done so for a substantial time prior thereto, while temperatures remained near freezing," the doctrine applied irrespective if it was only "raining" at the moment of the fall so long as there was a "wintery mix" still existing at such time. Moving forward, temperature is no longer the only dispositive factor to apply the doctrine. Instead, a totality of the weather circumstances is the standard.

**Vested right to develop requires reasonable reliance**

The Court of Appeals, in *Exeter Building Corp. v. Town of Newburgh*, clarified the reliance element to obtain "a common law vested right to develop the property in accordance with prior zoning regulations." The court clarified that the reliance element from the "*Magee* test," which the court set in its 1996 holding *Town of Orangetown v. Magee*, must be reasonable. With respect to the reliance element, the *Magee* holding had only stated that "[t]he landowner's actions relying on a valid permit must be so substantial that the municipal action results in serious loss rendering the improvements essentially valueless."

Now, practitioners must also focus on whether such reliance was reasonable under the circumstances when seeking a common law vested right to develop. As an illustration of reliance being unreasonable, the dispositive factor in *Exeter Building Corp.* was that "the Town Planning board had repeatedly warned petitioners of the proposed rezoning." Moving forward, land use counsel must hear what the Town Planning Board is saying, rather than just focusing on the written approvals obtained.

**Vested right to develop requires legally issued permit**

The Court of Appeals, in *Perlbinder Holdings, LLC v. Srinivasan*, again analyzed the Magee test with respect to establishing a common law vested right to develop property in accordance with prior zoning regulations, but this time addressed the test's valid permit element. The court held that "[v]ested rights cannot be acquired . . . on an invalid permit." The facts before the court concerned a permit for a non-conforming "grandfathered" sign, which was erroneously issued because the "non-conforming use had been lost since that use had been discontinued for more than two years," which was the applicable grandfathering limitations period to the facts. As the court explained, wrongfully issued permits can be revoked by the municipality at any time. Moving forward, counsel needs to independently confirm and perhaps litigate whether the permit that is relied upon for a vested right was legally issued in the first instance.

**Justiciability of positive declaration pursuant to SEQRA**

The Court of Appeals, in *Ranco Sand and Stone Corp. v. Vecchio*, addressed whether a lead agency's positive declaration, under SEQRA, requiring an applicant for rezoning to prepare a Draft Environmental Impact Statement (DEIS), is justiciable in an Article 78 Proceeding. In reaching its determination, the court first looked to its 2003 holding in *Gordon v. Rush*, which set forth the "two requirements," for ripeness, including: "whether the decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury;" and whether the harm "may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party." Next, the court differentiated the requirements by stating that the second requirement requires more than an inability to "recoup the costs incurred and time spent on conducting a DEIS." Then, the court gave illustrations of ways to satisfy the second requirement, including by claiming that "the declaration is unauthorized or that the property is not subject to SEQRA" or the "Town Board acted outside the scope of its authority." Simply stated, the court reminded practitioners that "a positive declaration imposing a DEIS requirement is usually" not ripe for review. Moving forward, counsel must advise clients of the cost-benefit analysis to bringing an Article 78 based upon a positive declaration given the limited window to obtain justiciability of the issue.

**Condominium lien priority**

The Court of Appeals, in *Plotch v. Citibank*, clarified lien priority issues between a consolidated mortgage and a condominium's common charge lien. The court held that a consolidated mortgage constitutes only one first mortgage of record, for purposes of lien priority under the Condominium Act, if it is filed prior to the common charge lien. It is unknown how lien priority will be decided in the future if a common charge lien is filed prior to the consolidated mortgage, but it is likely to lose priority based on the holding's justification.

Moving forward, practitioners must race to file their liens to preserve priority.

**End of anonymous LLC members in NYC**

The Financial Crimes Enforcement Network (FinCEN) of the U.S. Department of the Treasury issued a Geographic Targeting Order, on July 22, 2016, "requiring [title insurance company] to collect and report information about the persons involved in certain residential real estate transactions" that do not involve "a bank loan or other . . . external financing." It being noted that FinCEN's final rule, effective July 11, 2016, which promulgated 31 CFR 1010.230(a), requires similar disclosures by banks (effecting deals with mortgage loans). Irrespective, under the GTO, title insurance companies must report "within 30 days of the closing," on Form 8300, *inter alia*, "the name, address, and taxpayer identification number of all [] members" of any limited liability company involved in a real estate transaction.

In New York, the GTO applies to "total purchase price[s] of $1,500,000 or more in the Borough[s] of Brooklyn, Queens, Bronx, or Staten Island" and "a total purchase price of $3,000,000 or more in the Borough of Manhattan." The GTO was effective on August 28, 2016. As a result, there are no more anonymous high-end purchases in the five boroughs.

**Citizenship for real estate investment trusts**

The U.S. Supreme Court, in *Americold Realty Trust v. Conagra Foods*, determined the citizenship of a REIT for purposes of diversity jurisdiction in Article III Courts. The court held that "citizenship is based on the citizenship of its members, which include its shareholders," not the "citizenship of its trustees alone." In rendering its holding, the court differentiated a REIT from a "traditional trust," which would only have the citizenship of its trustees, and a corporation, which has citizenship "where they were chartered and had their principal places of business." Moving forward, diversity jurisdiction will be difficult to obtain for REITS as they will need to demonstrate that no shareholder shares citizenship with the adverse party.

Practitioners should therefore carefully consider the costs of an application to remove a claim to federal courts on diversity grounds, in proving the citizenship of each shareholder, and the potentiality that such removal will be unsuccessful when crafting their litigation strategy.

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similar circumstances.

The *JFD* Court likened discovery to Rosario discovery in criminal cases, such as police officer's memo book notes, which are discoverable, but ultimately in possession of the prosecution. In 2015, in *KC v. JC*, 50 Misc. 3d 892 (Sup. Ct. Westchester County, 2015), the court aptly turned *Ochs* on its head, stating that it was hard pressed to see how disclosing the underlying data could possibly further fracture the alleged frail relationships the children already had with their parents:

"The degree to which any damage may occur to these already fraught relationships is dwarfed by the substantial benefit to the Court in obtaining a full understanding of the forensic report and the process used by the evaluator to reach its conclusions, so that the Court may determine the best interests of the children."

Thus, the recent persuasive authority (congruent with the CPLR) is that discovery of the entire forensic file is and should be permitted, unless it can somehow be shown that releasing same would result in substantial prejudice.

What access does the court have prior to trial regarding the contents of the report? First, the report is entirely hearsay (sometimes double, triple, quadruple hearsay) and thus per se inadmissible absent an agreement of the parties to let portions of the report (or the entire report) into evidence, subject to cross-examination. A strict reading of the rules, then, appears to prohibit any access into the contents or conclusions of the report, prior to the moment it is handed up to the expert witness to be verified as made under oath, at trial.

Conflicting duties and responsibilities come into play, however, if the report contains, for example, severe allegations of parental misbehavior that would serve as grounds for an immediate change of custody. In that event, excerpts from the report could and should freely be cited by the movant, insofar as the rubric concerns the best interest of the child and the hearsay exception can be overcome in that the contents are not being offered for the truth but under the state of mind exception, or as dealing with a party's mental, emotional, physical state, which is never hearsay.

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