

For the Record

The Official Newsletter of the John W. Peck Chapter

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President's Message, from Kevin Schad

Greetings, everyone, and thank you for taking the time to read through our Chapter newsletter. Big thanks go out to Augustus Flottman for putting this together, and Matt Miller-Novak for the great pictures. I am excited to share with you all that is going on with our Chapter.

First, this month marks the 100th anniversary of the Federal Bar Association. Our Chapter will be sending several people to the Washington DC mid-year meeting as National celebrates the centennial from March 20-22, 2020. Second, I am excited for us to continue our programming and events started in the last few years. Our Gender Diversity committee recently held its PLEDGE celebration, honoring several women who have been practicing 4-8 years who are demonstrating exceptional legal skills. There is more information on that celebration later on in the newsletter. Our mentor/mentee program is already winding down (what a quick academic year), with over 45 law school students signed up to be mentored by our Chapter. Congratulations to Chandra Napora and Megan Fields for leading this effort. We are also continuing our service with Tender Mercies. On the second Tuesday of each month, we serve a pizza dinner to those residents. You can sign up for more information here: <https://www.signupgenius.com/go/30e0e44aba82da4f85-tender>



Immediate past-president Bryce Lenox (left) peacefully transitioned power to King Schad (right).

Our Chapter is also planning several CLE events in the next few months – be on the lookout for emails and sign up for these great resources.

Finally, I wanted to take a moment to thank our previous president, Bryce Lenox, for his outstanding service to our Chapter over the past year. He has made my job easier through his leadership. Looking forward to continuing our great year with the Chapter!

Advising Non-Citizens of Consequences of Criminal Charges

by Sarah Larcade

The Sixth Circuit just-decided an interesting case, *Rodriguez-Penton v. United States*, 905 F.3d 481 (2018), in which it held that a non-citizen defendant claiming ineffective assistance of counsel based on counsel's failure to advise of the immigration consequences of a guilty plea may demonstrate prejudice based on a missed opportunity to bargain for a more favorable plea, even where the defendant admits he would not have gone to trial. Dissenting Judge Thapar felt the decision went too far and created "a new right – the right to negotiate more." See *Id.* at 490 (J. Thapar dissenting).

While the court did not "create a new right," its decision does have a broad impact on ineffective assistance claims brought by non-citizens. Under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), there is a two-part test for an ineffective assistance of counsel claim: (1) deficient performance by counsel, and (2) prejudice to the defendant. *Id.*, at 687. The Supreme Court has issued two important decisions on how the *Strickland* analysis applies to non-citizens' right to accurate advice regarding immigration consequences of a criminal conviction.

Update from the Student Division of the Federal Bar Association

By Raika Casey

As law students, our professional reputation begins once we step foot into the law school. For some, it begins even earlier. At the University of Cincinnati College of Law, we recognize both the burdens and opportunities this presents. Every interaction with a classmate, every visit to a professor's office hours, and every coffee meeting with a member of the legal community is an opportunity. How to adequately capitalize on each opportunity is a learned skill, and it is a skill that the Student Division of the Federal Bar Association at the University of Cincinnati aims to perfect. Through seminars underscoring the value of effective networking and professionalism, events out in the Cincinnati legal community, and the guidance of FBA mentors (The FBA Mentorship Program), the UC FBA cultivates the next generation of exceptional federal practitioners.

In October, the UC Student Division welcomed over 30 new members into our chapter, doubling our size from last year. Nearly every new member signed up for the mentorship program. The 2019-2020 Mentorship Program kicked off officially on October 22nd at an event at the Transept. There, FBA mentees were able to get to know members of the federal bar in a casual, fun setting.

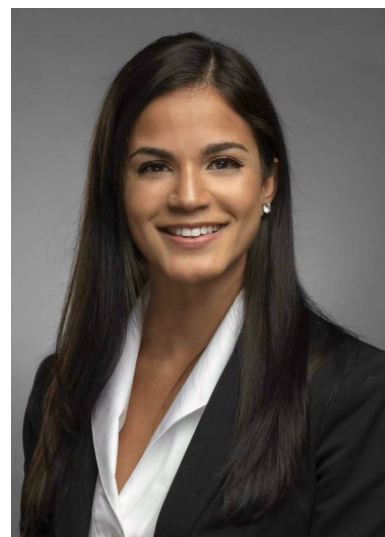
In November, we hosted Bryce Lenox and Kevin Schad for a "Secrets to Success Seminar" focused on networking and building your professional reputation. This event was well attended, and allowed non-FBA members to see the kind of connections and opportunities available to FBA members.

In December, coordinated with Kevin Schad and got a group of students down to the courthouse to observe

oral arguments. Learning oral advocacy in a classroom is beneficial, but seeing arguments in action, in a courtroom, with actual judges will be an extraordinary experience for students.

Next semester, we plan to host a panel discussion focused on federal practice from four different perspectives involving four distinguished members of the legal community. A District Judge, a Magistrate Judge, a Federal Public Defender, and an Assistant United States Attorney.

Additionally, we also hope to co-host the Judges Networking event with the Chase Law Student Division again in March. Last year, both Student Divisions coordinated to put on an exceptional event at a restaurant downtown that allowed students to get to know our local Judges.



Raika is in her second year of law school at University of Cincinnati and is looking forward to returning to Faruki as a summer associate.

In the first decision, *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284, the Court found the failure to advise a non-citizen defendant of the immigration consequences of a guilty plea constituted deficient performance, satisfying the first part of the Strickland test. Mr. Padilla was a lawful permanent resident who faced mandatory deportation after pleading guilty in a Kentucky state court to trafficking a large amount of marijuana. *Id.* at 359. Mr. Padilla later claimed his counsel failed to advise him of the consequence of deportation prior to entering the plea. Specifically, counsel advised “that he did not have to worry about immigration status since he had been in the country so long.” *Id.*

The Kentucky Supreme Court denied relief, finding that deportation is merely a “collateral” consequence of the conviction. The Supreme Court disagreed, holding that “constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation.” *Id.*, at 1478. The Court considered the vast changes made to immigration laws over the past century and recognized that “deportation is an integral part – indeed, sometimes the most important part – of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.” *Id.*, at 1478-1480.

Continued on page 13.

JUDICIAL SPOTLIGHT

WITH JUDGE BUNNING

Do not tell Judge Bunning fewer cases are going to trial, he is presiding over as many cases in the Eastern District of Kentucky now as he ever has in 17 years on the bench, including several bench trials. Despite the healthy trial docket in the EDKY and our chapter’s initiatives to offer more court room opportunities to recently admitted federal practitioners (outlined by Judge Litkovitz in the Winter Edition of this newsletter), all attorneys need to find ways to hone fundamental trial skills outside the court room. Continuing our editorial focus of bringing practical advice to our chapter with this newsletter, the Cincinnati-NKY Federal Bar Association sat down with Judge Bunning to get his advice on trial practice and learn about the differences in trying a case between the Southern District of Ohio and the Eastern District of Kentucky.

Q: What are three tips for successful trial practice?

Judge Bunning: Preparation, Perspective and Patience. The most important factor in a successful trial is preparation. Although it may sound cliché, thorough preparation is the most important attribute for any successful trial lawyer. The Court and your opposing counsel will be prepared and if you’re not, it will show, and the jury will most certainly notice. I routinely speak to every jury at the conclusion of a trial and the one criticism I hear most often is that one (or more) of the lawyers didn’t seem prepared to try the case, or seemed to be wasting their time with proving something that didn’t matter in their decision.



The second P is perspective. Every lawyer needs a healthy dose of perspective, and should make sure he or she has given his or her clients a reasonable expectation of the case. Keeping the case in its proper perspective will allow you to be a more successful trial lawyer. This is especially true with criminal defense lawyers who practice in federal court. Success is often defined not in obtaining the rare dismissal or acquittal, but rather, making sure that your client receives the best defense possible. Making sure the client understands the realistic likelihood of success is critical. As I am fond of saying to litigants, you can’t make chicken salad out of chicken feathers. Remember that even the best lawyer can’t change the facts.

The third P is patience. If the Court rules against you on an evidentiary objection, don’t pout or stew over it, especially in front of the jury. And especially don’t thank the Court after I sustain your opponent’s objection at side bar. The second time you do it I will tell you in front of the jury not to thank me when I rule against you. *Continued on page 12.*

PLEGDE TAKES FLIGHT

FBA “Pledge” Initiative Announced This Summer

This summer, Judge Stephanie Bowman and Gender-Equity Awardee Jody Luebbers announced the John W. Peck Chapter’s new gender equity initiative at an event hosted by KMK. Announcing a continuation of one of Past President Dan Donnellon’s signature initiatives, Judge Bowman noted the work that our Chapter has to do in cultivating a greater degree of equality in our own jurisdictions. In fact, Judge Bowman explained that our local litigation practice is **below** the national average in key gender statistics.



CHAPTER HOLDS FIRST ANNUAL PLEDGE EVENT TO HONOR 2020 EMERGING WOMEN LITIGATORS

On January 28, 2020 the Chapter held an event at PRIME to honor the first ever class of “Emerging Women Litigators”, listed below. The Chapter would also like to extend a **special thanks** to **Judge Stephanie Bowman** for her role in leading the PLEDGE initiative event and to **LexisNexis** for sponsoring the event at PRIME. Eight chapter members were honored.

THE PLEDGE CLASS OF 2020



Melissa Watt - Faruki

Lindsay Upton - Montgomery Jonson

Sophia R. Holley - Keating Muething & Klekamp

Erin M. Heidrich - Freking Myers & Reul

Jennifer Dollar Smith - Squire Patton Boggs

Abby Chermely - Dinsmore & Shohl

Ashley Brucato- United States Attorneys Office

Medora (Dorie) Akers - Taft /



Cristina Frankian deserves a very special thank you from the Chapter for selecting a wonderful array of appetizers, which included fried chicken. Thank you, Cristina.

SPECIAL THANKS TO CHAPTER AND PLEDGE SPONSOR LEXISNEXIS

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Win



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2019 Chapter Christmas Party



Judge Black explains to young lawyers at the Chapter Christmas party to never call him in chambers with a question.

WINTER LUNCHEON



WINTER LUNCHEON RECAP



New Southern District of Ohio District Court Judge Cole spoke to chapter members at the annual luncheon and provided some general practice insights and tips for lawyers who are appearing in front of him for the first time:

1. Be thematic. Identify a theme for your case. Provide the Court with something short and memorable that frames the case in your client's best interest.
2. Frame the issue. Regardless the side you're on, the issue can be presented in a persuasive way; think about how you are framing the issue for the Court to decide.
3. When preparing for oral argument, assume he has read the briefs thoroughly. This may not apply to all judges; but, Judge Cole emphasized his preparation and desire not to hear a regurgitation of the briefs. He explained that he likely has a draft opinion in front of him at oral argument and will be prepared with specific questions during argument.
 - a. Answer the specific question asked. Do not avoid or deflect.
 - b. Think of oral argument as a conversation – not an “argument.”
 - c. What is the best case he can cite to if he wants to adopt your position.
4. Avoid adjectives and adverbs. Leave the hyperbole out of your writing and argument. Stick to the facts and present them in an organized and persuasive manner. If you do this, then you will not need the fluff.

Summary provided by Erin E. Rhinehart of Faruki

FBA EVENT PHOTOS



The Colleges of Law for UC and NKU hosted a happy hour mixer.



President (King) Schad found time to confer with the FBA's past presidents, similar to President Obama's famous meeting with former Presidents George W. Bush and Bill Clinton.

Magistrate Judge Karen Litkovitz Honored as First First Ever Barrister of the Quarter



By Eden Thompson

The Executive Committee is proud to unanimously name Magistrate Judge Karen L. Litkovitz as its first ever John W. Peck Cincinnati-Northern Kentucky Chapter Barrister of the Quarter. As the nominator wrote to the Executive Committee, “Judge Litkovitz embodies the core mission of the Federal Bar Association by administering justice, serving the public honorably, and making positive contributions to the legal profession.” According to Senior U.S. District Judge Michael R. Barrett, (insert quote from Judge Barrett). Most recently, in October 2018, Judge Litkovitz was appointed to her second term as a United States Magistrate Judge for the Southern District of Ohio. Her path to the judgeship is preceded by a respectable background of public service and commitment to helping people in A native of Cleveland, Judge Litkovitz grew up in the suburb of Avon

Lake as the granddaughter of Italian immigrants and first generation Polish and Hungarian-Americans. She had no lawyers in her family. Judge Litkovitz attributes her strong work ethic to growing up with a father who worked full-time at a chemical factory, raised two kids, went to night school for twelve years to earn his college degree, and always made time for his family. Judge Litkovitz decided that she wanted to become a lawyer while researching career paths in a high school civics class. Talented at math (unlike most lawyers), Judge Litkovitz double majored in Statistics and Business Pre-Law at Bowling Green State University, where she graduated in 1981.

She subsequently enrolled at the University of Cincinnati College of Law where she met her husband, attorney Matthew Brownfield, in a 1L Civil Procedure class. She was initially unsure what she wanted to do with her law degree. During law school, Judge Litkovitz participated in an “urban plunge” experience through a local church group. For one weekend, she stayed with a single mom raising four kids in a home lit with one lightbulb and heated

by an oven. She learned about the family’s challenges of daily living and the services available to low income people. “In two days, I’ll be able to leave, but they won’t,” reflected Judge Litkovitz about the experience. The “urban plunge” inspired Judge Litkovitz to use her law degree to help those with less means navigate the legal system and have their voices heard.

Continued on page 13.



Judge Litkovitz and President (King) Schad volunteer at Tender Mercies, where our Chapter serves dinner on the second Tuesday of each month. To volunteer for Tender Mercies, contact Greg Ahrens.

As such, the Court found that “accurate legal advice for noncitizens accused of crimes has never been more important.” *Id.* Because the immigration consequences of conviction were clear, the Court held that Mr. Padilla had established a constitutional deficiency in his counsel’s performance sufficient to satisfy the first prong of the Strickland test – the attorney’s performance fell below the “objective standard of reasonableness.” *Id.* at 1483-1484.

In the second decision, *Lee v. United States*, the Supreme Court held that a defendant is prejudiced by his attorney’s erroneous advice about the immigration consequences of a plea where deportation is a determinative issue and the defendant would have gone to trial had he known that conviction would result in deportation. *Lee v. United States*, 137 S. Ct. 1958, 1966 (2017). Mr. Lee was a legal permanent resident who had moved to the United States with his family when he was 13 years old. *Id.*, at 1960. Decades later, he was indicted on federal charges for possessing drugs with the intent to distribute. *Id.* at 1963. The evidence against Mr. Lee was overwhelming, so his attorney advised him to plead guilty in order to receive a lower sentence, even after Mr. Lee asked repeatedly whether he would be deported. *Id.* Counsel incorrectly assured him that he would not be deported. *Id.*

Read the rest of the article on page 14.

Q&A with Judge Bunning Continued

Q: Do you commonly receive feedback from jurors regarding cases?

In almost every case, I will routinely speak to the jury after the jurors have rendered their verdict. Of course the Court will not ask the jurors anything about their deliberation. Rather, it is designed to elicit feedback about the lawyers, the Court, etc... that could be helpful for future cases. If I learn anything that I believe would be helpful for the lawyers, I will ordinarily have a conference call with both lawyers to share that feedback.

If the jury is unable to reach a verdict or a mistrial is declared for any reason, I will ordinarily allow the lawyers to ask the jurors questions before they are finally excused. That feedback is oftentimes invaluable for the lawyers in determining whether the case should be retried, or if a settlement should be pursued.

The most frequent criticism I have received from jurors is that lawyers over try their cases. Questions such as “why did that lawyer call 4 witnesses when I would have been enough?” or “why did they waste 3 days of our lives on this case?” or comments such as “there was too much down time between questions, it seemed like the lawyer didn’t know his case very well” are common.

The lesson from these questions and comments is to not over try your cases. Jurors uniformly don’t like having their time wasted.

Q: Are there any appreciable differences between trying a case in the ED-KY vs. the SD-OH?

The most significant difference is how the jurors are summoned for jury service. In the ED-KY, jurors serve for 6 months or 20 days, whichever occurs first. The ED-KY practice oftentimes will lead to having experienced jurors on the prospective jury panel. I will ordinarily ask the prospective jury pool about prior jury service during voir dire. We also have a long-standing rule in the ED-KY that prohibits lawyers from contacting jurors after the case is over. Unless the procedure has changed in the SD-OH, they have a one and done juror policy, which means you wouldn’t have returning jurors on your prospective panel.

Another difference is that both Judge Bertelsman and I will often limit each side in civil cases to a specified number of hours. For example, each side would be limited to 10 or 20 hours for their presentation of proof. That includes opening statements, all examination, both direct and cross, bench conferences (usually assessed 5 minutes for the side that requests to approach), and closing arguments. The clerk serves as the timekeeper. This procedure requires the lawyers to focus on the testimony and evidence which is truly important, streamlines their case, and helps them avoid over trying their cases.

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Q: Every judge handles voir dire a little differently. How do you prefer to handle voir dire?

In a garden variety case, I will conduct the majority of the Q&As with the prospective panel. Each side is usually given 15 minutes to ask follow-up questions. If there are multiple defendants I will usually give each party some time to question the jurors. If you want additional time you can request it at the final pretrial conference, usually about 10 days beforehand in a criminal case or approximately 30 days prior in a civil case. Depending on the complexity of the case I have used juror questionnaires but that is the exception not the rule.

After the Q&A session is complete, I will ordinarily call the lawyers to the bench where for-cause strikes are addressed. Once jurors are excused for cause (if any), the clerk will call around enough jurors so that if all peremptory strikes are used, we'll have the requisite number of jurors remaining. Of course that would be 12 in a criminal case and I will usually seat 8 jurors for a civil trial.

In the average criminal case, the clerk would call around 31 jurors after for cause strikes were exercised. The first 28 jurors would be the regular venire and the final 3 jurors called around would be the alternate venire. For the first 28 jurors, the Defendant would have 10 peremptory strikes

and the government would have 6. The first 12 jurors in order of selection not stricken would make up the jury. For the alternate pool, each side would have 1 peremptory strike so the first alternate juror not stricken would be the alternate.

In the average civil case, the clerk would call around 14 jurors after for-cause strikes are resolved. Each side would have 3 peremptory strikes. The first 8 jurors in order of selection not stricken would make up the jury. I do not seat alternate jurors in civil cases.

Interview by Augustus Flottman. Special thanks to Judge Bunning for his time.

Barrister of the Quarter Continued

Judge Litkovitz sees her role as a magistrate judge as a “problem solver.” She really enjoys mediating disputes between the parties to a lawsuit and finds that alternate dispute resolution is a fair, cost-effective, and often more satisfying way to resolve legal disputes. As a law clerk, Judge Litkovitz had developed an expertise in many substantive areas of the law, as well as federal jurisdictional issues. However, she had never practiced criminal law. When first taking the bench, Judge Litkovitz had to quickly get up to speed on criminal matters. In addition to a diverse civil docket, she is also responsible for the initial proceedings in felony criminal cases, such as initial appearances, bail hearings, arraignments, and detention hearings. With a warm demeanor to welcome our country’s newest citizens, Judge Litkovitz also presides over many naturalization ceremonies in the courthouse and off-site at local schools.

Outside the courtroom, Judge Litkovitz volunteers a significant amount of her personal time to improving the legal profession and community at large. She sits on the Cincinnati Bar Association’s Board of Trustees, mentors law students through the Federal Bar Association and Ohio Women’s Bar Association, and volunteers with Tender Mercies. She is also a Fellow of the Cincinnati Academy of Leadership for Lawyers, a judicial advisor of the Potter Stewart Inn of Court, and a member of the Federal Magistrate Judges Association.

Judge Litkovitz believes that it is important for the legal community to be inclusive and diverse. Two of Judge Litkovitz’s proudest professional achievements include the revitalization of the Cincinnati Bar Association’s Lawyer-to-Lawyer program and the implementation of the Criminal Justice Act (CJA) Training Panel Program. The Lawyer-to-Lawyer program was created in the mid-1990s and revitalized by Judge Litkovitz and Dinsmore attorney Michael Hawkins this past year. It is an initiative of the Cincinnati Bar Association’s Diversity & Inclusion Committee that pairs lawyers of diverse backgrounds to share professional, social, and other experiences. In its first year back, the program has received a tremendous response with 120 people participating. The CJA Training Panel Program was implemented to increase the diversity of attorneys on the court’s CJA Panel, ensure the availability of qualified applicants to the CJA Panel, and secure quality representation for all indigent criminal defendants. The Training Panel Program gives “mentees” an opportunity to serve in a “second chair” capacity and gain necessary experience in order to provide indigent defendants in federal criminal cases with high quality, constitutionally-guaranteed legal representation.

While Judge Litkovitz certainly stays busy with her caseload and professional activities, she enjoys jogging and yoga in her free time. Judge Litkovitz also embraces her Italian roots by traveling, cooking Italian food, and taking Italian language lessons.

Congratulazioni, Judge Litkovitz! The Federal Bar Association John W. Peck Chapter commends you for your contributions to our chapter, the legal profession, and the community at large.

Judge Litkovitz graduated from the College of Law in 1984. Prior to her appointment to the federal bench, Judge Litkovitz clerked for then-Magistrate Judge Robert Steinberg and honed her legal research and writing skills under his tutelage. After two years of clerking, she began her eight-year career at the Cincinnati Legal Aid Society, representing low income people in the areas of housing, disability, and public assistance law. Judge Litkovitz then decided to scale back her legal career to focus on raising her three sons, Andy, Joseph, and Luke.

Judge Litkovitz returned to the federal court as a part-time clerk again for Judge Steinberg and later as a full-time clerk for Magistrate Judge Timothy Hogan. In these positions, she focused on prisoner civil rights, habeas corpus, social security disability, employment discrimination, and various other types of civil cases filed in the federal courts. Judge Hogan served as both boss and mentor by allowing her to actively participate in settlement conferences and court hearings. “I would not be a magistrate judge today if not for Judge Hogan’s mentoring,” explained Judge Litkovitz. Judge Hogan saw in Judge Litkovitz the potential as a judge and upon his retirement, he encouraged her to apply for his position. In 2010, the sitting district court judges of the Southern District of Ohio selected her for the open magistrate judge position.

**This article was authored by Eden Thompson, FBA member and current term law clerk to Magistrate Judge Litkovitz. On a personal note, I would like to add how fortunate I am to have started my legal career as Judge Litkovitz’s law clerk. I learn so much from my clerkship each day as a result of her guidance, training, and patience.*

Advising Non-Citizens of Consequences of Criminal Charges Continued

In the second decision, *Lee v. United States*, the Supreme Court held that a defendant is prejudiced by his attorney's erroneous advice about the immigration consequences of a plea where deportation is a determinative issue and the defendant would have gone to trial had he known that conviction would result in deportation. *Lee v. United States*, 137 S. Ct. 1958, 1966 (2017). Mr. Lee was a legal permanent resident who had moved to the United States with his family when he was 13 years old. *Id.*, at 1960. Decades later, he was indicted on federal charges for possessing drugs with the intent to distribute. *Id.* at 1963. The evidence against Mr. Lee was overwhelming, so his attorney advised him to plead guilty in order to receive a lower sentence, even after Mr. Lee asked repeatedly whether he would be deported. *Id.* Counsel incorrectly assured him that he would not be deported. *Id.* However, Mr. Lee was charged with a deportable offense, and conviction would have led to automatic deportation (which his attorney would have known had he even read *Padilla*). Mr. Lee filed a § 2255 motion, arguing that if he had known his conviction would result in mandatory deportation, he would never have pled guilty and instead taken his chances at trial. *Id.* The Sixth Circuit found that, because Mr. "Lee had no bona fide defense, not even a weak one, so he stood nothing to gain from going to trial but more prison time... no rational defendant charged with a deportable offense and facing overwhelming evidence of guilt would proceed to trial rather than take a plea deal with a shorter prison sentence." *Id.* The Supreme Court disagreed, finding that the inquiry into a defendant's decision-making may not necessarily turn solely on the likelihood of conviction after trial, and recognizing that the

consequence of deportation could affect this decision-making. *Id.*, at 1966. After all, deportation may be as dire if not more dire than a lengthy prison term for some non-citizens. *Id.*, at 1967. As such, the Court held that Mr. Lee was prejudiced by his attorney's inaccurate advice regarding the immigration consequences of conviction:

"But for his attorney's incompetence, Lee would have known that accepting the plea agreement would certainly lead to deportation. Going to trial? Almost certainly. If deportation were the 'determinative issue' for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this country and no other, as did Lee; and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in [Lee's] case, that 'almost' could make all the difference. *Id.*, at 1968-1969 (emphasis sic)."

If *Padilla* found that a non-citizen defendant can establish ineffective assistance of counsel based on incorrect advice regarding immigration consequences, and Lee found that prejudice could be shown if the defendant says he would have gone to trial had he known he would be deported, why is the Sixth Circuit's recent decision, *Rodriguez-Penton*, significant? In *Rodriguez-Penton*, whether there was deficient performance was not disputed, as the attorney failed to advise *Rodriguez-Penton* that his guilty plea would have the consequence of deportation. Instead, the question was whether *Rodriguez-Penton* could establish prejudice by showing that, had he known of the deportation consequence, he would have tried to negotiate a plea deal that did not involve (or lowered) the risk of deportation despite the fact that he would not have taken his chances at trial. *Rodriguez-Penton v. United States*, 905 F.3d 481, 488-89 (6th Cir. 2018). Even though there was no record of an offer that would have specifically taken deportation off the table, and *Rodriguez-Penton* unequivocally

stated he would not have taken the case to trial, the Sixth Circuit held that his counsel's failure to advise of the immigration consequences of a guilty plea may constitute prejudice as that failure causes a defendant to miss the opportunity to bargain for a more favorable plea. What the court did in *Rodriguez-Penton* was recognize the importance of accurate advice regarding the immigration consequences of conviction in negotiating a plea agreement. Without knowing the consequences at the outset, *Rodriguez-Penton* never had a chance of even trying to resolve his case in a way that avoided deportation. He at least had the right to try.

So, what does this mean for federal practitioners defending non-citizens? The first and most important thing to do is to determine your client's immigration status and what, if any, are their goals for staying in the country or obtaining some other immigration status. What is more important for your client to avoid – prison or deportation? Second, your client's charges must be analyzed under Section 237(a)(2) of the Immigration and Nationality Act, which sets out classes of deportable crimes. 8 U.S.C. § 1227(a)(2). Third, it is important to advise your client of immigration consequences in connection with every stage of a criminal process – whether that is in plea negotiations, trial, or sentencing. And if all else fails, consult an immigration attorney before you decide on a defense strategy.

Sarah Larcade is an associate at McKinney & Namei Co., LPA and practices in criminal defense and immigration.