

VLN TIP OF THE MONTH DECEMBER 2022

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NONCITIZENS AND THE RISKS ACCESSING THE LEGAL SYSTEM

In our legal professional life, it is possible that we will encounter noncitizen clients. When we do, we will need to determine whether the legal advice or service we provide should take that status into account, so as not to put the person at risk of removal from the USA, and whether the client's ability to access the legal system and obtain justice may be affected by his legal status. For most legal matters, it will be important to clarify whether the client is a U.S. citizen and if not, what legal status he has.

For noncitizens who have a legal status, whether it be permanent legal residence or permission to be in the USA temporarily, pursuing a legal claim should not create an adverse risk of detection for them because they are already known to the government. The decision whether to pursue a legal claim will be harder to make for persons who are not detected by the government and have no current legal status in the USA, and for persons who have prior immigration offenses but never left or returned to the USA without prior permission.

Attorneys will need to counsel clients using their knowledge of the specific legal area and how the law is applied in any given jurisdiction or context. With that information, clients will need to decide whether to pursue a legal remedy or not. Ultimately, the decision to proceed lies in the client's hands.

Every client will have his own tolerance for risk. Each client's context is different and will carry with it more, or less, risk. Clients live in different places (e.g., urban versus rural) and each place may have its own risks associated with it. Most clients without legal status in the USA understand risk—they live with it every day. They just want to know the type of risk they may face pursuing any given legal remedy so that they can reasonably decide if they are willing to take the risk or not. Some will. Some won't.

Whether a legal status affects a client may depend on any combination of factors, including:

- The type of legal matter.
- Whether the issue of status is relevant to the legal matter or will be made available in a public record.
- The tribunal or administrative body that has jurisdiction (there may be a higher risk for noncitizen clients in criminal versus civil proceedings).
- The jurisdiction/county of the proceedings.
- The opposing party (will the other party try to use the information against the client?).
- Whether the case can be settled without accessing a legal forum or appearing in person (can the client appear telephonically, by mail, through an attorney?).
- The contextual climate and practices.
- The proximity to and relationship with ICE (Immigration and Customs Enforcement).

- Whether the Immigration and Customs Enforcement (ICE) is looking for the client based on prior situations (e.g., client has a final order of removal).
- The propensity to monitor legal status and report to ICE.

Even if there is risk, there may be ways to mitigate it and still obtain a legal outcome. Ask yourself,

- Can I advocate for the client and/or obtain an outcome without accessing the legal system or going to court?
- Can the client proceed without going in person (e.g. paying a ticket by mail or online instead of in person)?

To help you along the way, here are some tips in the most common areas of law for which VLN volunteers serve clients.

Housing

The [Fair Housing Act](#) prohibits landlords from discriminating against tenants based on several different protected bases, including race and national origin. This means that while landlords are not prohibited from asking potential tenants about residency status, such questions must be asked evenly and fairly so as not to appear discriminatory based upon a protected status. Potential tenants without residency status may prefer to stay away from landlords who inquire into residency status on a rental application.

Non-citizens cannot be evicted based on non- citizens status alone. However, if a tenant completed an application and signed a lease under false pretenses as a citizen or with other status they do not have, then eviction for breach of lease may be possible. Any tenant being threatened with eviction due to their citizenship status should reach out for legal assistance right away.

Landlords may ask for social security numbers on rental applications. Prospective tenants may ask why the social security number is needed and offer other ways to provide the verification needed. Social security numbers are often used to run background checks for criminal and credit history. Prospective tenants could instead offer references from previous landlords, proof of financial support, or other alternative proofs to the information that would be gained through a background check.

Certain rights are afforded to all tenants, regardless of citizenship status. These rights include: (1) notice when a landlord is going to enter their unit, Minn. Stat. 504B.211 (2) the right to unit that is good, habitable condition, Minn. Stat. 504B.161 and (3) the right to have copy of a written lease, if there is one. Minn. Stat. 504B.115. Finally, landlords may not evict a tenant in retaliation for enforcing their tenant rights, regardless of their citizenship status. Minn. Stat. 504B.285.

Custody

Custody of children is determined based on what is in the best interests of a child. The best interest factors that the Court looks at are in [Minnesota Statute 518.17](#). None of these factors mention citizenship status.

In a custody case between a mother and grandparents in 2013, the Minnesota Court of Appeals found that the mother's undocumented status did not affect her ability to be a parent and was not a factor in making a custody determination.

As the best interest factors do consider stability for a child, there are times when a pending deportation or being unable to care for a child might be considered by the Court.

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