

## **Competency of Criminal Defense Counsel**

### **Nebraska Rules of Professional Conduct § 3-501.1: Competence.**

“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

If an Immigration issue arises in a criminal case, §3-501.1 requires competent representation as to the immigration issue as well as the criminal matter.

### ***Counsel for Discipline of the Nebraska Supreme Court v. Orr* 277 Neb. 102 (2009)**

“We take this opportunity to caution general practitioners against taking on cases in areas of law with which they have no experience, unless they are prepared to do the necessary research to become competent in such areas or associate with an attorney who is competent in such areas.”

*\*\*The Immigrant Defense Project* offers some advice on strategies to become competent in representing a client with potential immigration issues. It is available for download at [http://www.immigrantdefenseproject.org/docs/2010/10-Padilla\\_Practice\\_Advisory.pdf](http://www.immigrantdefenseproject.org/docs/2010/10-Padilla_Practice_Advisory.pdf)

### **Nebraska Rules of Professional Conduct § 3-501.4: Communications.**

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

### **Nebraska Rules of Professional Conduct § 3-505.1:**

#### **Responsibilities of a partner or supervisory lawyer.**

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in

the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

### **Nebraska Immigration Related Statutes & Cases**

#### **Neb. Rev. Stat. § 29-1819.02**

Before accepting a guilty plea or a plea of *nolo contendere* in a criminal matter, the trial court must advise the defendant that a conviction based on the plea could result in removal from the United States or a denial of naturalization.

#### ***State v. Mena-Rivera* 280 Neb. 948 (2010)**

A defendant who pleaded not guilty at arraignment, and later pleaded guilty to a lesser offense as part of a plea bargain, was permitted to withdraw his guilty plea when the court failed to repeat the advisement required in Neb. Rev. Stat. § 29-1918.02.

“[T]he court should give the advisement immediately before the defendant enters a guilty plea or *nolo contendere* plea.” *id.* at 953 (emphasis added)

#### **Does *Padilla* apply Retroactively?**

Not in Nebraska.

#### ***U.S. v. Perez* 2010 WL 4643033 D. Neb. 2010**

“A decision of the Supreme Court should not be applied retroactively if it creates a “new rule” which “ ‘breaks new ground or imposes a new obligation on the States or the Federal Government” *id.* at 2.

“In 2006, when Perez pled guilty... failure to inform a defendant of the prospect of deportation did not necessarily constitute an error of counsel in the Eighth Circuit. Thus, this Court is convinced that *Padilla* created a “new rule” that should not apply retroactively because such rule was not dictated in prior Eighth Circuit precedent.” *id.*