

ADDRESSING IMMIGRATION IN THE STATE COURTS

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ADDRESSING IMMIGRATION IN THE STATE COURTS

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I. Introduction – Why Do State Courts Need to Care About Immigration?

More and more, state courts across the nation are being challenged by the size, diversity, and complexity of the expanding populations of both legal permanent resident and undocumented immigrants the courts must serve. As a result, fundamental notions of justice – including long-held beliefs and values about equal access to the courts, equal and consistent justice for court users, the independence of the judiciary, and the appropriate relationship between federal and state judiciaries – are being severally tested. Moreover, when combined with a lack of national consensus about immigration generally, the complexity of the challenges posed by immigration is making it especially difficult for courts across the nation to assess the impacts that serving diverse immigrants are now having on the courts and subsequently to develop effective strategies for better serving all those who use the courts.

This article presents the initial findings from an ongoing State Justice Institute (SJI) sponsored effort now being conducted by the Center for Public Policy Studies (CPPS) in cooperation with three learning site trial courts. The purposes of the project are to first identify the challenges and opportunities state courts need to address when dealing with immigration in the courts, and subsequently develop effective responses that can be used in trial courts and state court systems across the nation. In particular, in May 2008, SJI launched a multi-year strategic initiative to help courts address the impact of immigration on the state courts. The initiative is focused on four strategic priorities:

- increasing understanding and awareness about the impacts of immigration in the state courts;
- developing and testing state and local approaches for assessing and addressing the impact of immigration in the state courts;
- enhancing state and local court capacity to improve court services affected by immigration; and
- building effective national, state, and local partnerships for addressing the impact of immigration in the state courts.

As a first step to address these strategic priorities, SJI made awards to the National Center for States Courts (NCSC) to provide targeted technical assistance and to the Center for Public Policy Studies (CPPS) to facilitate a series of pilot learning site projects to develop and implement approaches to assessing and addressing the impacts of immigration that can be used in courts across the nation. In addition, the National Judicial College is a partner in both the CPPS and NCSC efforts. Findings reported in this article are from the ongoing CPPS project that is currently:

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- identifying the major challenges and opportunities state courts need to address when dealing with immigrants in the courts, including the impacts of immigration on caseloads, court operations, resources, service delivery, and overall performance;
 - working with three diverse jurisdictions – the Eighth Judicial District located in rural, western Minnesota; the Eleventh Judicial Circuit Court (Miami-Dade County, Florida), and the Maricopa County Superior Court (Phoenix, Arizona) – to learn first hand what challenges they face in addressing the needs of immigrant populations that use the courts and how to best address those challenges;
 - preparing a guidebook for addressing the impacts of immigration on the state courts that can be used in courts across the nation; and
 - preparing an interactive electronic bench guide to help judges identify and address immigration issues in the cases that come before them. (See Figure 1 for a description of the three pilot courts.)

We begin this article in Section II by describing the size and diversity of the current legal permanent resident and undocumented immigrant populations in the U.S. and how they compare to immigrant populations of the past and those projected for the future. Next, we explore the complexity of the challenges posed by immigration in the state courts by highlighting the numerous points of intersection among federal, state, and local immigration law, policy and practice. We continue with a discussion of how the challenges posed by immigration in the state courts test fundamental notions of justice, such as equal access, equal and consistent justice, judicial independence, and the independence of the state judiciary from the federal and state executive and legislative branches. In Section III, we present an approach for addressing immigration in the state courts and highlight some of the key actions courts are taking to fashion effective responses. The conclusions presented in Section IV summarize the key lessons learned so far in the ongoing SJI and CPPS immigration initiative.

II. Size and Diversity of Immigrant Populations and the Complexity of the Challenges Posed by Immigration to the State Courts

Size and Diversity of Immigrant Populations

State courts across the nation face unprecedented challenges resulting from the size and diversity of expanding immigrant populations, as well as the complexity of the nexus of federal, state, and local immigration law, policy, and practice.

Today's immigrant population, along with the projected future population, includes people from dozens of nations and cultures, and a vast range of richer and poorer, more and less well educated and skilled, and more and less mobile, people who, collectively, make a sizeable contribution to local, state, and the national economies. Today's immigrant population encompasses millions of people with a variety of different formal legal statuses that can have differing implications for the operations of the state courts. (See Figure 2 for a list of different legal statuses.)

Numbers tell part of the story about the challenges to the state courts imposed by the size and diversity of the nation's immigrant populations.²

- About 38 million people living in the U.S. are foreign born.
- The legal permanent resident (LPR) immigrant population in the U.S. is about 12 million people. About 8.5 million of these people meet the residency requirements to become U.S. citizens.
- An additional 11.5 million people living in the U.S. are undocumented, illegal immigrants.
- About 12 million people living in the U.S. are naturalized citizens.
- An additional 1.3 million people in the U.S. are temporary legal migrants such as students and temporary workers.
- The percentage of U.S. residents who are foreign born, about 13 percent of the total U.S. population today, is expected to reach nearly 20 percent by 2050. This percentage will far exceed the historic highs recorded in 1890 (14.8%) and 1910 (14.7%).
- Between 40,000 and 60,000 refugees and asylees are admitted to the U.S. every year.

Understanding the country of origin, diversity, and distribution of immigrant populations across the U.S. provides additional insights about the scope of the immigration challenges state courts face.³ For example:

- While California, New York, Texas, Florida, and Arizona remain leading centers for in-migration for people from outside the U.S., states with historically smaller immigrant populations – Georgia, Minnesota, Washington, and North Carolina – are experiencing rapid immigrant population growth.
- In 17 states – Oregon, Nevada, Arizona, Idaho, Utah, Colorado, New Mexico, Texas, Kansas, Oklahoma, Michigan, North Carolina, Arkansas, Mississippi, Alabama, Georgia, and Tennessee – undocumented immigrants make up 40 percent or more of the entire foreign born population.
- People from Mexico and other Latin American countries account for well over half of both the legal and illegal immigrant populations in the U.S.
- People from Mexico and Latin America account for about 78 percent of the undocumented immigrant population in the U.S.
- People from Asian countries, particularly the Philippines, India, Vietnam, and Korea, account for an additional 25 percent of both the legal and illegal immigrant populations in the U.S.

Of particular significance to state courts as institutions that can have significant roles protecting children and working with distressed families, recent demographic assessments indicate that:⁴

- 14.6 million people in the U.S. live in 6.6 million unauthorized families where the head of the family or the spouse of the head of the family is undocumented.

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- 4.9 million children live in unauthorized families. Of these children, about 1.8 million are undocumented, but an additional 3.1 million are U.S. citizens by birth.
 - 7 percent of all unauthorized families include both U.S. citizen and non-U.S. citizen children.

With regard to language and education:⁵

- 84 percent of the foreign-born population speaks a language other than English at home and 52 percent say they speak English less than “very well;”
- 32 percent of the foreign-born population has less than a high school education – compared to 13 percent of the native-born population;
- 24 percent are high school graduates – compared to 31 percent of the native-born population;
- 18 percent have some college education – compared to 29 percent of the native-born population;
- 16 percent have a bachelor’s degree – compared to 17 percent of native born; and
- 11 percent have a graduate or professional degree in contrast to about 10 percent of the native-born population.

In addition, foreign-born U.S. residents including naturalized citizens, legal permanent resident immigrants and undocumented immigrants, are a significant presence in the U.S. labor force. With regard to occupation:⁶

- 27 percent of the foreign-born population works in management and professional occupations;
- 23 percent work in service occupations;
- 18 percent work in sales and office occupations;
- 1.9 percent work in farming, fishing and forestry;
- 13.5 percent work in construction, maintenance and repair; and
- 17 percent work in production, transportation and material moving occupations.

Undocumented immigrants alone likely account for:⁷

- just under 5 percent of the entire U.S. labor force;
- at least one-third of all insulation workers, 29 percent of all roofers and drywall installers, 27 percent of all butchers, 24 percent of all farm workers, and 21 percent of all private household workers in the United States;
- between 12 percent and 14 percent of the entire U.S. food manufacturing, construction, textiles and food services work-force.

With regard to income:⁸

- about 16 percent of the foreign-born population live below 100 percent of the federal poverty level;
- 24 percent live at 100 to 199 percent of the federal poverty level; and

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- about 60 percent live at or above 200 percent of the federal poverty level.

Finally, while arrest and incarceration rates for both legal permanent resident and undocumented immigrants are generally lower than the rates for other groups living in the U.S., fear of contact with law enforcement and the challenges to state and local justice systems from those who do commit violations of immigration regulations and state crimes can be formidable.⁹ In particular:

- A Pew Hispanic Center survey revealed that 57 percent of Latino immigrants worry about deportation of themselves or someone close to them.
- Anti-immigrant hate crimes have increased by nearly 30 percent in recent years.
- Over 1.2 million deportable illegal immigrants have been located by Immigration and Customs Enforcement (ICE) each of the past few years. There are currently over 400,000 active federal removal/deportation orders in force, but fewer than 32,000 beds in federal deportation facilities.
- About 65 percent of detained illegal immigrants are in state and local jails and prisons, 2 percent are in federal prisons, 14 percent are in ICE facilities, and 19 percent are in contracted facilities.
- Of 42.5 million male immigrants and U.S. natives between the ages of 18 and 39 years, 1.3 million (just over 3%) are incarcerated in federal, state or local jails. The incarceration rate for U.S. born males in this age group was 3.51 percent, or four times the rate of the foreign born (0.86%). The foreign born percentage includes Puerto Ricans (incarceration rate of 4.5%), even though they are U.S. citizens by birth and have unlimited access to the U.S. Excluding Puerto Ricans from the foreign born, the incarceration rate for immigrants drops to 0.68 percent.¹⁰
- The least educated immigrant groups and the groups most stigmatized as “illegals” have the lowest incarceration rates: Mexicans 0.70 percent, and 0.52 percent for both Guatemalans and Salvadorans.
- A total of five states incarcerate 80 percent of all criminal aliens: (1) California, 40 percent; (2) Texas, 15 percent; (3) New York, 8 percent; (4) Florida, 7 percent; and (5) Arizona, 6 percent.

Complexity of Challenges Posed by Immigration in the State Courts

Much of the complexity of the challenges facing state courts associated with serving immigrants result from the often confusing nexus of constantly changing federal, state, and local immigration law, policy, and practice, coupled with the need to understand and serve greater numbers of people from cultures other than those that traditionally have been served in many jurisdictions across the nation. For example, the brief inventory of the intersections of federal, state, and local law, policy, and practices that affect the state courts presented in Figure 3 suggests that:

- There are numerous, diverse points of intersection among federal, state, and local law and policy regarding immigration that can affect many fundamental aspects of state court operations.

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- The intersection of federal immigration law and practice and state law and practice can affect civil, family, juvenile, and dependency cases, as well as criminal cases.
 - The U.S. citizenship eligibility status of the nation's 12 million Legal Permanent Residents and their U.S. residency status can be affected by numerous types of local justice system and state court activity such as criminal charges, convictions, and imposed and suspended sentences.
 - There is a potential that court caseloads and case complexity might increase as a result of both the intersections of federal, state, and local law and practice and the increased presence of state laws regarding immigrants, such as laws regarding bail eligibility, document forgery, human smuggling, and employer sanctions for hiring undocumented workers.
 - There are mechanisms available to local justice systems and the courts to protect immigrant victims, and juveniles and children.
 - In addition to national and statewide action, understanding and addressing the impacts of immigration in the state courts will likely require local assessment and strategy development, because local interpretations and application of state and federal law can vary greatly.

Also, in part, the complexity of the immigration challenges to state courts results from the reality that the availability of court resources and infrastructure for addressing the impacts of immigration varies greatly across the nation. For example, even though many jurisdictions in the Southwestern U.S. have very large and expanding immigrant populations, they often also have greater service capacity, such as the availability of language specialists and interpreters, ability to establish litigant assistance partnerships with organizations in Latin America, and an abundance of court staff with well developed ties to immigrant communities. In contrast many other courts with rapidly expanding immigrant populations do not have these types of resources. At the same time, until recently very few courts, regardless of where they are located, have had much of a capacity for meeting the court service needs of many of the nation's more recent refugee and immigrant populations, such as new arrivals from Somalia, Eritrea, Ethiopia, and other parts of East Africa.

Furthermore, the complexity of the immigration challenges to state courts is increasing because immigration-fueled cultural diversity in the courts is dramatically expanding the need for courts and their justice partners to understand the complicated interplay of immigration, culture, language, and effective court service provision. Demand for culturally competent courts will continue to grow as courts across the nation attempt to maintain the delicate balance between traditional American court notions of what constitutes key behaviors, values, and beliefs, and the orientations of increasingly diverse populations of court users.¹¹

Challenges to Fundamental Notions of Justice and Traditional Court Values and Mission

Addressing immigration issues in the state court cases presents a number of challenges to fundamental notions of justice.

In particular, the ability of the courts to provide equal access for immigrant litigants may be affected by a variety of issues, including, among others:

- unwillingness of immigrants to report crimes, from fear or distrust of local law enforcement officers or general reluctance to call attention to themselves or their families;
- fear of reprisals, including arrest and possible deportation, for appearing in court;
- barriers created by language or culture; and
- general reluctance to engage government.

Moreover, providing equal and consistent justice can be a challenge. There may be a lack of resources and restricted access to certain types of programs for immigrants. For example, juvenile and adult offenders who are undocumented may not be able to pay restitution because they are prohibited from having jobs to earn money to pay restitution as a result of employer sanctions laws. This limits both the sanctions available for those individuals and the ability to provide compensation to victims. In short, it inhibits the use of restorative justice approaches for those individuals. Also, federal immigration status outcomes, which are often dependent on local case outcomes, can vary from one state court jurisdiction to another due to differing charging decisions of prosecutors and sentencing practices of judges.

Further, the independence of state judiciaries may be threatened in numerous ways by the nexus of federal, state, and local immigration law, policy, and practice. For example, the courts and local justice agencies, including law enforcement, probation, corrections, and social services, may face pressure to assist ICE by identifying and reporting illegal aliens to ICE authorities. Federal law authorizes ICE to deputize local law enforcement officers as ICE agents, and this may happen more frequently in the future. As many immigration rights are determined by outcomes in state court cases that can be affected by the discretion exercised by local judges and prosecutors, there may be increasing local political and social pressure to exercise that discretion in a way to maximize or minimize the immigration consequences for immigrants depending on local circumstance.

Finally, achieving procedural fairness can be a challenge to courts in dealing with aliens. Procedural fairness encompasses how the courts behave toward litigants and how people are treated in court, as opposed to what the courts decide. There are four main aspects of procedural fairness:

- Respect and understanding, or the extent to which people are treated with dignity and are helped to understand what is happening in court;
- Voice, or the extent to which people are given a chance to be heard;
- Trust, or the extent to which the judges and court staff give the impression that they care about people's needs; and
- Neutrality, or the extent to which judges can instill confidence that they are treating all people equally and fairly.

Newer immigrants often do not understand the court system or how justice operates in the United States and as a result may be fearful and baffled by what is going on. Courts must take extra steps to assure that the goals of procedural fairness are met for these litigants.

III. Developing Effective Approaches for Addressing Immigration in the State Courts

Ongoing efforts to assess and address the impacts of immigration in each the three pilot learning sites are loosely following the six-step process summarized in Figure 4. The initial three steps of the improvement process focus on:

- building effective action-oriented teams;
- collectively learning about the composition, needs, and service demands on the courts and justice system of the immigrant community;
- learning about the local political and policy climate surrounding discussion about immigration; and
- fully inventorying the potential impacts on the court of the interactions among federal, state and local immigration law policy, and practices.

The later three steps in the process emphasize designing, implementing, and monitoring appropriate, lasting responses.

Assessing Community Context and the Impacts on the Court of Federal, State, and Local Immigration Law, Policy, and Practice

The purpose of Step 1 – *building assessment and improvement teams* – is to assure that the needs of immigrant communities are known, and that detailed understanding of the implications of immigration on all aspects of court policy, structure, and operations can be ascertained. In turn, the formation and work of the assessment and improvement teams needs to stress putting in place teams whose work will be respected and supported throughout the court and fully integrated into all aspects of court structure and operations.

Thus far, our experience in all three of the pilot jurisdictions has been that knowledge about the composition, needs, and implications for court services of both the legal and undocumented immigrant communities is fragmented and complicated by local, state, and federal politics. Consequently, Step 2 – *describing the court's immigrant community context* – is a key early step in the multi-step process.

In particular, it is likely that in many jurisdictions the composition of the immigrant community is not well understood and courts make a variety of erroneous assumptions that complicate court operations. For example, many courts discover after multiple court sessions and with considerable frustration that many Spanish surnamed people from throughout Latin America have very limited Spanish language proficiency but instead speak a variety of indigenous languages, such as one of the many Mayan

language groups like K'iche, Mam, and Kaqchikel¹² – three language groups which alone are spoken by at least one-third of the entire population of Guatemala and unknown numbers of Guatemalans living in the United States. Similarly, juvenile judges report that not knowing the immigrant populations they serve has limited their opportunities to shape appropriate sanctions such as culturally meaningful restitution. In short, knowing the immigrant community has become increasingly important to courts so they can provide effective services.

As a result of the local political climate and local policy, local law enforcement agencies in many trial court jurisdictions are reluctant to be involved in enforcing federal immigration policies and do so only when there is a link to serious criminal behavior. In some jurisdictions, corrections agencies are not involved in screening the immigration status of individuals when they are admitted to local jails. In contrast, in other jurisdictions local law enforcement and corrections agencies are aggressively involved in identifying and detaining undocumented immigrants. In addition, document fraud laws that can be used to prosecute immigrants with fake drivers licenses are more or less aggressively enforced depending on the local political climate. Moreover, in multi-county court jurisdictions, law enforcement and prosecutor policy and practices can vary dramatically from county-to-county. As one consequence, these differences in policy can greatly affect court caseloads and operations, such as case scheduling, prisoner transport, language service demand, sentencing options, and program eligibility.

Step 3 – identifying and assessing the impacts on the courts of interactions among federal, state, and local immigration law, policy, and practice – has proven to be one of the most difficult yet important steps in the pilot jurisdictions. In particular, the intersection of federal and state law can greatly affect fundamental aspects of court justice system operations such as:

- the adequacy of attorney representation and the role of the attorney, especially regarding plea practices, when state criminal charges and convictions can jeopardize Legal Permanent Resident eligibility for U.S. citizenship and result in removal from the U.S. of both documented and undocumented immigrants;
- compliance with state court conditions for probation;
- citation and release practices;
- eligibility for federally, state, and locally funded treatment and other services;
- pretrial release and bail eligibility;
- issuance and use of drivers licenses and other forms of identification;
- policy and practice regarding the use of state document fraud laws;
- assignment and the timing of assignment of interpreters;
- role of local law enforcement in enforcing federal laws;
- jail capacity, policy, and prisoner movement;
- dealing with unaccompanied juveniles and many other aspects of juvenile case processing;
- child protection case processing;
- domestic violence case processing and protection for the victims of domestic violence;

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- divorce and child support case processing;
 - state court compliance with international treaties regarding child custody, adoption, and many other aspects of family law; and
 - processes for adjudicating state law employer sanctions for hiring undocumented workers and the document fraud often associated with employer sanctions.

Improving Court Services

The purpose of Step 4 – *assessing your court culture* – is to have judges and personnel throughout the court collectively learn about the meaning and implications of culture, describe the court’s culture, and identify where there may be gaps between the culture of the courts and cultures in the immigrant community. In turn, Step 5 – *designing and implementing immigration sensitive and culturally appropriate court services* – focuses on developing and implementing effective responses that both support the law and the values and expectations of the community, and serve the needs of immigrants in the courts.

Culture means the commonly shared, largely taken for granted assumptions about goals, values, means, authority, ways of knowing, and the nature of reality and truth, human nature, human relationships, and time and space, that a group has learned throughout its collective history. Ethnic/national culture refers to groups whose individual members’ common affiliation is defined by reference to ethnicity or nation.

Ethnic/national culture matters for the courts and justice system because notions of culture greatly affect how people:

- define justice, conflict, and disorder;
- determine when it is appropriate to involve third parties, including the state, in resolving problems and conflicts;
- describe events or “what happened;” and
- fashion responses or solutions to problems and conflicts.

Also, culture matters because it influences:

- the ways people communicate;
- perceptions about the sources of legitimate authority;
- beliefs about individual and group responsibility;
- beliefs about what are fair processes;
- fundamental, underlying beliefs about cause and effect – such as the causes and treatment of illness; and
- beliefs about people and their motivations.

Moreover, ethnic/national culture matters because the meeting of cultures within a justice system presents both risks of misunderstanding and opportunities for creative problem-solving.

In short, cultural competency means first understanding where, how, and why culture matters. Cultural competency also means developing individual, organizational, and system capacity for culturally appropriate service delivery that helps individuals successfully navigate the courts and justice system, process information, make wise decisions, and understand and comply with court orders.

Only now are courts in the three pilot jurisdictions developing and implementing responses for serving immigrants in court. Much of this early improvement activity is focusing on:

- collective learning among judges and court personnel about the consequences to litigants, court operations, and case processing of the intersections among, federal, state, and local law policy and practice;
- assessing and redesigning work processes to better address the problems that accompany immigration status;
- improving attorney representation of litigants whose immigration status may be affected by state court activity;
- improving record keeping practices so that state court records can be more readily used in federal immigration matters; and
- developing problem-solving groups that include federal agencies, such as Immigration and Customs Enforcement (ICE) as well as local justice agencies.

For example, items now being addressed as part of the improvement efforts in the three pilot sites include:

- preparing bench guides, training, and informational materials and establishing training programs to increase general understanding among judges and court personnel about the intersections of federal and state immigration law, policy, and practice;
- reviewing the potential impacts of immigration issues on plea and evidentiary practices;
- increasing general understanding of status and potential services for unaccompanied immigrant juveniles and these juveniles' siblings, including minors with differing citizenship and immigration status;
- redesigning litigant assistance, self-help materials, to assure that the materials accommodate immigration-related issues;
- assessing plea and sentencing practices to determine potential unintended consequences on immigration status of legal permanent residents and undocumented litigants;
- working with defense organizations and prosecutors to increase common understanding of intersections among federal and state law;
- redesigning pretrial release and probation practices;
- reviewing and redesigning records-keeping practices to improve the potential for records to be used in federal immigration case processing;
- reviewing interpreter practices to determine if litigants receive needed assistance soon enough in the criminal process to avoid system inefficiency;

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- reviewing public defense assignment practices to determine if litigants receive needed assistance soon enough in the criminal process to avoid system inefficiency;
 - reviewing jail management practices to determine impacts on case processing of local enforcement personnel acting as immigration agents and interactions between local jail and ICE regarding detainees with immigration matters;
 - reviewing use of citation and release and other mechanisms often used for lesser offenses;
 - reviewing methods for identifying people so that law enforcement, the courts, and the jails can determine who people are;
 - dealing with the misgivings of some immigrant communities to engage court and justice systems as witnesses and victims; and
 - determining when and how court-related agencies are subject to federal, state, and local limitations of service provision for immigrants, such as limitations to mental health services, or eligibility to participate in restorative justice and other programs.

Finally, for the most part, Step 6 – *performance monitoring* – requires building immigration sensitive measures that gauge the impacts of immigration on court workload, case processing time, costs, and the quality of justice services provided. For example, the essential measurement questions now being addressed in the three pilot jurisdictions include:

- What are the *workload and caseload impacts* of cases involving both Legal Permanent Resident and undocumented immigrants? For example, are more hearings required per case? Are additional types of hearings required, such as hearings to determine bail eligibility? Are trials demanded more often in minor criminal cases? Do cases involving immigrants complicate evidentiary practices? Are more interpreters required? Are different forms of probation monitoring required? Are others types of court services more frequently required in cases involving immigrants?
- What are the *case processing time impacts* of cases involving immigrants? Do hearings take longer? Does locating appropriate interpreters require more time? Does it take longer to locate and move immigrants from detention facilities to court? Do attorneys need more time to work with immigrants because of the complexities involved in assessing the implications of the connections between state court activity and immigration law? Is case processing time delayed because of difficulties involving accurately identifying immigrants?
- What are the *quality of justice* implications of cases involving immigrants? Are immigrants treated with respect, politeness, dignity and have their rights respected in court? Are immigrants helped to understand how things work in court and what they must do? Are immigrants able to tell their side of the story in court? Do immigrants understand the immigration consequences of actions taken in state court? Is trust with immigrant communities built by the courts? Are the needs of immigrants considered as important as the needs of non-immigrants? Are the consequences of decisions clearly explained to immigrants?

IV. Conclusion

For now, the early experiences of the CPPS team from working with the trial courts in Miami-Dade County, Maricopa County, and Western Minnesota has revealed three important general findings about the challenges and opportunities courts across the county are likely to face as they attempt to assess the impacts of immigration and develop appropriate responses.

1. The complicated nexus of federal, state, and local immigration law, policy, and practice is likely to lead to numerous unanticipated consequences for local trial court operations and policy.

As we have shown throughout this document, for all types of cases, many aspects of court operations and management – from bail eligibility and pretrial services, through case scheduling, records preparation and management, attorney assignment and performance, to sentencing practices and eligibility for treatment options – can be influenced by the federal, state, and local immigration law, policy, and practice nexus.

2. Local trial courts can make substantial improvements in improving the quality of services provided to legal permanent resident and undocumented immigrants to assure that equal protection of the law is provided to everyone who uses the courts.

To list but a few of many improvement examples, local trial courts can do more to assure that attorneys take into account and advise their clients about the implications that activities in state court might have on immigration status. Courts can improve record keeping practices to assure that state court records provide adequate information in a form that might subsequently be used in a federal immigration matter. Local trial courts can become more sophisticated in facilitating the use of federal remedies for protecting immigrant women and children, such as special immigrant juvenile status. Courts can become more aware of the problems and opportunities that can accompany the presence of numerous cultures in the courts.

3. Individual trial courts alone and even state court systems alone will not be able to develop adequate lasting responses to the nexus of federal, state, and local immigration law, policy, and practice.

At the federal level, federal, state, and local collaboration will be necessary to:

- assure the availability of adequate funding and services;
- streamline and clarify the fragmented, complicated federal law;
- clarify the appropriate roles for local justice systems in enforcing federal immigration laws; and
- develop future immigration reforms that take into account the needs, resources, values, and capabilities of the state courts.

At the state level, effective strategies for addressing the impact of immigration on local state trial courts may require extensive participation by federal agencies, such as Immigration and Customs Enforcement, that traditionally have not been participants in local justice policy and planning groups.

Finally, what is needed now is a state/federal court and justice system dialog that begins to address systematically and comprehensively the complicated nexus of federal, state, and local immigration law, policy, and practice and the implications of that nexus on American justice. Figure 5 summarizes some of the key issues that need to be addressed in that dialog.

Figure 1
Immigration and the State Courts Initiative Learning Site Profiles

Maricopa County Arizona Superior Court

With a current population¹³ approaching 3.8 million – a 20% increase in just the last 6 years on top of a 40% increase during the 1990s – and a projected population of 4.75 million by 2015, Maricopa County continues to be among the fastest growing counties in the United States. Along many measures, Maricopa County is also one of the more affluent areas of Arizona and the Southwest with family and individual incomes that exceed those across the state and region generally. However, poverty remains a factor, accounting for the circumstances of 13% of the entire population. Moreover, 25% of the entire Maricopa County population speaks a language other than English at home, and about 15% of the entire population is now foreign born. Further, the City of Phoenix just joined the ranks of “minority-predominant” cities, and trend data indicate that within the next three decades “minority” groups likely will become the majority population throughout the entire county.

Arizona has one of the fastest growing immigrant populations in the United States, the majority of whom migrate to Maricopa County. From 2000-2006, the total foreign-born population increased about 40%, twice as much as the national increase of 20%. Of the 500,000 Latinos who migrated to Arizona between 1990-2000, 72% moved to the Phoenix-Mesa region in Maricopa County. In Maricopa County, 70% of the total foreign-born population is Latino. There are close to 500,000 immigrants of Mexican origins in Phoenix alone. It is also estimated that there are between 400,000 and 450,000 unauthorized immigrants living in Arizona. Furthermore, one-third of the total foreign-born population arrived within the last six years.

Maricopa County Judicial branch services are provided by 94 court judges, 23 justice of the peace, 52 commissioners and approximately 4,000 staff in 52 court and probation service sites located across a massive county with a land area of 9,213 square miles.

Courts of the Eleventh Judicial Circuit
Miami-Dade County, Florida¹⁴

Miami-Dade County, Florida has one of the nation's largest immigrant population. The foreign-born population comprises a little over half (50.3%) of the total population of about 2.5 million, with Latinos representing an overwhelming majority (80.5%) of the total foreign-born population. The Latino presence has created a strong culture and identity unique to Miami-Dade County, where as little as 7.8% of the foreign-born population say they speak only English at home. The Cuban-American presence is particularly high in Florida; today, more than two-thirds of all Cuban-Americans live in Florida, with the majority residing in Miami-Dade County. Haitians represent

Figure 1
Immigration and the State Courts Initiative Learning Site Profiles

the third largest ethnic group, with close to 230,000 living statewide. The heaviest concentration of Haitians is in Miami-Dade County. Other sizeable immigrant groups include Jamaican, Colombian, and El Salvadoran populations. In general, 59% of the foreign-born population in Miami-Hialeah is Caribbean, with Latin Americans accounting for 34%.

Although Cubans represent the largest group of immigrants in Florida, the greatest increase has actually been in the Mexican population, which grew by 49.5% between 2000-2005. In Miami-Dade County, the number of immigrant children has also increased dramatically, growing by 41% between 1990-2000 in the Miami-Knight community alone. Here, the complexity of immigration is seen as a majority (56%) of these children now live in mixed-status families.

Perhaps most notable is the impact of immigration on the Florida workforce where immigrants comprise nearly one-quarter of the total workforce. In the Miami-Hialeah community, immigrants account for as much as 62% of the total labor force.

The Eleventh Judicial Circuit of Florida, serving Miami-Dade County, is the fourth largest trial court in the nation. The Circuit serves a population in excess of 2 million people over a 2,000 square mile area in four main courthouses and five full-service branch courts. The court has 123 elected circuit and county judges, 16 magistrates and several senior judges who are supported by 773 staff.

Courts of the Minnesota Eighth Judicial Circuit¹⁵

The Eighth Judicial District of Minnesota encompasses 13 rural counties in Western Minnesota with an estimated total population of 167,395 in 2007. Our work has concentrated on two neighboring counties within the judicial district, Kandiyohi County and Chippewa County, with Chippewa County serving as the pilot site for court improvement efforts. In Chippewa County, the immigrant population is not of the same magnitude as the populations in Maricopa and Miami-Dade Counties, but it represents a particularly good example of immigration in the northern Midwest. In Minnesota, there is evidence that the number of immigrants has increased rapidly in the last 5 years. For example, it is estimated that the number of immigrant students in elementary and secondary schools across the state almost doubled between 2000 and 2004. Unfortunately the very recent rise in immigration has yet to be fully documented by key research organizations like the US Census Bureau. The most recent census that provided information on Chippewa County was in 2000. The census data estimated that of the 13,088 people in Chippewa County, 178 were foreign-born. Local governmental officials in Chippewa County believe that the number is much higher today. Close to 50% of the foreign-born population identified in the 2000 census were from Latin America, and a large percentage of them indicated that they spoke Spanish in the home. The 2000 census did not contain any analysis on foreign-born employment in Chippewa County. The numbers for the overall state indicate that 71.0% of the foreign-born population is employed in the civilian labor force and they comprise 6.2% of the total civilian labor force.

The Eighth Judicial District has 11 judges to serve the 13 counties. Kandiyohi County has three judges and also serves as the locus for the District and Assistant District Court Administrator. Chippewa has one judge, who is also serving as the District Presiding Judge. There is a courthouse in every county, and there are seven local trial court administrators serving the 13 county courthouses.

Figure 2 Categories of Foreign Born Status

Naturalized Citizen

An alien who wishes to become a naturalized citizen must file an application and meet the following requirements: (1) at the time of filing of the application for citizenship, be a lawful permanent resident for five years prior, physically in the United States for at least half of that time, and a resident of the state in which the application is filed for three months; (2) be continuously in the United States from the time of filing to admission to citizenship; (3) be of good moral character; and (4) support the Constitution and be disposed to the good order and happiness of the U.S.

Lawful Permanent Resident (LPR)

A grant of lawful permanent resident (LPR) status allows an alien to reside and work permanently in the United States. To be eligible for LPR status, the applicant must indicate an intention to reside permanently in the U.S.

The following are the major categories of lawful permanent residents.

- Family-based visas: unmarried sons or daughters of citizens; spouses and children of LPRs; unmarried sons or daughters (not a child) of LPRs; married sons or daughters of citizens; brothers or sisters of citizens.
- Employment-based visas: (1) priority workers (aliens who possess extraordinary ability, professors or researchers, multinational executives); (2) aliens who hold advanced degrees or possess exceptional ability; (3) certain classes of skilled workers, professionals, or other workers who perform jobs for which qualified workers are not available in the US.
- Diversity-based visas: as determined by the Attorney General.

Conditional Permanent Resident

A conditional permanent resident is an alien who does not have lawful permanent resident status but is legally in the U.S. as a child or spouse of a LPR or a citizen. The marriage giving rise to the conditional status must be legitimate. The conditional status expires on the second anniversary of obtaining conditional status unless the immigrant has made timely application for lawful permanent resident status. Both spouses must apply together.

Deportation of the lawful permanent resident spouse or divorce from a resident or citizen spouse terminates the conditional status unless the remaining spouse can meet the requirements for a hardship waiver, including as a VAWA self-petitioner or other hardship.

Figure 2
Categories of Foreign Born Status

Special Immigrant Juvenile Status

Special immigrant juvenile status (SIJS) is available under the following conditions.

- There must be a state court finding that the juvenile is: (1) abused, neglected, or abandoned; (2) eligible for long term foster care; and (3) not returnable to home country.
- The juvenile must concurrently apply for lawful permanent resident status.
- The dependency case must not have been filed as a sham solely to obtain immigrant status.

Delinquency is generally not a bar to SIJS status, as delinquency is not considered adult criminal activity. A juvenile may be ineligible for SIJS status for: (1) being a drug addict; (2) violating a protection order; (3) being a sexual predator; (4) using false documents; (5) engaging in prostitution; or (6) engaging in drug trafficking.

Violence Against Women Act (VAWA) Self-Petitioner

Immigration law provides that a conditional immigrant spouse may petition for LPR without the cooperation of the lawful permanent resident spouse or citizen spouse if:

- The spouse or child has been battered or subjected to extreme cruelty by citizen or lawful permanent resident spouse;
- The act or threatened act was one of extreme cruelty, including physical violence, sexual abuse, forced detention, or psychological abuse against the petitioner or petitioner's child by the spouse during the marriage;
- The marriage was legal and in good faith;
- The petitioner is not the primary perpetrator of the violence; and
- The petitioner is of good moral character.

Non-Immigrant Visitor

The law provides for a variety of categories of aliens that are eligible for visas to legally enter the United States on a temporary basis for a limited period of time. Eligible aliens include vacationers, students, certain classes of temporary workers, and a variety of specialized categories. The authorized length of stay is specified in the visa. The alien may have to take certain actions to maintain the status.

Figure 2 Categories of Foreign Born Status

Non-Immigrant Refugee or Asylee

The following are the conditions for admissibility into the U.S. as a refugee or asylee.

- The individual is likely to be persecuted on the basis of race, religion, nationality, member of a particular social group, or political opinion if returned to the home country or the country of last permanent residence.
- The individual is not a security risk or perpetrator of persecution.
- The individual has not committed a serious crime outside the U.S. before arriving in the U.S.

Once admitted, the alien will be allowed to stay in the U.S. as long as expulsion from the U.S. would put them at a safety risk, unless he or she: (1) is able to safely return to home country or move to another country; (2) no longer meets the requirements of eligibility; or (3) has been convicted of a serious crime, including conviction of an aggravated felony.

Non-Immigrant Victim of Human Trafficking

The “T” visa is available for individuals who have been the victims of severe human trafficking and is assisting in the investigation or prosecution of traffickers. The maximum length of stay under the “T” visa status is four years unless extended. The individual may apply for lawful permanent resident status if he or she is of good moral character.

Non-Immigrant Crime Victim or Witness

The “U” visa is available to an individual in the U.S. as an undocumented alien who: (1) has suffered severe physical or mental abuse as a result of being a victim of criminal activity; (2) has been, is being, or is likely to be of help to a federal, state, or local investigation of the criminal activity causing the abuse; and (3) has certification from a federal, state, or local justice system official that he or she has been, is being, or is likely to be of help to a federal, state, or local investigation of the criminal activity causing the abuse. The maximum length of the “U” visa is four years unless extended.

Figure 3 Examples of Key Points of Intersection of Federal, State, and Local Law, Policy and Practice Regarding Immigration that Affect the State Courts

General Law and Practice

- Immigration and Custom Enforcement (ICE) practices can vary greatly from jurisdiction to jurisdiction. For example, some state courts report that ICE officials have sought interpreter, pretrial release, and probation records to identify potential immigration law violations and detain individuals outside courtrooms.
- Federal law enables state and local law enforcement personnel to act as immigration agents (287 G Certified Officers) to (1) arrest persons for smuggling, harboring, or transporting illegal aliens, and (2) perform a function of a federal immigration officer in relation to the investigation, apprehension, or detention of illegal aliens.
- Local ICE responsiveness to individuals with immigration holds in local jail facilities can vary from jurisdiction to jurisdiction.
- ICE contracts with many local jails for bed space.
- Eligibility for state-supported services may be affected by immigration status.

Figure 3
Examples of Key Points of Intersection of Federal, State, and Local Law, Policy and Practice Regarding Immigration that Affect the State Courts

State Laws Used To Address Immigration Issues

- The vast majority of American states have enacted laws targeting immigration issues either directly or indirectly. The National Conference of State Legislatures reports that in 2007 alone, 1,562 bills were introduced across the nation targeting immigration concerns and 240 new laws were enacted in 46 states. These laws encompass making it a state law felony for illegal immigrants to hold a job in Mississippi to making it a felony for sheltering or transporting illegal immigrants in Oklahoma.
- For a particular jurisdiction the combined affects of state laws can challenge the courts resource. In Arizona for example, local courts must take into account: (1) Prop. 102, a constitutional amendment relating to standing and punitive damage awards for illegal aliens, (2) Prop. 103, a constitutional amendment relating to English as the official language, (3) Prop. 300, a referendum on public program eligibility that denies illegal aliens in-state tuition, taxpayer supported adult education, and child care, (4) Prop. 100, limitations on bail for those who entered or have remained in the country illegally, (5) the Legal Arizona Workers Act which sets out employer sanctions for hiring illegal workers, (6) a smuggling statue under which many victims are charged with or otherwise plead to conspiracy to commit smuggling or solicitation to commit smuggling, (7) a class 4 felony forgery statue, and (8) a statue which allows the court to order detention of a material witness who may not be available to testify in a criminal proceeding because of immigration status.
- Many states have enacted document fraud laws that encompass making it a felony to use false documents including fake birth certificates and driver licenses.
- Note also that across the nation the potential impact of many of these laws when courts deal with Lawful Permanent Residents and their families are waiting to be assessed, and likely in some circumstances, litigated.

Criminal Law and Practice

- State court criminal arrests can jeopardize lawful permanent residency status, refugee and asylum status, and eligibility for U.S. citizenship.
- State court criminal convictions can jeopardize lawful permanent residency status, refugee and asylum status, and eligibility for U.S. citizenship. Examples of these crimes include: (1) aggravated felonies, (2) prostitution, petty theft, perjury, (3) controlled substances, (4) crime with intent to commit great bodily harm, (5) crimes of moral turpitude, such as turnstile jumping and shoplifting, (6) domestic violence including stalking, (7) document fraud, (8) identity theft, and (9) violation of protection order.
- State court criminal sentences can jeopardize lawful permanent residency status, refugee and asylum status, and eligibility for U.S. citizenship.
- Federal immigration law can consider state court suspended sentences, as well as imposed sentences, in immigration decisions.
- Participation in state court drug courts and other therapeutic approaches can jeopardize lawful permanent residency status, refugee and asylum status, and eligibility for U.S. citizenship.
- There are numerous federal immigration laws that can be used to protect immigrant victims such the Violence Against Women Act, Battered Spouse Waivers, U Visas for cooperation with authorities in criminal cases, and T Visas for victims of server forms of human trafficking.

Figure 3

Examples of Key Points of Intersection of Federal, State, and Local Law, Policy and Practice Regarding Immigration that Affect the State Courts

Family Law and Practice

- A person who gains lawful permanent status through marriage and later divorces the petitioning spouse can not file a petitions for a new spouse for five years , unless he or she can prove by clear and convincing evidence that the first marriage was bona fide, including reasons for that marriage's demise.
- A conditional permanent residences married to a U.S. citizen can become a lawful permanent resident within two years if at the end of the two years the couple jointly files to have the conditional permanent resident become a LPR. Children of conditional permanent residents are also conditional permanent residents. If divorce occurs prior to LPR process, conditional permanent residence must obtain a good faith, extreme hardship, or battery or extreme cruelty waiver.
- Divorce can have impact on Violence Against Women Act self-petitioners.
- Divorce may affect a stepchild's eligibility for immigration benefits.
- Noncitizens who violate some kinds of civil or criminal protection orders can be removed from the U.S.
- To greatly simplify adoption, immigrant children should be adopted before they are 16 years of age.
- There are many immigration implications surrounding sibling adoptions and orphans.
- Kinship care can be complicated by immigration status.
- Child custody and child support can be complicated by immigration status.

Juvenile Law and Practice

- Immigrant juveniles under juvenile court jurisdiction due to abuse, neglect, or abandonment, may be eligible for lawful permanent residency as "special immigrant juveniles."
- There are barriers to special immigrant juvenile status such as: (1) record of involvement with drugs, prostitution, or other crimes, (2) HIV positive, (3) classed as mentally ill, suicidal, or a sexual predator, (4) committed visa fraud or were previously deported.
- Some delinquency types can jeopardize juvenile immigration status such as prostitution, sale or possession for sale of drugs, and sex offenses.
- State courts in some instances can obtain jurisdiction over juveniles in ICE detention.

Civil Law and Practice

- Dealing with mentally or physically ill individuals in state court may be complicated because mental illness, and some forms of communicable diseases can jeopardize immigration status.
- State laws may limit civil damages for undocumented immigrants.
- Applications for name changes may be complicated by immigration status.
- Tenant and housing status may be complicated by immigration status.

Figure 4
Six Steps For Addressing Immigration In A State Trial Court

Step 1: Build Assessment and Improvement Teams

- Form an assessment and improvement team or teams composed of personnel from throughout the court.
- Develop common understanding of the importance, challenges, and opportunities for addressing immigration in the court and local justice system.
- Clarify assessment and improvement process goals, tasks and time-lines, and participant responsibilities.
- Establish information recording and reporting processes.

Step 2: Describe Immigration and the Courts Community Context

- Identify immigrant composition, presence, needs, and social and economic roles in the community.
- Identify immigrant community interactions with courts and justice system.
- Identify political climate surrounding immigrant presence.

Step 3: Identify and Assess Impacts of Interactions Among Federal, State, and Local Law, Policy, and Practice in the Courts and Justice System Involving Immigration, such as:

- state and local initiatives targeting immigrants such as access to service restrictions, English only language requirements, employer sanctions, document fraud offenses, and limits on bail eligibility;
- federal and state law empowering local law enforcement to perform federal immigration functions;
- federal immigration law regarding victims, criminal offenses, convictions, sentences, and participation in specialty court programs;
- federal immigration law regarding marriage, divorce, child custody, adoption, delinquency, and dependency;
- local application of federal policies; and
- detention policies and practices.

Step 4: Assess Your Court Culture

- Describe your court's general organizational culture.
- Identify behaviors, values, fundamental assumptions and beliefs of importance in the court.
- Identify potential gaps between court culture and court user cultures.
- Determine orientations towards change and change management.

Figure 4
Six Steps For Addressing Immigration In A State Trial Court

Step 5: Design and Implement Immigration Sensitive and Culturally Appropriate Processes, Policies, Programs and Services

- Determine cultural competency implications of immigrant service needs.
- Prepare improvement action plans for each priority process, program, and infrastructure improvement.
- Prepare an aggregate court immigration sensitive improvement plan.
- Identify performance measures.
- Integrate immigrant service improvements and other planning, policy, performance measurement, and court improvement efforts.

Step 6: Monitor Performance

- Monitor and report performance measures.
- Engage immigrant communities to assess expectations and satisfaction with court service.
- Periodically review process and program improvements.

Figure 5
Topics For State –Federal Court Dialog About Immigration

Problems Resulting From Complexity and Ambiguity in the Federal law

- Definition of crime of moral turpitude.
- Definition of good moral character.
- Numerous types of immigrant status.

Implications of Immigration Consequences Dependent on State Convictions or Sentences

- Criminal charges constituting an aggravated felony or crime of moral turpitude.
- Variations in sentencing practices.
- Effects of state law elements of crimes.

State Authority vs. Federal Supremacy

- Authority of prosecutors to tailor criminal charges to achieve immigration results.
- Authority of judges to tailor convictions and sentences to achieve immigration results.
- ICE dependence on state and local assistance and cooperation.
- Exchange of evidence between ICE officers and local prosecutors.

Figure 5
Topics For State –Federal Court Dialog About Immigration

Eligibility for Services and Probation

- State law restrictions on access to services.
- Federal law restrictions on access to services.
- Funding and reimbursement issues.
- Restrictions on ability of illegal aliens to meet probation conditions.
- Restrictions aimed at lawful permanent residents.

Implications for State Court Trial and Case Flow Management

- Need for and role of interpreters.
- Locating defendants in ICE custody.
- Protocols for obtaining information from ICE.
- Transportation from ICE custody.
- Advising defendants of immigration consequences of pleas.
- Open probation cases for defendants unable to meet conditions due to ICE custody or removal.

Impacts of Federal Use of Local Jails and State Prisons on State Court and Justice System Policy and Practice

- Jail overcrowding and management.
- State court pretrial release.
- Sentences.
- Financial incentives to alter local and state priorities to accommodate federal immigration policy and practice.
- Access to detainees by state courts.
- Cost to state systems of housing removal criminal alien prisoners.
- Detainee transportation.

ICE Voluntary Removal Process

- Criteria for allowing aliens to leave voluntarily.
- ICE officials authorized to make the decision.
- Tracking people to assure that they leave.
- Effect of voluntary removal on the alien's right to reenter the country legally.
- Notification to state and local justice officials as to who is removed.

System-Wide Coordination and Training

- Areas where coordination of different parts of the justice system is needed.
- Need for system-wide training.
- Learning objectives and content of a system-wide training programs.

Figure 5
Topics For State –Federal Court Dialog About Immigration

Potential Uses of ICE Information by State and Local Courts and Justice Agencies

- Assist in identifying people who are suspected illegal aliens.
- Advise as to the location and status of individuals under ICE custody who are awaiting trial in state court or are on supervised probation.
- Advise state officials about individuals who have been removed.

Making ICE Electronic Records Available For Direct Access

- State and local judges.
- Local prosecutors.
- State and local law enforcement, corrections, and probation officers.
- Local family service and social service providers.
- Deputized 287g officers.

Other Potential ICE Assistance to Local Justice Officials

- Detainee transportation.
- Finding and transporting individuals for trial.
- Tracking individuals who are on probation.
- Providing emergency phone contact.
- Providing evidence obtained in conjunction with ICE arrests to local prosecutors.
- Notifying local officials of planned ICE raids.

Potential Information For ICE From State and Local Courts and Justice Agencies

- Reporting of foreign-born individuals who have contact with the criminal justice system for investigation and interview.
- Court/probation/arrest records for purposes of initial investigation or determination of deportability.

Potential Area For Local Justice Assistance to ICE in Apprehending or Holding Individuals

- Direct enforcement assistance through 287g officers.
- Evidence for ICE interviews or prosecution.
- Assistance from local jails.

Endnotes

¹ John Martin is the Director of the Center For Public Policy Studies immigration in the states courts project and the coordinator for the Maricopa County site. Steve Weller is coordinator for the Minnesota site. David Price is the coordinator for the Miami-Dade site. Angie Lederach and Jeff Yoder are the project research associates.

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