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## A P P E A R A N C E S

Manny Vargas, Senior Attorney, Immigrant Defense Project

Rick Jones, Co-Chair, Problem Solving Task Force Committee

Marvin Schecter, Co-Chair, Problem Solving Task Force Committee

Jay Clark, Co-Chair, Problem Solving Task Force Committee

*Joel Schumm, Task Force Reporter, Problem Solving  
Task Force Committee*

## Elizabeth Kelley, Problem Solving Task Force Committee

John Cutler, NCBSF

Angela Fraser, NSCBF

Cheryl Bernard

1                   RICK JONES: -- probably get started because  
2 Manny's here and I promised him that we would let him  
3 get on with his day by eleven o'clock, and, and so let  
4 me just, let me just start by saying I'm, I'm glad that  
5 everyone is here in one form or another and I look  
6 forward to a productive couple of days. I, sadly, am  
7 going to have to miss out on portions of the  
8 conversation just because these hearings are in New  
9 York, and whenever stuff happens in New York, it just  
10 seems that I can't free up the kind of time that I,  
11 that I would like to, so I apologize in advance for  
12 having to, for having to leave for blocks of time, but,  
13 but, as I said, Manny is here, and I greatly appreciate  
14 him being here. Manny is the Senior Counsel at the  
15 Immigration Defense Project and is, and is, for my  
16 money, oh, Doug, Doug just walked in.

17                  FEMALE SPEAKER: Sorry. Sorry, I'm late.

18                  RICK JONES: That's okay, you're really not.  
19 We're just, we're just starting here, and he's one of  
20 the leading, leading lights in the, in the field of  
21 the, the intersection of criminal law, and, and  
22 immigration, and the rights of immigrant defendants.  
23 Manny has graciously agreed to spend some time with us  
24 this morning talking about immigrant defendants and  
25 problem solving courts, and what I think we ought to do

1       is, is just very quickly go around the room and  
2       identify ourselves, and then give Manny ten or fifteen  
3       minutes to give us sort of an overview, and then we  
4       will ask him whatever, whatever questions we might  
5       have. So, so thank you, Manny, for coming. As you  
6       know, I'm Rick Jones. I guess (unintelligible).

7                     ELIZABETH KELLEY: Good morning. Elizabeth  
8        Kelley from (unintelligible).

9                     RICK JONES: Good morning.

10          JAY CLARK: Good morning. Jay Park from  
11        Cincinnati.

12          JOHN CUTLER: John Cutler, NCBSF.

13          ANGELA FRASER: Angela Fraser, NSCBF.

14          CHERYL BERNARD: I'm Cheryl Bernard. I work  
15        for (unintelligible). How are you?

16          RICK JONES: Good, how are you?

17          JOEL SCHUMM: I'm Joel Schumm, member of the  
18        Universal (unintelligible).

19          RICK JONES: Hi, Joel.

20          VICKY YOUNG: Vicky Young, San Francisco.

21          MARVIN SCHECTER: Marvin Schecter of New  
22        York and on the news.

23          FEMALE SPEAKER: And Gail.

24          RICK JONES: Gail? Are you there?

25          GAIL SHIFMAN: Gail Shifman, San Francisco,

1 literally.

2 MANNY VARGAS: Hello, Gail.

3 RICK JONES: Well, the floor is yours, Manny.

4 MANNY VARGAS: Thank you. Okay, well, thank  
5 you everybody for having me here today. I'm, I'm very  
6 pleased to do this and I'm, and I'm very happy that,  
7 that the Task Force is looking at the issues of concern  
8 that immigrant communities are having to deal with  
9 problem solving courts. So let me start by focusing on  
10 what the problem is here, what the problem is with  
11 respect to immigrant access to problem solving courts  
12 or other alternative to incarceration type  
13 dispositions, and I want to do that by, well, first  
14 thing, I had a handout. Let me distribute this. What  
15 I'm distributing is a, a one page checklist, which is  
16 our project's effort to sort of summarize the law of  
17 immigration consequence of the criminal convictions on  
18 one page, and what I want to direct people's attention  
19 to is the box in the middle on the right-hand side,  
20 Conviction Defined. This is the definition of what  
21 constitutes a conviction for immigration purposes that  
22 now is the immigration statute and has been in the  
23 immigration statute since 1996. Prior to 1996, there  
24 was, was not a definition of conviction, but then as  
25 part of IRA, IRA, the Immigration Reform Bill of 1996,

1       Congress added this definition, and as you, you can  
2       see, it includes not only a formal judgement of guilt  
3       entered by a court, which is what you and I normally  
4       would consider to be a, a conviction, and what the  
5       state of New York or other states might deem to be a  
6       conviction, but also adjudic, adjudications where  
7       guilt, where the adjudication of guilt has been  
8       withheld or deferred adjudications where these two  
9       prongs are met, the first prong being that a judge or  
10      jury has found a non-citizen guilty or the non-citizen  
11      has pled guilty or admitted the essential elements for  
12      the finding of guilt, plus to the judge, the court, has  
13      ordered some penalty or restraint on liberty. Now,  
14      think about this definition when you think about  
15      dispositions of problem solving courts that now often  
16      require up front guilty pleas, with the court then  
17      ordering that person to participate in drug treatment,  
18      domestic violence counseling, whatever it is or  
19      whatever the problem solving court is addressing, and  
20      think about the implications then where immigrants who  
21      are, are placed in these drug diversion programs, or  
22      are, are adjudicated in problem solving courts that  
23      require an up front guilty plea. You have the, the plea  
24      of guilt meeting prong one, and then you have the judge  
25      ordering the participation in the program. So this is

1 why immigrant advocates like our project and others,  
2 you know, have been trying to get the word out to  
3 immigrant communities, obviously, to, and to the dense,  
4 defense community, and to the, the criminal justice  
5 system generally, judges, prosecutors as well, so folks  
6 are aware that a, a non-citizen is subject to a  
7 diversion-type disposition or a, a problem solving  
8 court, that, that disposition with an up front guilty  
9 plea, that that person, regardless of whether or not  
10 the plea is later vacated or withdrawn, is subject to  
11 deportation for the initial plea, for the initial  
12 admission of guilt. Now, I wanted to highlight  
13 that there's, you know, good arguments why we don't  
14 think this is what Congress intended in 1996, and some  
15 of this is being litigated, including here in New York  
16 in the Second Circuit. Because we were discussing be,  
17 beforehand the Netern versus Folder case, but there's  
18 been legislative history, for example, that when  
19 Congress instituted this definition, it was meaning to  
20 overrule a prior agency precedent that simply had to do  
21 with not giving the, the government authority to use  
22 guilty pleas in certain types of (unintelligible)  
23 adjudication provisions where the government wanted to  
24 go after what they termed the bad actor, but when the  
25 state required some subsequent hearing before the plea

1 converted into a conviction. It was not meant to  
2 address dispositions where, in fact, the guilty plea  
3 was later vacated or withdrawn, and there was no  
4 conviction under state or federal law for, for the  
5 applicable for the, the, the criminal justice  
6 system that entered the adjudication. It's also the  
7 case that when you think about where problem solving  
8 courts were in 1996, the, the up front guilty plea, as I  
9 understand it, was not a requirement. You know, there  
10 was a pretty massive movement at that point, but to the  
11 extent that there were problem solving courts or these  
12 alternative incarceration dispositions, they didn't  
13 require up front guilty pleas at that time, and one can  
14 conclude from that that time was, this, this wasn't the  
15 type of disposition that Congress was going after, and  
16 moreover, you have federal criminal justice policy now  
17 that favors or promotes in many cases the idea of these  
18 ATI programs, these alternative incarceration programs,  
19 with which this immigration policy was in tension or it  
20 conflicts, where a segment of the U.S. resident  
21 population is effectively being excluded from non-risk  
22 participation in such programs, and this is, you know,  
23 this was, the, the, the fact that there is a risk here  
24 has, has been confirmed in agency precedent. There's a  
25 Board of Immigration Appeals decision from 1999, a case

1       called Matter of Roldan-Santoyo, which involved a  
2       lawful permanent resident in Idaho who pled guilty to a  
3       drug possession offense, was promised by the state of  
4       Idaho that if he completed a, I think it was a five-  
5       year probation period without any further problems with  
6       the law, that that plea would be vacated and withdrawn,  
7       and, in fact, Mr. Roldan's plea was vacated after he  
8       successfully completed the five-year program, but then  
9       it subsequently came to the attention of the  
10      Immigration Service, the Immigration Service initiated  
11      removal proceedings, and in Matter of Roldan-Santoyo,  
12      the Board of Immigration Appeals upheld an immigration  
13      judge's order that that person, despite having, not  
14      having a conviction under Idaho state law, was still  
15      being convicted for immigration purposes and ordered  
16      deported. So that's the, the rule that immigration  
17      judges, or the, or the precedent decision that  
18      immigration judges across the country are bound by  
19      and are following with the exception of the Ninth  
20      Circuit, but in every other jurisdiction in the country  
21      now bound by this decision and by this wrong  
22      interpretation of the conviction definitions. Now,  
23      some of you, you know, may be asking, "Well, how is it  
24      that folks that are referred to drug treatment programs  
25      or domestic violence counseling programs come to the

1       Immigration Service's attention?" and it is true that  
2       there are substantial numbers of immigrants now who are  
3       being referred to these programs, who are in the  
4       problem solving courts, and if they don't wind up in  
5       custody or aren't in custody, may not come to the  
6       attention of Immigration Services and successfully  
7       complete the program and, and, and go on with their  
8       lives until, and let me bring up the circumstances  
9       where this becomes an issue for the, for the, if you  
10      have any violation during a drug treatment, and that  
11      results in your being taken into custody, even if that  
12      violation is, is, winds up being nothing, the fact that  
13      you're in custody even for a brief period, say, in  
14      Riker's Island here in New York, can bring you to the  
15      attention of immigration authorities who can then start  
16      removal proceedings on the basis of that initial guilty  
17      plea, even though there's not yet a conviction under  
18      state law. When you later apply for U.S. citizenship,  
19      if you're a long-term permanent resident, you are given  
20      a form to fill out, the N-400 application form, and that  
21      form asks you to identify whether you've ever been,  
22      quote, "placed in an alternative sentencing or  
23      (unintelligible) rehabilitative program," and then in  
24      parentheses, "for example: diversion, deferred  
25      prosecution, withheld adjudication, deferred

1 adjudication," so that even if you hadn't been  
2 identified for removal proceedings, your honest answer  
3 to this question on the citizenship application can  
4 then result in you being placed in removal proceedings,  
5 and your dishonest answer to this question can later  
6 result in revocation of citizenship if the government  
7 later finds out that you had, in fact, been placed in a  
8 diversion program at some point. Another example where  
9 this comes up is when somebody later applies for, it,  
10 it, say, it's a, a person who's trying to legalize  
11 their status, who's not yet legal, and later applies  
12 for adjustment to legal status. A rap sheet run is  
13 done, that arrest shows up, questioning is done  
14 regarding how this disposition was resolved, and if it  
15 comes to the adjudicator's attention that there was a  
16 guilty plea, that can result in the deferral of that  
17 individual to removal proceedings, as well, and then  
18 the, the final, additional example I want to bring to  
19 your attention, which is reflected in this case before,  
20 that's pending before the Second Circuit now, the  
21 Beecham case, is where the immigrant takes a trip out  
22 of the country, and upon their departure from the, the  
23 country and, and attempt to re-enter the U.S., at the  
24 point of entry, say, JFK Airport here in New York, a  
25 criminal record check is done, an arrest shows up, the

1 individual's sent to secondary inspection at the point  
2 of entry, questioned about the, what happened, the  
3 information comes to the attention of the Immigration  
4 Service that there was a, an arrest that resulted in a  
5 guilty plea, even though later vacated, can result in  
6 that individual being placed in removal proceedings,  
7 and the Beecham case is an example of that. Mr.  
8 Beecham took a trip to the Dominican Republic, and upon  
9 his return, was placed in removal proceedings, even  
10 though his conviction was subsequently vacated under  
11 New York state law. The government continued with  
12 their effort to remove Mr. Beecham, got a removal  
13 order, and he's now challenging that in federal court.  
14 The New York State Association of Criminal Defense  
15 Lawyers, and NACDL, by the way, have filed an amicus  
16 brief on that case to this court on Mr., Mr. Beecham's  
17 position.

18 MANNY VARGAS: All right. So what can be  
19 done about this? There's a few things I want to bring  
20 to the court's attention, and some of these  
21 possibilities are outlined in some of the materials  
22 that I passed along to Rick and I believe the members  
23 of the Task Force have them, including the New York  
24 City Bar's 2007 Report on the Immigration Consequences  
25 of Deferred Adjudication Programs in New York City.

1 Obviously, at minimum, I think one thing that should be  
2 done is education. The actors in, in problem solving  
3 courts are immigrants themselves, obviously, about the  
4 potential immigration implications of what happens in  
5 problem solving courts, particularly where there is a  
6 guilty plea or admission of guilt. To the extent that  
7 you have problem solving court diversions, obviously  
8 from the immigrant's perspective, a pre-plea type  
9 program would be preferable, would avoid these  
10 risks, assuming that the person does successfully  
11 complete the program, that there's not that first prong  
12 of the guilty plea or admission of guilt, regardless of  
13 the referral or the court's ordered deferring somebody  
14 to a, a diversion program. That disposition can't be  
15 considered a, a conviction for immigration purposes  
16 unless the person is later found guilty. To the extent  
17 that pre-plea diversions aren't possible or deemed not  
18 appropriate, there are jurisdictions that come up with  
19 alternative ways to process these cases or adjudicate  
20 these cases that possibly, not necessarily guarantee,  
21 but possibly could avoid these dispositions, which to  
22 the extent if a system isn't operating pre-plea, we  
23 believe these alternative-type measures should be  
24 encouraged, at least in the case of, of non-citizen  
25 defendants, and that is to have diversions which are

1 based on stipulations or contracts with the prosecution  
2 in which maybe the, the defendant agrees to give up  
3 certain rights, but, but where there isn't a plea or  
4 admission of guilt in court, that's, that's accepted  
5 in court, that has its own issues and problems  
6 obviously from the defense perspective, but there would  
7 be a way were there a will in certain cases to avoid  
8 the immigration consequences, and then the final idea  
9 I'll put out there is to encourage openness of problem  
10 solving courts to alternative pleas in certain cases.  
11 This comes up particularly where, you know, there may  
12 be a factual basis for other charges that do not  
13 trigger deportability, and just to throw out an  
14 example, the, let's say you have a defendant who's been  
15 arrested for a larceny offense and, and a drug offense,  
16 drugs were found on his or her possession, but is a  
17 long-term permanent resident, a permanent resident  
18 who's been here over five years, that permanent  
19 resident, if he pleads guilty to the drug offense, will  
20 become deportable in the U.S. under this definition of  
21 conviction, even if that plea is later vacated or  
22 withdrawn. However, if the, the individual pleads to a  
23 larceny offense, the government would need two such  
24 larceny offenses, or the immigration terminology is  
25 crimes involving (unintelligible) to make such a long-

1 term permanent resident deportable. Would knowledge of  
2 that, and with a well, the actors in the, in the  
3 problem solving court, to avoid this position that  
4 would result in permanent deportation of that  
5 individual, openness to the possibility of pleading to  
6 the offense that doesn't trigger deportability could  
7 also avoid these immigration consequences. So I think  
8 I'll leave it at that and open it up for any questions  
9 anybody has about any of this.

10 RICK JONES: Do people have questions?

11 Questions?

12 SPEAKER: I certainly have some, but I'll  
13 wait.

14 VICKY YOUNG: (Unintelligible).

15 RICK JONES: Vicky? Vicky, do you have  
16 questions?

17 VICKY YOUNG: Well, one question I do have is  
18 my understanding is that immigration can, or maybe it's  
19 only its, its inadmissibility, if they even suspect  
20 that someone has a drug abuse problem, that triggers  
21 other immigration consequences, so the fact that  
22 someone's even been in a program could in itself have  
23 consequences, but that's not the same as deportability?  
24 I'm just trying to --

25 MANNY VARGAS: No.

1                   VICKY YOUNG: -- get at what that is, 'cause  
2 I know that's a problem, as well.

3                   MANNY VARGAS: Yes, and you are absolutely  
4 right. There is a, both a deportability and an  
5 admissibility ground for drug abuse or addiction.

6                   VICKY YOUNG: Mm-hmm.

7                   MANNY VARGAS: Deportability is what gets  
8 applied to immigrants who are lawfully admitted to the  
9 U.S. --

10                  VICKY YOUNG: Right.

11                  MANNY VARGAS: -- and admissibility is what  
12 gets applied to folks who are seeking lawful  
13 enmeshment into the U.S. who aren't currently of legal  
14 status, and for both deportability and admissibility,  
15 there is a drug abuse or drug addiction ground.

16 (Unintelligible) --

17                  VICKY YOUNG: So, so does that sort of either  
18 moot or expand the whole problem solving court problem  
19 because the fact that you're even in it --

20                  MANNY VARGAS: Yeah.

21                  VICKY YOUNG: -- regardless, does that have  
22 its own problem?

23                  MANNY VARGAS: It's definitely something to  
24 be aware, and, yes, it is a potential issue. A couple  
25 things that I wanted to bring to folks' attention about

1       that. Number one is that there are certain case law  
2       limitations on when somebody can be found to be a drug  
3       abuser and an addict so that, you know, a one time  
4       admission use of drugs doesn't necessarily make you a  
5       drug abuser or drug addict for immigration purposes,  
6       and secondly, the immigration system operates at this  
7       point still, you know, despite all the money thrown  
8       at it (unintelligible) largely based on criminal  
9       dispositions --

10                  VICKY YOUNG: So --

11                  MANNY VARGAS: -- and, and not so much these  
12       other grounds like drug abuse or drug addiction that,  
13       yes, are in the immigration statute, but I can tell you  
14       in my years of experience with, with deportation that  
15       it's rarely if ever charged, and I think the only  
16       instances I've seen where it's been charged, it's where  
17       it's been thrown in, it's an additional charge where  
18       somebody has several other grounds and immigration is  
19       really after that person. So as a practical reality,  
20       I, I don't think one, it, it doesn't seem like one  
21       needs to be as concerned about that right now, and the  
22       (unintelligible) reality is that the immigration system  
23       right now is based largely on what the dispositions of  
24       criminal courts, not this other evidence and of these  
25       other grounds that actually don't even exist in the

1       criminal grounds of the immigration statute. They're  
2       under the health grounds of the immigration statute.  
3       It's not one of the listed criminal grounds for  
4       removal.

5                   VICKY YOUNG: As a practical matter in these,  
6       do you have any idea, like, the, the, the numbers of  
7       people that are being affected and have had pleas  
8       entered and withdrawn, the, either the Wilda or, or  
9       this Beecham, any idea of, of how is it, is it rare or  
10      not so rare?

11                  MANNY VARGAS: It's been hard to get a handle  
12      on that, on that, and we've recently, you know, made an  
13      effort to try, try to get more information on that. To  
14      get, you know, data numbers is, is virtually impossible  
15      to, to figure out what people are deported based on  
16      drug deportability or admissibility, where, where cases  
17      have resulted from problem solving court-type  
18      dispositions or ATI-type dispositions, but there are,  
19      you know, there is anecdotal evidence out there, folks  
20      who have fallen into problems with immigration as a  
21      result of this, these various routes that I described.  
22      I mean, to some extent, it is an issue that, that I  
23      don't think yet has resulted in the numbers that it  
24      could result in, but that there's, there are thousands  
25      of immigrants out there who have problem solving court

1 dispositions who are at risk with any of these, you  
2 know, if any of these things occurred in their lives,  
3 I mean, like I described previously, like, a future  
4 application for citizenship, most permanent residents  
5 want at some point to apply for U.S. citizenship, and  
6 they're asked on the application, you know, have they  
7 ever participated in a diversion program, or the trip  
8 outside the country, you know, that, and then upon  
9 re-entry, as in Mr. Beecham's case (unintelligible).

10 MALE SPEAKER: Is there any kind of window in  
11 terms of the (unintelligible) period that it's not as  
12 big of, it's not considered as, as strongly?

13 MANNY VARGAS: Unfortunately --

14 MALE SPEAKER: Or is it for, forever in their  
15 history.

16 MANNY VARGAS: Yeah.

17 QUESTION: Okay.

18 MANNY VARGAS: No statute of limitations like  
19 you have in, you know, in the criminal justice world  
20 with respect to immigration consequences, not even, you  
21 know, (unintelligible) protections. If, you know, you  
22 could have somebody whose disposition was prior to  
23 1996, and they're going to have the new definition of  
24 which applied to them as Congress expressly applied  
25 this conviction definition (unintelligible).

1                   MARVIN SCHECTER: As we're trying to write a,  
2 a public policy report, we're, we're sort of caught  
3 betwixt and between. We, we want to do what's right  
4 for clients and the defense bar, and at the same time,  
5 make a recommendation that's reasonable and not  
6 preposterous. What's to really vote on? What should  
7 we be saying to the public or to the, to the justice  
8 community about immigrants who are in problem solving  
9 courts? It seems to me on, just on face value, the new  
10 recommendation should be that a new legal immigrant in  
11 this country or somebody who's here with a green card  
12 and gets into trouble goes through the entire drug  
13 court process and succeeds, that they've done what we  
14 as Americans want them to do, to come here and to help  
15 themselves. The true American success story, get back  
16 on track. Is that a good public policy? Do we want  
17 to recommend that such people should be excluded from  
18 this definition? Is that what you would do if you  
19 could?

20                  MANNY VARGAS: I would say so, and as, as a  
21 practical matter, by the way, when the immigrant  
22 community that this is the biggest issue for is the  
23 lawfully admitted community --

24                  MARVIN SCHECTER: Right.

25                  MANNY VARGAS: -- and the reason for that is

1       that many indoctrinated immigrants wouldn't be eligible  
2       in any event for some of these diversion programs which  
3       require Medicaid coverage, but it's the, the, which is  
4       a whole separate issue that, but it's lawful, lawfully  
5       admitted, green card holders, for example. Permanent  
6       residents. Folks, folks who, the government have  
7       admitted to the U.S. with the express purpose of  
8       allowing them to live and work here permanently. You  
9       often have U.S. citizen family members, dependent U.S.  
10      citizen spouses and children who are at risk, who, who  
11      have problem solving court dispositions, so I would  
12      agree with what, what you just laid out. I mean, it's  
13      not the, this is a policy that's meant to allow  
14      defendants who successfully complete programs in drug  
15      treatment or domestic violence counseling programs to  
16      re-integrate into society and to, in fact, do  
17      successfully comply with what's required of them. Are  
18      these the folks that you really want to be deported?

19                   MARVIN SCHECTER: One of the things we've  
20      learned, well, actually, we've learned across the  
21      country was the issue of training, seems to be  
22      training.

23                   MANNY VARGAS: Training?

24                   MARVIN SCHECTER: Training. Training of the  
25      players --

1                   MANNY VARGAS: Okay.

2                   MARVIN SCHECTER: -- particularly the defense  
3 attorneys' PDO's. It seems they're kind of reworking  
4 and looking at all of the transcripts that we've had,  
5 and the one statement that repeatedly comes up in,  
6 "Training is a no-brainer."

7                   MANNY VARGAS: Mm-hmm.

8                   MARVIN SCHECTER: It comes up every, in  
9 almost every single (unintelligible), and yet wherever  
10 we go, there's no training, or the training is  
11 hodgepodge, or the training is on-the-job, or you can  
12 take one course which your office has money to go to  
13 the course. So here's the question. Based upon your  
14 experience with the (unintelligible) in this state and  
15 with public defenders offices in this state, would it  
16 be a good recommendation to say that for drug court  
17 training or problem solving court training, domestic  
18 violence, whatever fits our definition of problem  
19 solving court, that there has to be an integration of  
20 (unintelligible)? Somebody has to come in and give two  
21 hours on, on, on this page that you handed out with  
22 these kinds of issues that you've raised here today?

23                  MANNY VARGAS: Absolutely, and these are, you  
24 know, I, I think the two prime examples of problem  
25 solving courts are the drug treatment courts and the

1 domestic violence courts. These are two areas of high  
2 risk for immigrants participating in because of the,  
3 the deportation grounds that exist, both for virtually  
4 any controlled substance offense, and the new  
5 deportation ground that was also added by Congress in  
6 1996 were various types of domestic violence related  
7 offenses, so given the, the particularly what I would  
8 call disproportionate deportation consequences for non-  
9 citizens participating in these programs, I would  
10 certainly promote the idea that any training that's  
11 done for problem solving court actors include an  
12 immigration component, and I think there would be  
13 resources out there who would be interested and willing  
14 to do that, including our project, the Immigrant  
15 Defense Project, and our partners in what's called the  
16 Defending Immigrants Partnership, a nationwide  
17 partnership of four organizations including our  
18 project, the Immigrant Legal Resource Center in  
19 California --

20 MARVIN SCHECTER: Mm-hmm.

21 MANNY VARGAS: -- the National Immigration  
22 Project and the National Lawyers Guild in, in Boston,  
23 and NLADA, the National Legal Aid Defenders  
24 Association, whose mission is to make sure that the  
25 criminal defense community throughout the country

1 and other actors in the criminal justice system  
2 increasingly as, as well, are aware of the, the  
3 immigration implications of, of choices made by non-  
4 citizens in, in criminal proceedings, and certainly  
5 with, you and everything we can, I think the, the  
6 various partners to, to assist in any effort to, to do  
7 training on, on this, on this issue for problem  
8 solving courts.

9 MALE SPEAKER: I had a couple  
10 (unintelligible). It seems (unintelligible) relatively  
11 modest and (unintelligible) legislative module. Have  
12 you developed a compendium of voters, and if not,  
13 could you provide us with some (unintelligible) points  
14 with one of the things that he's capable of doing, and  
15 then if (unintelligible) --

16 GAIN LSHIFMAN: (Unintelligible), shush.

17 MALE SPEAKER: -- (unintelligible) you know, very  
18 much capable of, of, of taking this to the next  
19 step, to our, you know, our, with our legislative  
20 (unintelligible). That would be really helpful, and is  
21 it also entirely possible, at least with respect to  
22 legal (unintelligible) to actually have some friends on  
23 the Hill, so --

24 VICKY YOUNG: Hey, is that dog doing  
25 better?

1                   GAIL SHIFMAN: Yes, he's out of the hospital.

2 Thank you.

3                   MANNY VARGAS: So, yes, I would certainly be,  
4 or I think our project would certainly be willing to  
5 help on that, and I, I would note that there is some  
6 conversation going on now, coming out of the, the case  
7 pending before the Second Circuit --

8                   MALE SPEAKER: Right.

9                   MANNY VARGAS: -- of doing an advocacy  
10 effort, yeah.

11                  MALE SPEAKER: But right now there's no  
12 proposed legislation that you're aware of?

13                  MANNY VARGAS: No.

14                  MALE SPEAKER: So we, yeah, we would really,  
15 that would be really helpful. We're on a fairly short  
16 time frame as we move into the drafting phase, and I  
17 don't think --

18                  MANNY VARGAS: As you move into the drafting  
19 phase of what?

20                  MALE SPEAKER: Of our, of our report.

21                  MANNY VARGAS: Oh, of, of this report, yes,  
22 yes.

23                  MALE SPEAKER: We, we're convened here.  
24 You're, you're among the last two folks we're going to  
25 hear from, so we're, we're about to write. Now, that

1 doesn't mean when you have the actual legislation, but  
2 we need to fill in, you know, we need to itemize what  
3 changes we would like to see implemented, and then we  
4 can take it to our, to our legislative (unintelligible)  
5 arm and show them.

6 MANNY VARGAS: So this is something you would  
7 be potentially interested in including --

8 MALE SPEAKER: Oh, yes.

9 MANNY VARGAS: -- as a recommendation.

10 MALE SPEAKER: Yeah. Oh, yeah.

11 MANNY VARGAS: Okay.

12 MALE SPEAKER: Yeah. I mean, you, you go  
13 right after what the problems are with --

14 MANNY VARGAS: Right.

15 MALE SPEAKER: -- with the, with the legislation  
16 from the (unintelligible).

17 MANNY VARGAS: Right.

18 MALE SPEAKER: Okay.

19 RICK JONES: Thank you (unintelligible).

20 VICKY YOUNG: I had a thought, but it, it  
21 went out.

22 MARVIN SCHECTER: Well, let me, let me, let  
23 me jump in with just a couple, a couple of questions  
24 (unintelligible). The first thing you said when you  
25 talked about recommendations was the education of

1       immigrant defendants and the ways of, of some courts,  
2       and my, I guess my question would be, would be who, who  
3       ought to be educating these folks? Who ought to be  
4       dealing with their case, in your mind? Should it be,  
5       should it be principally, primarily their lawyers,  
6       their counsels? Should it be the, the, the larger,  
7       sort of criminal justice system judges? There could  
8       be some sort of formalized training that, or education  
9       piece that everyone, everyone including the immigrant  
10      defendant has to go through to understand what he's  
11      (unintelligible)? Should there be, and I know this,  
12      this is going to be a compound question, should there  
13      be something more than, you know, twelve, eighteen,  
14      twenty-four hours that a person has to make upon arrest  
15      before going into these courts? What's your sense of  
16      how the education piece should happen?

17                  MANNY VARGAS: We're, you know, generally,  
18                  the view of this, it's, and it should extend across the  
19                  criminal justice system, not just in problem solving  
20                  courts, obviously, generally, the view that it is  
21                  primarily the responsibility of the defense lawyer,  
22                  and, you know, for many reasons. When, you know, you  
23                  don't necessarily want other actors in the criminal  
24                  justice system to be aware of which defendants  
25                  appearing before the court are non-citizens, and, and,

1 you know, that, that, that's always been the, been the  
2 best position, we think, make sure that the non-citizen  
3 defendant understands, you know, what the potential  
4 implications are under the immigration laws, choices in  
5 the criminal proceeding. That doesn't necessarily mean  
6 that, that a defense lawyer has to become an expert in  
7 this area, or, but to be able to identify where there  
8 might be an issue, they could maybe consult with an  
9 expert or at least refer the non-citizen defendant to  
10 someone with whom that person could consult with to  
11 understand the, the immigration implications. So, you  
12 know, the primary responsibility I would say should,  
13 should lay with the defense lawyer, but that's not to  
14 say that there isn't a role here for the judiciary or  
15 even prosecutors, and we do think, for example, that,  
16 that if the, there should be broader requirements of  
17 judges to get real warnings regarding the, the  
18 potential immigration consequences when someone pleads  
19 guilty and to give the warning across the board, not,  
20 not to give it only to the individuals who the court  
21 may perceive as being non-citizens. It, that, it, and  
22 when I say a real warning, I mean a warning that's  
23 backed up by the opportunity for an adjournment or  
24 whatever it is to allow the non-citizen to, to, to then  
25 investigate maybe with his or her defense lawyer what

1       the immigration implications are, and what I also mean  
2       by that is that state law require that if the warning  
3       isn't given that there's an opportunity to, to later  
4       vacate or withdraw that guilty plea. In New York  
5       state, as an example, the state which provides a  
6       requirement under the, the Criminal Procedure Law, for  
7       an advisal. Only in felony cases, by the way, which,  
8       you know, it's in misdemeanor cases where I think the  
9       warning is most needed to be given, but, but it  
10      requires an advisal in felony cases, often not complied  
11      with and partly because New York State Law then goes on  
12      to say failure to get the warning is not basis for  
13      later negature of the plea.

14                  MALE SPEAKER: (Unintelligible) prejudice  
15                  or --

16                  MANNY VARGAS: No, I don't --

17                  MANNY VARGAS: Period.

18                  MALE SPEAKER: Just so --

19                  MANNY VARGAS: Period.

20                  MALE SPEAKER: Period.

21                  MALE SPEAKER: Period.

22                  FEMALE SPEAKER: In California I think you,  
23        you have a failure, but then you have a prejudice --

24                  MALE SPEAKER: Mm-mmm.

25                  FEMALE SPEAKER: -- argument.

1 MALE SPEAKER: You don't.

2 MALE SPEAKER: If, if you don't give it, you  
3 may be able to proceed, but you have to show that you  
4 would have had relief or something if you had --

5 MANNY VARGAS: Yeah, I'm not sure exactly.

6 Other states I know do have different provisions on  
7 this, and some states have advisal requirements with  
8 more teeth to them, but, but so, you know, I, the, I do  
9 see a role for the judiciary as well, and in the  
10 problem solving court venue, one would think that  
11 there's interest of all actors in the, in the  
12 individual being able to successfully reintegrate into  
13 society, that I would assume prosecutors, as well,  
14 would be interested in dispositions that don't  
15 then result in that non-citizen instead of being able  
16 to return to his or her family or community being  
17 deported from the United States, so I think there's a  
18 role for educating prosecutors as well regarding what  
19 can happen immigration-wise.

20 MALE SPEAKER: Does it make a difference if  
21 it was an altered plea?

22 MANNY VARGAS: No. No, an altered plea is,  
23 is treated as a --

24 MARVIN SCHECTER: Prejudice (unintelligible).

25 MANNY VARGAS: Yeah. I mean, a, a altered

1       plea can make the difference for certain things in  
2       immigration law, but not for, not for the, the, the  
3       (unintelligible). Yes?

4                     FEMALE SPEAKER: In response to the, his  
5       question, he said that potentially there are thousands  
6       of non-citizens out there who are at risk of removal  
7       because they've gone through problem solving courts,  
8       but you really don't have numbers.

9                     MANNY VARGAS: No.

10          FEMALE SPEAKER: Is there anything anyone can  
11       do about that body of individuals who are at risk or do  
12       they just have to spend the rest of --

13          FEMALE SPEAKER: (Unintelligible).

14          FEMALE SPEAKER: -- their existence in this  
15       country waiting for the hammer to fall?

16          MANNY VARGAS: Legislative change would be  
17       obviously one thing you could do, but under the current  
18       scheme, under the current legislative scheme, when  
19       you're left with this just, the whole (unintelligible)  
20       discretion, and that, you know, the Immigration  
21       Service --

22          FEMALE SPEAKER: Well, I meant discretion.

23          MANNY VARGAS: Yes.

24          FEMALE SPEAKER: Yeah.

25          MANNY VARGAS: That, that, that's what I'm

1 talking about, the, the, the Immigration Service  
2 (unintelligible) discretion.

3 FEMALE SPEAKER: Well, we need the, whatever  
4 they call them, 212's or something or other. We need,  
5 would these or not?

6 MANNY VARGAS: Well, in certain cases.

7 That's, you know, there, there are certain waivers in  
8 the immigration statute for certain folks even though  
9 found deportable might be eligible for a waiver. Many  
10 of you probably know that that's become much more  
11 limited since the '96 laws, that anybody convicted, for  
12 example, of a, what's called an aggravated felony  
13 conviction, which can include misdemeanors sometimes  
14 (unintelligible) --

15 FEMALE SPEAKER: Right, so are most of our  
16 drug court offenders also aggravated felonies, so  
17 that's even a bigger problem is that --

18 MANNY VARGAS: Yeah, the government would say  
19 that anybody who pleads in a drug treatment court plea  
20 a drug trafficking offense --

21 FEMALE SPEAKER: Okay, so possession is  
22 (unintelligible)?

23 MANNY VARGAS: -- or, or to a second or  
24 subsequent possession offense can be, be an  
25 aggravated felony. That's, that's the government's

1 position. Now, that second --

2 FEMALE SPEAKER: There's some argument that  
3 the second one is (unintelligible) --

4 MANNY VARGAS: Yes, and, and that's in heavy  
5 litigation. We're involved in that, and, and, and  
6 actually there's been a recent success in the Second  
7 Circuit, so that's, despite what the government wants,  
8 the government can't treat a second or subsequent  
9 possession, possession offender as an aggravated felony  
10 any, anymore, but even aside from the aggravated felony  
11 issue, there's another bar on the, the, the, the, the  
12 biggest form of leave for permanent resident immigrants  
13 which is called Cancellation, Rule One of the --

14 FEMALE SPEAKER: (Unintelligible).

15 MANNY VARGAS: -- Immigration Statute, and  
16 that's where any drug offense that's committed within,  
17 within your first seven years of the U.S. Many people  
18 aren't aware of that second, you know, bar to the leaf.  
19 It's not only aggravated felony drug offenses, but if  
20 your drug offense occurred within your first seven  
21 years, that also --

22 MARVIN SCHECTER: (Unintelligible). The  
23 first one occurs within his first seven years.

24 FEMALE SPEAKER: No, the aggravated felony --

25 MANNY VARGAS: Yes.

1                   FEMALE SPEAKER: -- is anytime.

2                   MANNY VARGAS: Aggravated felony anytime, and  
3 any drug offense within the first seven years.

4                   MALE SPEAKER: Oh.

5                   FEMALE SPEAKER: Oh, okay, and one thing I  
6 didn't learn until, like, this week when I was doing  
7 research, I wouldn't think that a controlled substance  
8 offense includes under the influence. They, but, and,  
9 and, and I had a client with some under the influence  
10 convictions and it turns out that those under the  
11 influence convictions from the '90's are not creating a  
12 big problem, so --

13                  MANNY VARGAS: It's read pretty broadly.

14                  FEMALE SPEAKER: Yes.

15                  MANNY VARGAS: Just to be precise, you know,  
16 when I said any controlled substance offense within the  
17 first seven years, the one exception to that would be  
18 one time possession of less than thirty grams of  
19 marijuana, but that, you know, other than that one tiny  
20 little exception, it is, any drug offense within the  
21 first seven years.

22                  MALE SPEAKER: The only question that I had,  
23 you, you, you talked about the, the, the possibility of  
24 there being alternative-type measures that aren't pleas  
25 in court or (unintelligible) concrete dispositions. I

1 think stipulations have turned into contracts with  
2 prosecutors offices (unintelligible). My question, my  
3 few questions are, one, if you know, where are those  
4 kinds of alternatives being employed in the country,  
5 and, and, and, two, have they ever been challenged and  
6 have they stood up to scrutiny?

7 MANNY VARGAS: Okay. There's examples cited  
8 in the New York City Bar's report, and I think the, the  
9 biggest examples are the, the state of Washington has  
10 come up with a, a, alternative ways of adjudicating. I  
11 think it came up initially in the domestic violence  
12 court arena, and have come up with contracts the  
13 defendants enter into with the prosecution in the state  
14 of Washington to void the immigration implications.  
15 Cook County, Illinois, also has come up with a, a,  
16 proceedings like that. I don't know the details that  
17 that involved, I think some sort of arrangement with  
18 the prosecution, as well, and there were instances here  
19 in New York City of, of certain prosecutor's offices  
20 agreeing to, to those (unintelligible) --

21 MARVIN SCHECTER: Immunity contracts --

22 MANNY VARGAS: Yeah.

23 MARVIN SCHECTER: -- (unintelligible).

24 FEMALE SPEAKER: (Unintelligible) details.

25 MARVIN SCHECTER: Yeah, the detail stuff they

1           wanted, wanted to (unintelligible) in the contract  
2        (unintelligible).

3           MANNY VARGAS: Okay. So there, there's that.  
4        It wasn't what I was referring to.

5           MARVIN SCFECTER: What were you talking  
6        about?

7           MANNY VARGAS: I, I know the, the Brooklyn  
8        prosecutors, for example, had agreed to certain  
9        arrangements in cases within the, the past few years,  
10      certain limited cases where --

11        MARVIN SCHECTER: Yeah.

12        MANNY VARGAS: -- and they're no longer --

13        MARVIN SCHECTER: And they're, they're  
14      (unintelligible).

15        MANNY VARGAS: -- doing it, as I understand  
16      it, but I think the issues did come up with later  
17      challenges to, to those agreements, so it's, it's --

18        MARVIN SCHECTER: So what --

19        MANNY VARGAS: -- it's, it's tricky, that --

20        MARVIN SCHECTER: Right, right, and what  
21      about, you're standing up to scrutiny. What about,  
22      what about if, if the immigration judge for  
23      (unintelligible) has running stipulations on your  
24      contract in front of him as, as something the  
25      government (unintelligible) or, or one of their

1 dispositions. Did you have any sense of how, what it  
2 was, the decision (unintelligible)?

3 MANNY VARGAS: No case law that I'm aware of  
4 yet, but that could be an indication that the  
5 government isn't acting under the --

6 End of recording.

7 (End of Side A)

9 (Side B)

10 Start of recording:

11 MANNY VARGAS: Oh.

12 FEMALE SPEAKER: Would you, would you, should  
13 we go on the website?

14 FEMALE SPEAKER: It says (unintelligible)?

15 MANNY VARGAS: Yeah. It, I mean, it is on the  
16 website.

17 FEMALE SPEAKER: Okay.

18 MANNY VARGAS: If you're a defense lawyer,  
19 yes, I think (unintelligible) --

20 MALE SPEAKER: (Unintelligible).

21 MARVIN SCHECTER: -- (unintelligible) if  
22 you're, if you're a defense lawyer, you need the book.  
23 You need the whole book. You need the whole book.

24 MANNY VARGAS: I, I figured that out.

1 FEMALE SPEAKER: Okay.

2 MARVIN SCHECTER: I, I know the answer to

3 many of your questions (unintelligible) training

4 (unintelligible) you know, (unintelligible) and

5 this, and this, this big book, it stays on

6 (unintelligible).

7 MANNY VARGAS: Thank you, Marvin.

8 FEMALE SPEAKER: And what's the name of the

9 book?

10 MANNY VARGAS: It's about representing immigrant

11 defendants in New York.

12 MALE SPEAKER: Oh, in New York.

13 MANNY VARGAS: Yeah. There's a national

14 version of that, the manual, that's, that they all

15 want to give them free of charge pending the

16 partnership with them.

17 RICK JONES: Manny, thanks, and did you have

18 anything else you wanted to meet with us and tell us

19 about?

20 MANNY VARGAS: No, I think that was it.

21 Thank you.

22 FEMALE SPEAKER: Well, what's that, that,

23 Defending Immigrants dot org?

24 MANNY VARGAS: Yes, I think Defending

25

1                   FEMALE SPEAKER: Immigrant defense, you mean,  
2                   oh, I see. You tried, this says you tried to visit  
3                   www.immigrantdefenseproject.org, but it's not loading.

4                   Well, given the way I type, actually --

5                   MANNY VARGAS: But the national manual isn't  
6                   yet on, on our website, but on this Defending  
7                   Immigrants Partnership website --

8                   MALE SPEAKER: Yeah, I see it.

9                   FEMALE SPEAKER: Well, Partner, Defending  
10                  Immigrant Partnership --

11                  MANNY VARGAS: Partnership.

12                  FEMALE SPEAKER: -- (unintelligible).

13                  MANNY VARGAS: Yes. Yes.

15                  RICK JONES: Thank you so much, Manny.

16                  (Unintelligible) --

17                  MANNY VARGAS: Thank, thank you.

18                  RICK JONES: -- you've been, you've been,  
19                  you've been a great (unintelligible) --

20                  FEMALE SPEAKER: Thanks very much.

21                  SPEAKER: -- and you, you may go, and you will  
22                  see this conversation reflected in our work, yes.

23                  MANNY VARGAS: Oh, and this, one additional  
24                  thing that I did, I, I'm sorry. It is, and it, if  
25                  there's any power that's required or any additional,

1 another potential resource is, my former colleague Lena  
2 Vas did a lot of the writing of this, of the  
3 literature that is circulating just now at NYU Law  
4 School. If, if there were any further questions or  
5 further information desired, she would be an additional  
6 research that --

7 RICK JONES: V-A-S?

8 MANNY VARGAS: V-A-S, yeah.

9 MALE SPEAKER: She'd be able to help if we  
10 had certain things (unintelligible) --

11 MANNY VARGAS: Yes, and, and I, that I think  
12 she would be very interested in.

13 MALE SPEAKER: You, you or she?

14 MANNY VARGAS: Both of us.

15 MALE SPEAKER: Okay, fair enough.

16 RICK JONES: Great. Thanks, Manny. Thank  
17 you very much. Appreciate it.

18 MANNY VARGAS: Thank you.

19

20

21

22

23

24

25

New York Recorded Hearing Corrections

March 20, 2009

- Cheryl Bernhard should be listed as Adele Bernhard, Problem-Solving Task Force Committee
- Angelyn C. Fraser is listed as NCBSF and should appear as Angelyn C. Frazer, State Legislative Affairs Director of NACDL.
- John Cutler is listed as NCBSF, and should appear as John Cutler, National Affairs Assistant for NACDL

