



CRIME WITHOUT PUNISHMENT: HAVE YOU EVER COMMITTED A CRIME FOR WHICH YOU HAVE NOT BEEN ARRESTED?

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Advising a client on how to answer Kafkaesque questions on immigration forms regarding potential past criminality can pose a dilemma for the ethically-minded immigration attorney and the processes raises a multitude of complex issues cutting across various areas of law.

For example, the Form N-400, Application for Naturalization, asks broadly *"Have you ever committed a crime or offense for which you have not been arrested?"* One would be hard pressed to find a person who has never committed an offense for which she has not been arrested. Multitudes of New Yorkers must have committed the offense of jay walking with full sight of a police officer who never bothered citing the offender. Some states criminalize "fornication" (sexual intercourse between unmarried persons) despite this type of law's dubious constitutionality. New York criminalizes adultery no matter how long ago a person separated from the spouse. Does an immigration attorney have to plumb a client's sexual past to answer the question on the N-400 application? Must the lawyer then also report the client's other past potential offenses such as speeding?

The question on the I-485 application asks more narrowly if one has knowingly "committed any crime of moral turpitude or drug-related offense" which did not result in arrest. Given the heavy litigation in this area, only a lawyer with experience could recognize a CIMT. Under the categorical approach, which requires consideration of the minimal conduct implicated by a penal law, even if one has engaged in "theft," a temporary taking of another's belongings (rather than a permanent one) may not be morally turpitudinous. See e.g. *Wala v. Mukasey*, 511 F.3d 102 (2d Cir. 2007). Regarding a "drug-related offense," if your

client smoked pot at a concert during college, how do you assess whether the act was a crime within that jurisdiction back then? In a complex penal law system, requiring the prosecutor to determine the applicable law and demonstrating each element of guilt beyond a reasonable doubt, without a lab test can the client know beyond a reasonable doubt that the substance was pot and not say oregano?

ABA Model Rule 3.3(a)(1) states that “lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of a material fact or law previously made to the tribunal by the lawyer...” Criminal penalties may attach to a lawyer who knowingly falsely prepares an application for a client. See 18 USC 1001, 18 USC 1546 or 18 USC 371. Whether a lawyer can be accused of unethical or criminal conduct without *knowing* that a crime occurred is unclear; an overzealous prosecutor or bar investigator might pursue it.

The question of knowingly committing a crime for which one has never been arrested derives from INA § 212(a)(2), which makes inadmissible one who *admits* having committed certain crimes. Thus, a non-citizen, including an LPR, need not have a criminal conviction to be found inadmissible; he or she can be equally snared for having admitted to the commission of a crime. Yet, the Board of Immigration Appeals (“BIA”) has established stringent requirements for a validly obtained admission: (1) the admitted conduct must constitute the essential elements of a crime in the jurisdiction in which it occurred; (2) the applicant must have been provided with the definition and essential elements of the crime in understandable terms prior to making the admission; and (3) the admission must have been made voluntarily. See *Matter of K-*, 7 I&N Dec. 594 (BIA 1957). It would be very difficult for an applicant to satisfy the requirements of an admission while completing the form.

The requirements established by the BIA to corral the unwieldy question suggests that it defies a straightforward answer. Even in what seems an obvious admission of crime – your client arrives to sign the form and reports having just killed someone, might she have committed an act of self-defense if she was in a city with a Stand Your Ground law?

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