

THE CRIMINAL PROCESS

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I. Background

The following is a summary of some issues often encountered in representing Spanish speaking clients in criminal matters. Some of these observations apply to any criminal case, but they are here because in my experience it is a good idea to emphasize them with Hispanic clients. On that note, references are made to Hispanics or Latins or Latin Americans rather loosely, (perhaps this is also technically or politically incorrect), to Spanish Speaking peoples from Latin America. On another note, words in Spanish are interspersed in this document, always in bold.

Most Latin American countries have a Napoleonic Code system, under which all rights are set forth by Codes, such as a Commercial Code, a Bankruptcy Code, a Tax Code, a Penal Code. There is no system of *stare decisis* or it is extremely limited. There is very little written law besides the Codes that may be consulted for precedential value. The constitutions of most countries are generally not regarded as important as in the United States. The constitutions of most Latin countries have changed many times, and they are hardly ever a source for substantive individual rights. Even if this should not be so in theory, in practice the Codes will dictate the outcome of judicial proceedings.

In Latin countries the Criminal Law is known as **Derecho Penal**. Criminal Procedure is known as **Derecho Procesal Penal**. While in Spanish a person who commits a crime may be called a **criminal**, the law on the subject is the **Codigo Penal**.

In many Latin countries there is no right to jury trials either civil or criminal. A sort of “jury,” composed of a panel of judges is sometimes used. Some Hispanic clients may have to be explained on the jury system, and the fact that while they are designed to be composed of “peers” there are disadvantages in that they are lay people with no expertise in the law, and often with entirely different backgrounds than the accused.

II. The Initial Proceedings.

Everything starts with the charges. In Spanish these are called **cargos**. These are generally filed by indictment or information. It will likely be unnecessary to explain those differences to a client, but in general, they can all be referred to as **documentos acusatorios**, or **inculpatorios**, or **acusaciones formales**.

Most courts will provide a court-paid translator for all criminal proceedings. While it is a time-saving good idea to waive reading of the charges in most cases, it is generally better to have the court read those charges with the aid of a translator in court, so there is a record that the client was formally made aware of the charges, to reduce chances for claims of insufficient understanding.

It should also be explained that the **cargos** do not have to contain all of the details of an investigation or all that the government knows about the events, but that each **crimen** has certain elements which the government must prove beyond a reasonable doubt, or **mas alla de una duda razonable**. This is not the same as beyond any doubt or **sin ninguna duda**.

At this stage it may also have to be explained that at an arraignment or first appearance no evidence or witnesses will appear and the court just needs to make sure the accused understands the charges against him, how he/she pleads to them and set bond to make sure the accused will come back to court when needed until the case is over. Let the client know that at this stage the plea should be of not guilty until further investigation is done and recommendations can be made on all the facts. This may be hard to understand for a client who believes himself guilty, because they are unfamiliar with the need to analyze whether the government has followed all constitutional and other standards to properly charge the client with a crime. Good advice might be “you must declare yourself not-guilty until I conclude my investigation of your case,” or “**debes declararte no culpable hasta que termine mi investigacion de tu caso.**”

III. On Bonds.

Bonds are called **fianzas**. It should be noted that many bonding companies refuse to bond foreign nationals, especially those from Mexico, based upon alleged prior sour experiences. You may have to call around and see who may accept a bond to save your client lots of frustration.

Undocumented aliens will face a near certain denial of bond, and in many instances the detaining agency may contact the Immigration and Customs Enforcement agency (ICE, formerly INS, known by many Latin Americans as “**la migra**”) and they may request their continued detention until they can be processed for deportation.

IV. Preliminary Hearings

There are generally no substantial equivalents to these hearings or **audiencias preliminares** in Latin American countries. One has to explain that the government bears a very low burden of proof in these hearings, and that while they often give a chance to find out what all the government may have against the client, it is often at a substantial risk of closing the door to some plea alternatives. It may be necessary to have a record made of a waiver of preliminary hearing, again making use of the court translator, if possible, just to make sure there are no claims of prejudice later.

V. Plea Negotiations

Perhaps the most important thing here is to make sure the client understands that he/she cannot plead guilty if he/she is not in fact guilty. I would say that there is a greater cultural tendency in Latin Americans to just do whatever is more likely to result in less trouble, and especially in whatever results in less expense. Make sure all the facts are

there to support a plea to avoid an injustice. Despite efforts by many local governments, police racial profiling does happen sometimes with blatant regularity. Inform the client that **“no puedes declararte culpable si realmente no eres culpable.”**

In most Latin American countries there are no exact equivalents to divisions between felonies and misdemeanors. Many crimes that may be regarded as minor in those countries may be felonies here, and vice-versa. The closest translation to the distinction is **‘cargos mayores’** for felonies and **“cargos menores”** for misdemeanors. Definitions of felonies and misdemeanors vary in our system, and while crimes punishable by one year are generally classified as felonies, in practice the difference for the client is the likelihood of serving time in prison. Make sure the client understands the maximum sentences for the original charges, as well as any reduced charges. I have seen some judges actually quiz defendants during plea hearings.

Of course the client also has to understand that a plea agreement or **“acuerdo”** is just a deal cut with the prosecutor or **“fiscal”** and the judge may impose a greater sentence than recommended after accepting the client’s guilty plea. One way to explain this may be to tell the client that while it is unlikely that a judge would not follow a plea recommendation, in criminal matters there are no absolute guarantees, or **“no hay garantias absolutas”** and there are always risks, or **“siempre hay riesgos.”**

Naturally, the client must also understand that entering into a plea means waiving some constitutional rights. This is another concept that may be completely without equivalent to Latin American clients. There is actually no exact translation for “waiver” but the closest words are **“abandonar derechos”** or **“renunciar a derechos”** of course more literally translated as abandon rights or renounce rights. Here, one must also make sure that such rights are explained with the idea that the client may have no substantial equivalent right in his/her country of origin to relate to. Thus, the explanation may have to take a very practical approach. Again, during a plea hearing judges will ask the client whether all these rights were explained to him/her, and some may, as they should, balk if they perceive the client is saying yes to questions without really understanding what they’re doing.

Other important aspects to be aware of in representing foreign-born clients in criminal cases is that certain charges and pleas may result in later denial of immigration benefits. Certain statutes disqualify applicants for legal permanent residency in this country to those who plead or were found guilty of certain crimes, generally those considered of moral turpitude. Similarly, there are certain crimes which may result in revocation of already granted status of legal permanent resident. Only naturalized citizens of the United States are out of this danger, with minimal exceptions, i.e. treason, fraud in the application process. Consult with an immigration attorney to make sure and it may also be a good idea to put such potential consequences on the record during a plea hearing in court.

It may also be important to explain to a client that deportation and sentencing are not mutually exclusive. Some clients think that since they will be deported, they will not

actually serve time in jail. This is sometimes the case, but in any serious charge, they will serve their time here, then be deported. Sometimes the fact that a defendant will be deported can be used as additional incentive in plea negotiations. Some prosecutors like the idea that the government should not be paying to have these defendants jailed if they will become some other country's problem.

Some clients also have the perception that if they are deported they could just come back illegally again, perhaps just changing their names. Of course there are thorny ethical issues about what clients tell you in any criminal case, but it must be kept in mind that an attorney may not recommend the commission of a crime. Clients should also be advised that a deported person who comes back into the country illegally will not just be violating immigration law, but actually may be committing a felony in so doing.