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__Practice Advisory__:
ICE Interrogations and Immigrants' (lack of) Constitutional Protections

__Introduction__

A client appears for arraignment, and agents from Immigration and Customs Enforcement (ICE) are waiting at the court to arrest him. A client is held in jail for a few days on a probation violation and is interviewed by ICE. These are scenarios that we, as defense practitioners, dread. Regulations and case law give ICE wide latitude to arrest and interrogate immigrants, notwithstanding concerns about self-incrimination. This practice advisory will discuss the authority of ICE to conduct such interviews, and will provide some ideas of ways to minimize the damage that such interviews could cause for an immigrant's criminal case and future removal proceedings.

__Legal Authority for Questioning by ICE__

ICE has the authority to interrogate anyone believed to be an immigrant regarding his right to be in or remain in the U.S. 8 USC §1357(a). It also has the power to detain that person briefly while conducting the interrogation, if it has a reasonable suspicion that the person does not have lawful immigration status in the U.S. 8 CFR §287.8(b)(2). ICE is allowed to arrest an immigrant without a warrant if it has reason to believe that the immigrant does not have lawful immigration status and that he is likely to escape before a warrant can be obtained. 8 CFR §287.8(b)(2)(ii).

While immigrants have the right to hire an attorney for their removal proceedings, 8 U.S.C. §1229a(b)(4)(A), they do not have a right to an attorney during ICE interrogations. *See, e.g.*, 8 U.S.C. §1357(a). __*However, they are not required to answer questions or sign anything during an ICE interview.*__

When interrogating a client following a warrantless arrest, ICE is not required to provide information regarding the immigrant's right to an attorney, and is not required to advise him that information he provides during an interrogation can be used against him. 8 CFR §287.3(c). *See also Matter of E-R-M-F- and A-S-M-*, 25 I&N Dec. 580 (BIA 2011) (allowing the immigrant's confession to be used against him in his removal proceedings to prove that he engaged in smuggling, even though he was not advised of his rights). ICE is not required to provide such information until it files a charging document with the Immigration Court, a process that usually happens days or weeks after the interview.

Immigration removal proceedings are civil in nature. The exclusionary rule does not apply to violations of the Fourth Amendment, as it does in criminal proceedings. *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984). *See also Westover v. Reno*, 202 F.3d 475, 479 (1st Cir. 2000) (holding that Fourth Amendment violations do not constitute grounds for invalidating removal proceedings). Except in the case of widespread or "egregious" violations of the Fourth Amendment, evidence obtained during ICE arrests and interrogations can be used against an immigrant during his removal proceedings. *Lopez-Meza,* 468 U.S. at 1050 (plurality opinion). Indeed, removal proceedings only need to be "fundamentally fair" for them to pass constitutional muster. *See, e.g.*, *Teng v. Muksasey*, 516 F.3d 12, 17 (1st Cir. 2008).

<u>ICE Interrogations in Practice</u>

ICE agents conduct interrogations in four typical scenarios: during an immigration arrest, during a workplace raid, at a court where the immigrant is appearing for a criminal matter, and during the time that an immigrant is in criminal custody. They usually place the immigrants under oath and ask questions regarding their identity, nationality, immigration status, criminal history, and whether they are afraid to return to their home countries. The answers to many of these questions form bases for removal proceedings. As a general rule, agents do not allow attorneys to be present for these interviews. The transcript of the interview is regularly submitted to the Immigration Court as evidence during removal proceedings.

In the past, agents would encourage immigrants to sign away their right to an immigration hearing, either to leave the U.S. voluntarily or by agreeing to be deported. The latter was called a "stipulated removal order," and was discussed in an article in our November 2008 newsletter. *See also, New report finds due process abuses in secretive deportation program*, National Immigration Law Center. (Sept. 8, 2011), available at http://www.nilc.org/pubs/news-releases/nr097.htm. In 2010, ICE updated its operating procedures to require a detailed affidavit from the immigrant, demonstrating that he was aware of the rights that he was giving up. *See* Brian O'Leary, Chief Immigration Judge, *Memorandum: Procedures for handling requests for a stipulated removal order.* (Sept. 15, 2010), available at http://www.justice.gov/eoir/efoia/ocij/oppm10/10-01.pdf. Since then, it appears that, at least anecdotally, stipulated removal orders occur less frequently. *See* Daniel González, *Immigration officials back away from deportation program*, Arizona Republic (Nov. 6, 2011), available at http://www.azcentral.com/arizonarepublic/news/articles/2011/11/06/20111106immigration-arizona-deportation-program.html.

<u>Practice Tips</u>

Defense practitioners must sometimes consider whether a client should cooperate with ICE, either through answering questions during an interview or through signing documents. Like most questions relating to immigration law, the answer to this question is more nuanced than a simple yes or no.

Most importantly, clients should not sign anything that they do not understand, and should not answer any question that they do not understand. They should not agree to voluntary departure or sign a stipulated removal order without consulting with an immigration attorney.

In limited circumstances, it may benefit your client to cooperate with ICE by answering some or all of the agents' questions. For example, if the client is a lawful permanent resident (ie: has a "green card") and is not subject to mandatory detention under 8 U.S.C. §1226(c), cooperating with ICE may mean that ICE decides to release him instead of taking him into custody. ICE might still place the client in removal proceedings, but the client will not have to endure ICE custody during those proceedings. Additionally, if your client truly is not deportable, it is in your client's best interest to try to convince ICE of that fact. If successful, ICE is likely to lift an immigration detainer and not initiate removal proceedings against your client. Finally, if your client is afraid of returning to his home country, he should make that very clear in all of his communications with ICE. If he neglects to do so, but later tries to apply for defenses to deportation based on a fear of persecution or torture, ICE will try to impeach him with any statements he has made denying any fear of returning to his home country.

However, there are many circumstances in which speaking to ICE is not in your client's best interest. The most obvious of these circumstances is when ICE asks your client about activities connected to an open criminal case. The client should be advised not to speak about the case, so as to avoid self-incrimination. Interrogations are conducted under oath; thus, statements could be used in criminal proceedings as well as immigration proceedings. Clients should also understand that ICE will use all information from the interrogation to help meet its burden of proving the client's deportability. Thus, if the client is likely to be detained anyway, due to the fact that he has crimes on his record that make him subject to mandatory detention, he is better advised to decline speaking with ICE and let them prepare their case against him without the benefit of a confession.

It is often a difficult, strategic decision as to whether your client should speak with ICE, and if so, how much information the client should provide. The Immigration Impact Unit is available to discuss individual situations.

<u>**Further resources**</u>:

ACLU Know Your Rights (a simple discussion of constitutional rights, appropriate to provide to clients): http://www.aclu.org/files/kyr/kyr_english.pdf

H.R. Jud. Comm., *Problems with ICE Interrogation, Detention, and Removal Proceedings*. 110-80. (Feb. 13, 2008). Available at http://judiciary.house.gov/hearings/printers/110th/40742.PDF.

Laura Murray Tjan, *When ICE comes knocking at the jailhouse door: what to tell your clients,* Immigrant Defense News (newsletter of the CPCS Immigration Impact Unit), 1:1 (Nov. 2008). Available at: http://www.publiccounsel.net/Practice_Areas/immigration/pdf/Immigrant%20Defense%20News%20Nov%202008.pdf.

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