

SEPTEMBER 2020

REPRESENTING CLIENTS DETAINED BY ICE

A Guide for Appointed Counsel

**COMMITTEE FOR
PUBLIC COUNSEL
SERVICES**

IMMIGRATION IMPACT UNIT

Please contact
iiu@publiccounsel.net
for the most up-to-date
information

This guide is available
online at:
publiccounsel.net/iiu/





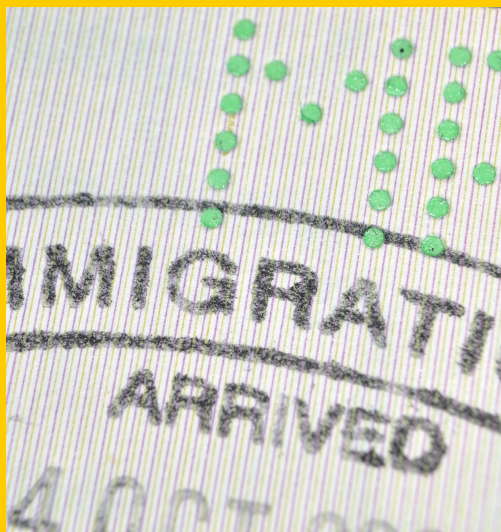
ABOUT THIS GUIDE

This guide is for court-appointed attorneys who represent clients who are or may be detained by ICE. It provides information to help you:

- Understand the interaction between ICE and the criminal legal system;
- Identify strategies to ensure your client appears in court from ICE custody;
- Ensure continued communication with your client while they are in ICE custody;
- Understand the immigration court process; and
- Access resources to ensure the best outcome for your client in criminal and immigration proceedings.

While much of the information contained here is aimed at attorneys practicing in Massachusetts, many of the strategies and considerations will apply to criminal defense attorneys across the U.S.

Special thanks to the Immigrant Defense Project (IDP) and Make the Road New York (MRNY) for their permission to adapt from and reproduce substantial portions of their guide.



IMMIGRATION IMPACT UNIT

The Immigration Impact Unit (IIU) is a unit within the Massachusetts public defender's office (CPCS) serving attorneys statewide who are appointed to represent indigent clients in criminal, delinquency, youthful offender, child welfare, mental health, sexually dangerous person and sex offender registry cases, as well as related appeals and post-conviction matters.

The IIU serves as an expert resource for all appointed attorneys to help understand and address the collateral immigration issues a client faces.

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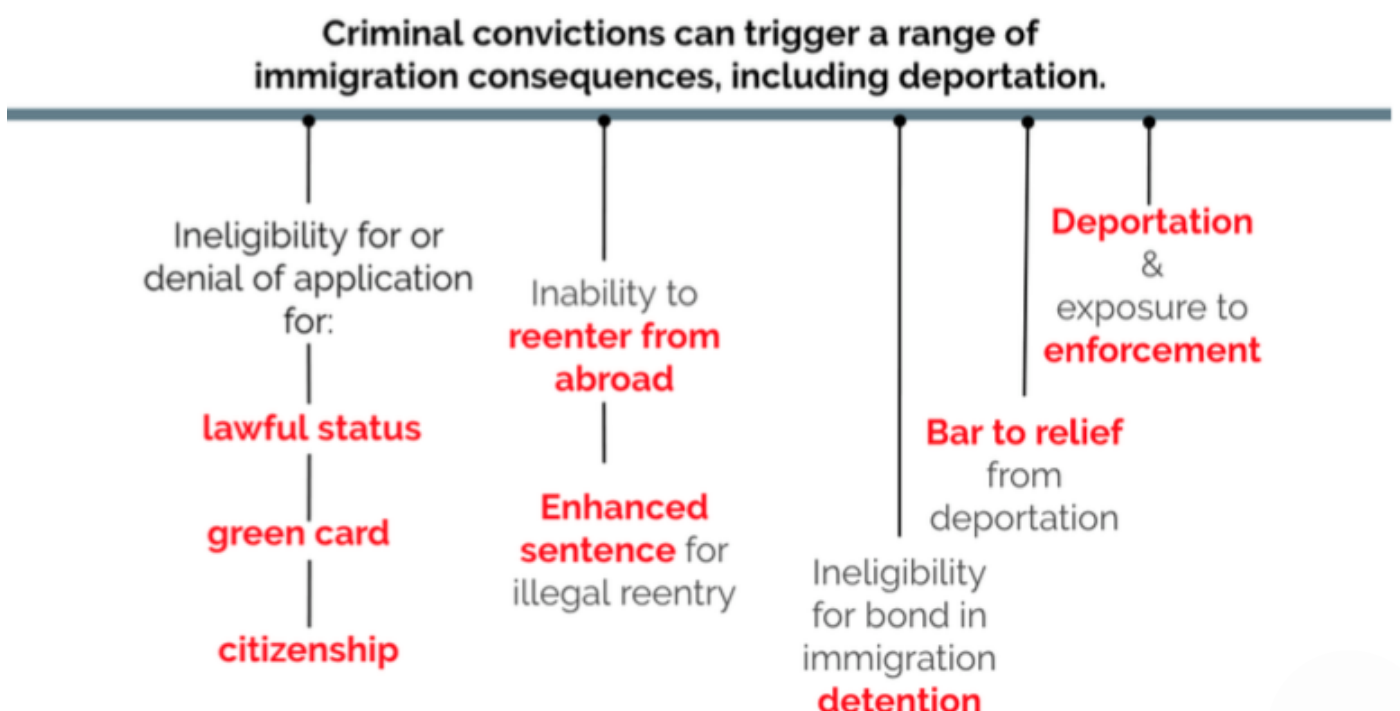
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The Defense Attorney's Crucial Role

Under *Padilla v. Kentucky*, criminal defense attorneys have an obligation to advise clients about the immigration consequences of a conviction. This obligation does not end because your client is in removal proceedings or facing imminent deportation. It continues throughout the entire course of representation.

As discussed in this guide, you play a crucial role in ensuring detained noncitizens are able to exercise their rights in the criminal legal system. Your work to ensure that they are able to appear in court can be the difference between staying in the U.S. and deportation.

In many cases, it will benefit the client to resolve the criminal case before the first immigration court appearance or before proceedings are over. The criminal case outcome may also impact eligibility for bond and arguments your client can make about their defenses to removal. An immigration expert from the Immigration Impact Unit (IIU) can help ensure your advice to plead or go to trial includes considerations of the impact of your case on these matters.



What does it mean that my client is detained by ICE?

ICE has the power to detain any noncitizen who is charged with being removable (deportable) from the United States. Your client may be detained anywhere in the U.S., but generally, most people arrested in New England are held locally.

Your client may be removable because they are undocumented (they came across the border without permission or overstayed a visa). Or your client may be removable because even though they have status (such as lawful permanent residents, refugees and visa holders), they also have certain criminal convictions.



ICE's ability to arrest and detain someone may be unconnected to the criminal case in which you represent them. But often the criminal case brings them to the attention of ICE and the outcome of the criminal case is a decisive factor in their ability to remain in the United States. Just because your client has been detained by ICE does not mean they will be deported. Noncitizens in detention may be able to successfully fight deportation and remain in the U.S., including some people with criminal convictions.

Clients in ICE custody will not automatically be produced for their state criminal appearances. As the defense attorney, you play a crucial part in ensuring your client retains the ability to fight their criminal case.

ICE Detainers

Who might be subject to an ICE detainer?

Any noncitizen who ICE believes is already deportable. This includes people who are undocumented (even if they have no prior criminal record), people lawfully present who have prior convictions that make them deportable, and people who have already been ordered deported.

Can state authorities hold my client on an ICE detainer?

No. In July 2017, the Massachusetts Supreme Judicial Court issued a decision in *Lunn v. Commonwealth*, 477 Mass. 517 (2017), holding that there is no authority under Massachusetts law – either statutory or common law – for an arrest for civil immigration purposes. This means that state law enforcement officials cannot hold someone on an ICE detainer past the time they would otherwise be released from state custody.

Does the *Lunn* decision apply to all state law enforcement officials?

Yes, the Court's decision applies to all Massachusetts law enforcement officials, including, sheriffs, court officers, and state and local police officers.

Does the existence of an ICE warrant make it lawful to hold a person?

No. An ICE warrant is an administrative warrant (form I-200 or I-205) and is not issued by a judge. Administrative warrants do not provide authority for state law enforcement to detain a person.

Does *Lunn* mean that ICE can't arrest my client from custody?

No. If ICE is present at the courthouse or at the jail at the moment a client is being released from state custody, ICE currently has the authority to make an arrest in that situation. In addition, *Lunn* does not prevent local authorities from calling ICE to alert them to an individual pending release from custody.

What do I do if I believe there has been a *Lunn* violation?

If you believe that the jail or court officers held a client for ICE to arrive (or unnecessarily prolonged the processing in order to extend the time for ICE to arrive) please report it to the IIU at iiu@publiccounsel.net or 617-623-0591.

ICE Detainers

Why do I need to know whether my client has an ICE detainer?

Some clients may want to remain in state custody to ensure that they are able to resolve their state criminal case before being arrested by ICE. In order to properly advise them about bail and other decisions about how best to proceed, it is necessary to know about an ICE detainer.

How do I determine whether there is an ICE detainer?

An ICE detainer will travel with the mittimus. In court, defense counsel can ask the court officers if there is anything beside the pending case holding the defendant. Defense counsel can also call the records department where the client is being held and ask the same question.

Can I get a copy of the ICE detainer?

The subject of the detainer must be served with the form in order for the detainer to take effect. As your client's attorney you should also be entitled to a copy. At a minimum, ask your client to request a copy and send it to you.

What can I advise my clients about ICE contact while in state custody?

It is important for clients to know that immigration officers visit and interview noncitizens in state custody. There are ICE officers specifically assigned to this task. Clients should know that these interviews are voluntary. They do not have to speak to any officer about immigration or criminal history. Clients have the right to remain silent and anything that they say to ICE officers (including simple information like place of birth) can and will be used against them in immigration court or criminal court. They do not have to sign any documents that ICE or other officers may provide.

For clients in custody, know your rights flyers are also available on the IIU website in nine different languages at: www.publiccounsel.net/iiu/public/

ICE Courthouse Arrests

Is ICE allowed to arrest people in court?

Yes, but that authority is currently circumscribed by a preliminary injunction. In June 2019, a preliminary injunction was issued in *Ryan v. ICE*, 382 F. Supp. 3d 142 (D. Mass. 2019). The injunction prohibits ICE from arresting people for civil violations of immigration law while they are coming to, attending, or leaving Massachusetts courthouses under their own power. This injunction does not apply to ICE arrests of people who are being released in court from criminal custody.

On September 1, 2020, the First Circuit Court of Appeals vacated the injunction and remanded the case back to the District Court, No. 19-1838, 2020 WL 5201945. However, as of the date of this publication, the injunction remains in place. The litigation is ongoing and can be followed at 1:19-cv-11003-IT.

When ICE is permitted to make courthouse arrests, what procedure must they follow?

- Requests from immigration officers for information about an individual case will be treated like any other request from the public;
- Immigration officials may enter a courthouse to perform official duties provided that their conduct in no way disrupts or delays court operations;
- Immigration officers must alert the proper courthouse security of their presence;
- Immigration officers are permitted to enter the holding cell area to take custody of a noncitizen for whom they have an ICE detainer or an administrative warrant;

These procedures come from guidance issued by the Trial Court in 2017, ([found here](#))

The policy was updated in June 2019 to reflect the preliminary Injunction ordered in *Ryan v. ICE*. ([found here](#))

ICE Courthouse Arrests

How do I know if ICE is in the courthouse?

ICE agents are generally plain clothed and come in groups of 2-4. In some courts, they carry their weapons. In courts where the general public is prohibited from having their cell phones, this is another way to identify them.

As per the trial court policy, immigration officers must inform the court officers of their presence. If an attorney has a good rapport with court personnel, it may be worth asking them if ICE is in the courthouse.

What can I do if ICE is present for my client?

If your client agrees, seek a small amount of bail to keep your client in state custody. This will ensure your client's ability to appear in state court on the next date. It will also give the client (or client's family) time to try to obtain immigration counsel prior to ICE detention.

If your client wants to be released from state custody, you cannot interfere with the ICE officers making an arrest. However, you can take the following steps:

- You can try to be present to bear witness to the arrest and document it;
- You can remind your client of their right to remain silent and remind them not to sign anything;
- Once the arrest is complete, locate your client (see pages 10-11) and follow steps for requesting a habe (see pages 12-13).

Criminal Court Appearances After an ICE Arrest

*What steps should I take when
ICE has detained my client?*

Confirming a client's location

Securing a client's appearance

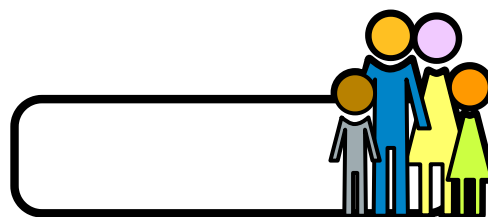
Communicating with clients in ICE
custody



Confirm a client's location:

1. Find out your client's A number

An "A number" is an 8 or 9 digit identification number found on most immigration documents. It may also be found on a triple I. It is the most accurate way to find your client.



Reach out to your client's loved ones for help confirming that your client is detained by ICE and finding out their A number.

2. Confirm your client is detained using the online ICE locator.



To use the online locator you need your client's:

- country of birth and "A number" or
- country of birth, first name, last name, and date of birth

If you find your client, the locator will state their name, their A#, and the place where they are detained.

NOTE: Your client may not show up on the locator if:

- They are a minor (under 18).
- They are in U.S. Marshal custody.
- You are not using their full name as ICE has recorded it. You can try using aliases or common mis-spellings. The A number is always the most accurate.
- They were recently arrested by ICE. It can take 1-2 days before a person in custody appears online.
- Your client has already been removed from the United States.

Confirm a client's location:

Redacted ICE locator result



Official ICE detainee locator website (locator.ice.gov)

Client Name, Country of Birth, and "A Number"

The screenshot shows the official ICE detainee locator website (locator.ice.gov). The browser address bar is circled, showing the URL. The website header includes the U.S. Department of Homeland Security logo and navigation links. The search results section displays the following information:

- Search Results: 1**
- A [REDACTED] B [REDACTED]
- Country of Birth: St. Vincent-Grenadines
- A-Number: [REDACTED]
- Status: In Custody
- State: NJ
- Current Detention Facility: [BERGEN COUNTY JAIL](#)
- [BACK TO SEARCH >](#)

On the right side, there are sections for **Related Information** (Helpful Info) and **External Links** (Bureau of Prisons Inmate Locator).

At the bottom, there are social media icons and links to DHS.gov, USA.gov, OIG, Open Gov, FOIA, Metrics, No Fear Act, Site Map, and Site Policies & Plug-Ins.

Custody information

Secure a client's appearance

BACKGROUND:

As of June 2020, ICE detainees are held in the following places in Massachusetts: Plymouth County Correctional Facility, Bristol County House of Corrections and Franklin County House of Corrections. The Sheriff with physical custody of the defendant is responsible for transporting that person to state court. However, before being transported to state court, ICE must give the Sheriff permission to release the person for transport.




PROCEDURE: (See the full IIU advisory on habe procedure [here](#))

In order to effectuate permission from ICE and transport by the Sheriff:

- Request a Habe for the Sheriff Holding Your Client in ICE Custody: Tell the court that your client is in ICE custody, identify which facility is holding your client, and request that a habe issue to that Sheriff. It is the defense attorney's responsibility to inform the court where the defendant is being held.
 - The Clerk should issue a habe to the sheriff with physical custody of the defendant. There is a specific habe for those in ICE custody which includes specific language relating to ICE. The habe is available in the MassCourts system.
- Request That the Court Send a Photocopy of This Habe to ICE.
 - The Clerk must fax a photocopy of this habe to ICE's Massachusetts Field Office in Burlington at 781-359-7589.
- Request That the Habes Be Sent in Advance: Because ICE and the Sheriff must coordinate in order for transport to occur, defense counsel should request that the clerk issue the habe a few days prior to the court date (as opposed to the day before).

NOTE: This procedure only works for detention facilities *within* Massachusetts (i.e. Plymouth, Bristol, and Franklin). At this time, there is not a procedure for securing the presence of those held in New Hampshire or Rhode Island.

Secure a client's appearance

HABEAS CORPUS FOR DETAINEE IN THE CUSTODY OF THE UNITED STATES CUSTOM ENFORCEMENT COURT COPY			DOCKET NUMBER 1653CR999888	Trial Court of Massachusetts District Court Department 
DEFENDANT - DETAINEE NAME JOE TEST				COURT NAME & ADDRESS Woburn District Court 30 Pleasant Street Woburn, MA 01801 (781)935-4000
DOB 01/01/1970	GENDER Male	SSN 123-45-6789	PCF NUMBER	
NAME & ADDRESS OF INSTITUTION MCI - Cedar Junction (at Walpole) Route 1A PO Box 100 South Walpole, MA 02071				NEXT EVENT DATE & TIME 04/15/2017 09:35 AM Bench Trial (CR)
AAAAAAAAAAAAAA DEFENDANT-DETAINEE MUST APPEAR AT ABOVE COURT ON THIS DATE AND TIME				
TO THE OFFICIAL IN CHARGE OF THE INSTITUTION NAMED ABOVE: You are hereby ORDERED to facilitate the transfer of the defendant - detainee named above, who is presently in your custody, before this court on the date and time noted above for the event indicated. If the defendant - detainee is transferred from your facility prior to the appearance date, please transmit this writ with the defendant - detainee to the new facility. If the defendant - detainee is released from custody prior to the appearance date, please notify the court immediately. FURTHER ORDER OF THE COURT: The defendant - detainee shall be returned to ICE immediately after the conclusion of the above referenced hearing or if the defendant - detainee is taken into custody following the hearing, immediately after the defendant - detainee is released from that custody, by the state, county or local entity having custody of the defendant - detainee at that time. The Middlesex County Sheriff shall make the necessary arrangements, including but not limited to providing transportation, to insure the defendant's presence in court for the above-referenced hearing and his or her return to ICE's custody at the conclusion of the state's custody. ADDITIONAL ORDERS OF THE COURT: THIS IS A TEST.				
Immediately upon issuance of this document, the Clerk shall fax a photocopy of this Habeas Corpus writ to ICE's Massachusetts Field Office at the following fax number: (781) 935-4000				
TESTE OF FIRST JUSTICE WITNESS: Hon. Marianne C Hinkle		DATE ISSUED 12/14/2018	SIGNATURE 	
RETURN OF SERVICE				
I certify that: <input type="checkbox"/> I have produced the defendant-detainee named above in court as required. <input type="checkbox"/> I am unable to produce the defendant-detainee and I am returning this writ to the court.				
DATE OF RETURN	SIGNATURE OF PERSON MAKING RETURN 			

Date/Time Printed: 01-07-2019 07:38:01

In January 2019, the Trial Courts issued guidance on the habe process and this sample ICE habeas.

Communicating with Clients in ICE Custody



Under current law, ICE does not have an obligation to detain noncitizens near the place of arrest, and noncitizens may be transferred to ICE detention facilities anywhere in the country. But ICE policy is to detain noncitizens within the "field office" jurisdiction of the place of arrest when possible.

In Massachusetts, this means noncitizens are usually held in the following locations:

- Bristol County House of Correction
- Franklin County House of Correction
- Plymouth County Correctional Facility
- Strafford County House of Correction (New Hampshire)
- Wyatt Detention Facility (Rhode Island)

As with all clients, you may visit these facilities to meet with your client. In addition, attorneys should provide clients with their phone numbers so they can call you. You will need to ensure that your phone can accept calls from jails and keep in mind that your call may be recorded.

If you are having difficulty locating or getting access to your client, contact the IIU at 617-623-0591.

Communicating with Clients in ICE Custody

Visit your client in detention by going to the facility with your bar card and your client's name. Call ahead to confirm "count" time and to ensure client's availability.

Bristol County House of Correction and ICE Facility
400 Faunce Corner Road
North Dartmouth, MA 02747
Phone: 508-995-6400

Franklin County House of Corrections
160 Elm Street
Greenfield, MA 01301
Phone: 413-774-4104



Plymouth County Correctional Facility
26 Long Pond Road
Plymouth, MA 02360
Phone: 508-830-6200

Strafford County House of Corrections
266 County Farm Rd
Dover, NH 03820
Phone: 603-742-3310

Wyatt Detention Facility
950 High Street
Central Falls, RI 02863-1506
Phone: 401-729-1190

For information on ICE detention facilities see:
www.ice.gov/detention-facilities

THE IMMIGRATION CASE

Will my client be assigned immigration counsel?

No. There is no right to appointed counsel in immigration proceedings.

- Individuals are allowed to hire private counsel.
- The Immigration Court is required to provide noncitizens with a list of low-cost or free options. It can be found at:
<http://www.justice.gov/eoir/probono/states.htm>
- There are very few options for free representation for detained individuals.

Will my client have a hearing before an immigration judge?

Not necessarily. Some clients are at risk of imminent removal, without seeing an immigration judge. Here are some red flags that may indicate that your client will not get a court hearing:

- They entered the U.S. on the "visa waiver program" or "ESTA."
- They remember "signing their deportation" at the border and may have an expedited removal order.
- They were previously ordered deported by an immigration judge. You can check on this if you have their A# by calling the immigration court hotline at 1-800-898-7180.

Will my client be released on bond?

It depends. In some circumstances, immigration judges have the authority to review ICE's determination to detain a noncitizen. A judge can release a noncitizen from custody on a bond of not less than \$1500 if the judge finds that the noncitizen is not a danger to the public and not a flight risk.

However, there are certain categories of noncitizens who are not eligible to request bond:

- "Arriving aliens" (those placed into removal proceedings while attempting to enter the U.S.)
- Individuals subject to "mandatory detention." Many people with criminal convictions fall into this category.

WORKING WITH IMMIGRATION COUNSEL

Keep in mind:

- The immigration system, even detention, is civil, not criminal.
- There is no right to appointed counsel in immigration court.
- There are very few pro bono representation options for people in ICE detention.
- In many cases, clients are not produced to immigration court and hearings are conducted by video conference.

"In essence, we're doing death penalty cases in a traffic court setting."

Dana Leigh Marks
Immigration Court Judge
April 1, 2018

You can help by:

- Working with the IIU to ensure the criminal case strategy takes into account immigration concerns. At the very beginning of representation, defense counsel should fill out and submit an IIU intake form (www.publiccounsel.net/iiu).
- Working with any pro bono or privately retained immigration counsel by providing criminal court documents including copies of police reports, complaints/indictments, CORI, certified copies of docket sheets. These documents can be useful very early on for bond purposes. Defense counsel should be in contact with immigration counsel as early as possible in the case.
- Talking with your client about whether they want copies of documents. You can send copies of these documents to your client by mail at the facility, but remember, your client may have limited privacy in detention. Depending on the contents of the documents, your client may not want to receive copies for fear that others in the detention facility will see them.

GETTING PADILLA ADVICE

"The importance of accurate legal advice for noncitizens accused of crimes has never been more important." Padilla v. Kentucky, 559 U.S. 356 (2010)



The Immigration Impact Unit of the Committee for Public Counsel Services ensures that every appointed counsel in Massachusetts has access to expert immigration advice. To get case-specific advice, please submit an IIU intake form:

CPCS IIU
iiu@publiccounsel.net
617-623-0591

[Click Here For All IIU Forms](#)

The IIU website also contains many resources and practice advisories to support counsel and their clients. Visit: www.publiccounsel.net/iiu

KYR FOR NONCITIZENS IN CUSTODY

To assist clients in asserting their rights, the IIU has created KYR forms in multiple languages for you to share with noncitizen clients in state custody: [KYR Forms Link](#)

Your Client's Rights In An Immigration Interview While in State Custody

ICE agents work inside Massachusetts jails, houses of correction, and prisons and may try to interview noncitizens or ask them to sign documents. Other corrections officers working with ICE may also try to question your client about their immigration or criminal history. Anything communicated to an ICE officer or corrections officer working with ICE could cause ICE to start deportation proceedings against your client. If any officer tries to question your client or asks them to sign something, it is important that your clients know their rights:

- (1) Immigration interviews are voluntary interviews.** Your clients do not have to speak to any officer about their immigration or criminal history.
- (2) Clients have the right to remain silent.** Anything that they say to ICE or correctional officers working for ICE (including simple information like where the client was born) can and will be used against them in immigration court or criminal court.
- (3) Clients do not have to sign any documents that ICE or other officers may give them.** Anything they sign at the request of ICE or correctional officers working with ICE can and will be used against them in immigration court or criminal court.

WORKING WITH INTERPRETERS

Translated Court Forms

[Click Here for Forms](#)

Requesting an Interpreter

List of interpreters for out-of-court assignments:

[Click Here for Interpreters](#)

Interpretation in Courts

- Courts are required to provide interpreters for all non-English speaking clients (M.G.L. ch. 221C).
- It is the obligation of counsel to ensure the court provides an interpreter.
- Make sure to hold the Court to its responsibilities! When language access is not provided, or if there are problems, make sure you make an objection for the record and appeal.
- Remember witnesses and others involved when requesting interpreters for proceedings.
- Ensure opposing parties are not made to sit together due to lack of interpreters.

Interpretation Outside Courts

- For out-of-court pre-trial preparation, including client interviews, the attorney representing the non-English-speaking client should obtain the services of a court-certified or professional interpreter, unless counsel is fluent in the client's language.
- Counsel may move the Court to approve funds pursuant to G.L.c. 261, §§ 27A-27G. CPCS will pay for out-of-court interpreter services upon presentation of the allowed motion and appropriate billing.