



## Committee for Public Counsel Services Immigration Impact Unit

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### **An Attorney Overview of ICE Enforcement in Courts**

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#### **When Clients are in Custody: ICE DETAINERS**

ICE detainers are lodged against an individual *in state custody*. An ICE detainer indicates the desire of Immigration and Customs Enforcement (ICE), the enforcement arm of the Department of Homeland Security, to take custody of an individual once that person has been released from state custody.

Because ICE detainers can be lodged for a wide range of people, **it is always critical to ask detained clients at arraignment where they were born. If a client was born outside of the United States, and has not subsequently obtained U.S. citizenship, attorneys should always check for an ICE detainer.** For clients who remain in state custody after arraignment, you should continue to check for an ICE detainer at any appearance where there is a possibility of release or before posting bail.

An ICE detainer travels with the mittimus and so the most expedient way to find out whether there is an ICE detainer is to ask the court officers if there is anything else holding your client. Duty attorneys may want to ask court officers if any individuals in lockup have additional holds prior to the call of the day's arraignments. This will give you an opportunity to speak to any non-citizen clients prior to arraignment and in cases where the ADA is not asking for detention or bail, will prevent defendants from being released to ICE custody without having a chance to speak to an attorney.

If your client is not released at arraignment but intends to post bail at the jail, you can call the records department at the jail to inquire about an ICE detainer.

Please remember, an ICE detainer is not a judicially issued warrant but instead is merely a document signed by an ICE officer requesting cooperation from state law enforcement authorities. As such, it does not authorize state officials to hold an immigrant for ICE. *See Lunn v. Commonwealth*, 477 Mass. 517 (2017).

**If there is an ICE detainer for anyone in lockup, it is critical to know whether ICE is in the courthouse...**

#### **When Clients are in Custody: ICE IN THE COURTHOUSE**

ICE is required to sign in with the court officers at the entrance. You can determine whether ICE is present in the courthouse by asking the court officers at the entrance.

If ICE is in the courthouse, and your client is taken into ICE custody, there is a good chance that your client will not be able to return to state court to resolve the criminal case.

If the ADA is asking for bail/revocation/dangerousness, your client may want to consider strategically agreeing to the ADA's request to remain in state custody in order to be able to pursue their criminal case.

If your client would otherwise be released, your client may want to consider requesting to be held in state custody. Here are some considerations in making that request:

- If the ADA had asked for bail or the judge otherwise held the defendant, ICE could not take the defendant even if they had expected them to be released. The ADA and the judge would not be considered to have been obstructing ICE enforcement and ICE would simply continue to monitor the case.
- Just as in those circumstances, if you ask for your client to be held, ICE will continue to be aware of where the defendant is held, their next court date, and likely will be notified when they are being released. Asking to keep your client in state custody does not hide them from ICE.
- When you ask that your client be held on bail it is important to be clear about your client's reasons. You are asking to ensure your client's ability to avail themselves of the state court process and assert their due process rights. Your purpose is not to assist your client in evading the law and you do not want to appear to be helping your client evade the law, so explaining the reason for the request on the record is important.
- On the other hand, if you ask for bail knowing your client has the intention of posting bail from the jail later to evade ICE arrest, this would raise concerns. While we cannot control the actions of our clients, we cannot advise them on ways to evade ICE. If our clients want to be held in order to resolve the criminal case, they need to be willing to remain in custody. Otherwise, it opens us up to the possibility of federal government response.

### **When Clients are NOT in Custody: ICE IN THE COURTHOUSE**

**If ICE approaches a client in your presence:**

- Identify yourself as the person's lawyer.
- You may ask to see an arrest warrant. For ICE, the arrest warrant is an administrative warrant (form I-200 or I-205). While it is not a judicial warrant and therefore doesn't give local law enforcement (including courts or jails) authority to hold someone until ICE can pick him up, it does give ICE officers authority to arrest an individual in a public place for civil immigration violations.
- In some circumstances, ICE can make warrantless arrests. If you believe the arrest was made without even an ICE warrant, please inform the IIU after the arrest.
- Whether ICE has a warrant or not, defense counsel can take the following steps:
  - Ask if the client is free to go. If the ICE officer says yes, inform the client.

- If the client is not free to go, **do not interfere with your client's arrest, even if you believe it is unlawful.**
- Ask if ICE would arrange a time for the client to surrender themselves to the ICE office in Burlington, in lieu of immediate arrest. This would give the client the opportunity to seek favorable state court action on the pending criminal case or at least some time to make personal arrangements.
- Remind your client of their right to remain silent. Remind them not to sign anything without consulting a lawyer.

*Please take care in your interactions with ICE officials, just as in all aspects of your representation, it is critical that you do not lie to any officer, physically obstruct ICE agents in their duties, advise your client to leave the courthouse, or tell your client not to appear in court (unless their presence is waived). These actions could run afoul of federal criminal laws.*

**REPORT ICE ARRESTS TO THE IIU AND READ MORE ABOUT IMMIGRATION ENFORCEMENT AT OUR  
WEBSITE: <https://www.publiccounsel.net/iiu/>**