



## Practice Alert for Criminal Defense Attorneys: Seeking Release of Immigrant Clients From State and Local Custody During the COVID-19 Health Emergency

As a result of the public health emergency caused by COVID-19, many defense attorneys are seeking release of clients held in custody.<sup>1</sup> In advocating for the release of immigrant clients, defense attorneys must also determine the risk their clients will be transferred to ICE custody.<sup>2</sup> This guidance applies to any release from custody, including release based on completion of a sentence, change of bail status, bail payment, release with consent of the DA, or release based on a writ of Habeas Corpus.

### Questions to determine the risk of ICE transfer

**Before seeking release of an immigrant client from state or local custody, determine whether they will be released to the community or transferred to ICE custody.**

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#### 1. Is your client removable from the U.S.?

ICE only has authority to detain immigrants who are removable from the U.S. In general, this includes people who are undocumented, like people who walked across a land border or overstayed a visa. It also includes those who have status, like a lawful permanent resident (LPR or greencard holder), but are removable based on a **conviction**. Determining whether a client is removable from the U.S. is a complex analysis that an immigration attorney that an immigration attorney can help complete.

If your client is not removable there is no risk that they will be transferred to ICE if released from local custody. For example, a lawful permanent resident with no convictions, cannot be transferred to ICE based solely on pending criminal charges.

#### 2. Is there a detainer lodged against your client?

Typically, ICE notifies jails and prisons of their intention to take a client into custody by lodging a detainer request with the custodial agency. This may be indicated in the online “look up” system run by the local arresting agency, it may have been announced as a “hold” during the arraignment, or it may be disclosed if you ask the custodial agency if there are any “holds or warrants” for your client.

A detainer is not a judicial warrant. It is a request that local law enforcement do two things:

- (1) notify ICE of the client’s date and time of release; and
- (2) hold the client for an additional 48 hours to give ICE time to take the client into custody.

In New York State, it is illegal for local jails and state prisons to hold immigrants for additional time based solely on a detainer request.<sup>3</sup> However, many local law enforcement agencies provide information to ICE to facilitate transfer without additional detention time.<sup>4</sup>

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<sup>1</sup> Timothy Williams, Benjamin Weiser & William K Rashbaum, ‘Jails Are Petri Dishes’: Inmates Freed as the Virus Spreads Behind Bars, New York Times, March 31, 2020, <https://www.nytimes.com/2020/03/30/us/coronavirus-prisons-jails.html>.

<sup>2</sup> ICE Guidance on COVID-19, ICE, <https://www.ice.gov/coronavirus> (last visited Mar 31, 2020) (“ICE Enforcement and Removal Operations (ERO) will focus enforcement on public-safety risks and individuals subject to mandatory detention based on criminal grounds.”). Note that the Immigrant Defense Project and other organizations are closely monitoring ICE enforcement. In the past, ICE has labeled individuals as threats to public safety based on any contact with the criminal legal system, regardless of the underlying facts, criminal legal system outcomes, or any other mitigating factors.

<sup>3</sup> *People ex rel. Wells v. DeMarco*, 168 A.D.3d 31, 88 N.Y.S.3d 518 (N.Y. App. Div. 2018).

<sup>4</sup> For more information about the risk of transfer due to information sharing in New York City, consult the Practice Alert by the Immigrant Defense Project available at:

<https://www.immigrantdefenseproject.org/wp-content/uploads/IDP-Detainer-Resource-Full-Version.pdf>.

### 3. Is your client eligible for release from NYS DOC custody without notification to ICE?

Some jurisdictions have local laws and policies which restrict local law enforcement from communicating and cooperating with ICE. For example, in New York City, DOC may only provide information about release dates and times to ICE about clients convicted of certain felonies in the past five years.<sup>5</sup> As a result, very few immigrants are transferred from NYC DOC to ICE each year.

If you determine that your client is not removable, or that ICE has not intended to detain your client or will not be notified about your client's release, there should be no risk in advocating for your client's release from state or local custody. However, if you decide that your client is removable from the United States and determine that ICE has lodged a detainer against them, it is important to work with an immigration attorney when requesting release for your client.

### Working with an immigration attorney

**If your immigrant client is at risk of transfer to ICE, you can still consult with an immigration attorney about advocacy with ICE to ensure release from custody.**

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If you are seeking release for an immigrant client, talk to an immigration attorney to:

- Understand the current local ICE policies regarding detention of immigrants.
- Determine whether your client is at risk of transfer to ICE.
- Determine whether there is a detainer lodged against your client.
- Determine whether your client is protected by local law or policies from transfer to ICE.
- Explore advocacy to lift a detainer request for clients who are vulnerable to COVID-19 or who have otherwise compelling circumstances.

By working in tandem with an immigration attorney, you can help your client get out of state and local custody and increase the chances that they could avoid immediate detention by ICE.

### Resources for appointed attorneys in New York State

**In New York State, every criminal defense attorney can consult with immigration attorneys on their appointed cases for free.**

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#### In New York City:

**Public defenders** can contact your in-house immigration attorneys.

Attorneys on the **18-b panel** can contact the Padilla Support Center of the Immigrant Defense Project:

**Webform:** [www.immdefense.org/webform](http://www.immdefense.org/webform)

**Call:** 212-725-6422

**Email:** [attorneyadvice@immdefense.org](mailto:attorneyadvice@immdefense.org)

#### Outside of New York City:

Contact information for the **Regional Immigration Assistance Center** for your county is available here:

<https://www.ils.ny.gov/content/regional-immigration-assistance-centers>

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<sup>5</sup> For more information about New York City's Detainer Discretion Law, consult the Chart and Practice Advisory by Cardozo Law Kathryn O. Greenberg Immigration Justice Clinic and the Immigrant Defense Project available at: <https://www.immigrantdefenseproject.org/wp-content/uploads/2013/09/Practice-Advisory-2014-Detainer-Discretion-Law-PE-P.pdf>.