



FAQ FOR DEFENSE ATTORNEYS: How to advise immigrant clients about ICE in the courts (Updated October 2021)

On December 15, 2020, the Protect Our Courts Act became law in New York State, prohibiting Immigration and Customs Enforcement (ICE) officers from making arrests of immigrants at or around courthouses. This victory was the result of state-wide advocacy in response to an 1700% increase in ICE courthouse arrests beginning in 2017. ICE officers regularly used New York State courthouses and the blocks surrounding them to make arrests of “removable” people, or to gather information about people they had targeted for arrest. This practice undermined equal access to justice and interfered with peoples’ ability to access all parts of the criminal process.

What is the Protect Our Courts Act?

The Protect Our Courts Act (POCA) prohibits ICE officers from making civil arrests in and around New York State Courts, including City and other Municipal Courts, without judicial warrants. Under POCA, ICE can no longer arrest people who are appearing in court, potential witnesses, or household and family members accompanying loved ones going to or leaving from state, city and municipal courthouses without judicial warrants.

How does POCA affect the [Office of Court Administration \(OCA\) rule](#) around ICE courthouse arrests?

POCA mirrors OCA’s April 2019 protocol governing ICE operations inside the courthouse in many ways. POCA applies to courts outside of OCA’s jurisdiction, such as town and village courts. OCA rules still remain in place for courts under OCA’s jurisdiction. Consistent with the OCA rules, POCA requires on-duty law enforcement agents, including ICE officers, to make themselves known to court staff and state their law enforcement purpose at the courthouse. POCA also imports the existing OCA requirement for ICE to have a judicial warrant to make an arrest inside a courthouse, and for court officers to notify the judge of ICE’s presence. However, POCA does not require judges to notify parties appearing before them of ICE’s presence, which is a requirement under the OCA rules. Finally, court officers are to file an “unusual occurrence report” if there is an arrest, including surveillance of court proceedings. But POCA’s protections go further than the OCA rule. POCA also prohibits ICE arrests without a judicial warrant outside of the courthouse, not just within its four walls.

Can ICE use courthouses for surveillance?

ICE officers have to identify themselves to court personnel if they enter a courthouse. They also have to state their reason for being at the courthouse, including if they are there to surveil, observe, or arrest a particular person. Court personnel are required to communicate ICE’s intent to surveil,

observe, or arrest someone to the judge, and to create an Unusual Occurrence Report recording the surveillance action. However, ICE may still surveil people outside of the courthouse building without notifying court personnel, even though they cannot make an arrest without a judicial warrant.

Would an ICE officer be easily identifiable if they are in court?

ICE officers are often dressed in plain-clothes, without visible badges, and come to courthouses in groups of 2-4 (sometimes more). ICE officers often refuse to identify themselves or answer questions. Under POCA, however, on-duty officers must identify themselves to court personnel when entering a courthouse and state their reason for being at the courthouse.

Does ICE carry judicial warrants?

It is unlikely that ICE will have a judicial warrant. ICE is more likely to have an “administrative warrant,” signed by an ICE supervisor, not a judge. Under federal law, this allows the officers to detain the person upon confirmation that s/he is the individual named in the document. An administrative warrant does not meet POCA’s warrant requirement for an ICE arrest in a courthouse or to arrest someone coming from or going to a courthouse.

Who could be at risk of being targeted or arrested by ICE?

ICE sets the policies of who they target for arrest. They may arrest people who have old orders of deportation or who can be put into removal proceedings, including people who are undocumented and people who have valid immigration status but have been convicted of certain crimes. The likelihood that ICE will choose to arrest an individual is based in part on the policies of the current federal administration. ICE still has the ability to arrest immigrants that do not fall within their set policies and are vulnerable to deportation.

As soon as you identify that your client was born outside of the United States, consult with an immigration attorney who can help advise both on potential immigration consequences that could arise from the open case and on whether your client could be at risk of an ICE arrest.

What should I tell my client about the risk of ICE arrest?

You can advise all immigrant clients of their right to attend court protected by POCA. In addition, once you identify that your client was not born in the US, you should talk with an immigration attorney about whether your client is at risk of an ICE arrest at a different location or time.

If your client could be at risk of an ICE arrest, provide them with Know Your Rights (KYR) information around ICE arrest so they are familiar with their rights and ICE tactics. IDP’s KRY information can be found at immdefense.org/kyr. Inform your client that if they are arrested by ICE, they may be eligible for a free immigration lawyer under the New York Immigrant Family Unity

Project (NYIFUP). For more information, see [Make the Road New York's Deportation Defense Manual](#) in [English](#) or [Spanish](#).

How can my client prove they were on their way to court or leaving court?

Usually courts have records of people attending court for various reasons. You can also provide your clients with documents that list the court date. Generally, IDP advises clients that if they are stopped by an ICE officer, they should remain silent and not answer any questions. If a client is stopped by ICE on their way to or from court, or while inside a courthouse, they should tell the officer that they are attending or leaving court and provide the defense attorney's contact information without saying anything else about the court appearance.

What happens if ICE violates POCA? What happens if my client is arrested by ICE on their way to or leaving court?

If your client is arrested and detained by ICE before their criminal case is resolved, below are some steps to preserve your client's ability to appear in their case and notify the court. Upon gathering the necessary information listed below, you can also contact the New York State Attorney General's office. In addition, there are arguments your client can make in civil, immigration, or federal court to challenge their arrest and detention in violation of POCA.

PROTECT YOUR CLIENT DURING AN ICE ARREST IN VIOLATION OF POCA:

- **Invoke your client's rights.** Identify yourself as the person's lawyer. Tell ICE not to question your client. Tell your client not to sign anything and to exercise his/her right to remain silent. Answering questions will only help ICE deport him/her.
- **Determine whether ICE had a judicial warrant.** Ask your client or any witnesses whether ICE presented a judicial warrant. If your client was arrested inside a courthouse, you can submit a Freedom of Information Law request for the Unusual Occurrence Report that should have been created when ICE entered the courthouse and may have information about whether there was a judicial warrant.
- **Get info from ICE.** Ask for officers' names and contact information. Ask for the basis of the arrest. Ask if they have a judicial warrant and to see it. Note if the document ICE presents is signed by a judge or an ICE supervisor. Ask where they are taking your client.
- **Document what happened and report the arrest,** even if you didn't witness it, including: where the arrest took place (e.g. in court vestibule or hallway, outside the courthouse, on the way to or from a courthouse); the number of ICE officers, how they were dressed and identified themselves; how they responded to questions, including when asked for a warrant; and whether any court staff seemed to be involved in the arrest or aware of ICE presence. If you didn't witness the interaction yourself, document what you hear from witnesses and get their contact information. In NYC, report the arrest to IDP at (212) 725-6422.

- **Notify the Attorney General about a possible POCA violation** . On June 11, 2020, the Southern District of New York issued an injunction that prohibits ICE from conducting any civil arrests on the premises or grounds of New York State courthouses, as well as such arrests of anyone required to travel to a New York State courthouse as a party or witness to a lawsuit. *Potential violations of this injunction should be reported to the New York State Attorney General's Office*. Such arrests may also implicate the Protect Our Courts Act (POCA). If your client has been arrested by ICE in or around a New York State courthouse without a judicial warrant, please contact the Attorney General's office at (212) 416-8250 or via email: Civil.Rights@ag.ny.gov. Please note that the Attorney General's Office is unable to assist with your client's underlying immigration proceedings.

PROTECT YOUR CLIENT'S DUE PROCESS RIGHTS IN THE CRIMINAL CASE AFTER AN ICE ARREST:

- As soon as you discover that your client is in ICE custody, **notify the prosecutor in writing and on the record**. Under CPL § 580.30, the prosecution has an obligation to issue a writ to return the client from ICE custody. The prosecution can be charged for the time under CPL § 30.30 unless they exercise due diligence to have the client returned to court.
- **Object to any warrant being issued on the open criminal case**. Make a record that your client's absence from court is because they are in ICE custody.
- **Get on the record**. Request to call or recall the criminal case while your client is present to avoid the issuance of a bench warrant. Explaining the situation may prevent a bench warrant, will put the ADA on notice to produce your client at the next court date, and may help in immigration court.
- Search the ICE online detainee locator to **locate your client in ICE custody**: locator.ice.gov
- **Continue to invoke your client's right to due process in criminal court**. For more information on representing a client in criminal proceedings who is detained by ICE, see: immdefense.org/crim-defense-ice.