

RIAC2



CRIMINAL LAW

FAMILY LAW



IMMIGRATION LAW

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In This Issue: Responses to COVID-19

UPCOMING EVENTS

04/28/2020:

Jefferson/Lewis Co. Bar Associations, via video conference

5/13/2020:

Cortland Co. Assigned Counsel Program, via video conference

REGISTRATION FOR CLEs:
CONTACT MELANIE MARCELLO
marcello@ocgov.net

The Regional Immigration Assistance Center provides legal support for attorneys who represent indigent noncitizen clients in criminal and family court. Founded in the wake of Padilla v. Kentucky, there are six centers located in New York State. Region 2 covers sixteen counties in the central part of the state.

**RIAC2 is administered by the Criminal Division of the Oneida County Public Defender.*

We interrupt our regularly scheduled program on Aggravated Felonies to bring you COVID-19 information that can affect your noncitizen clients...

TEMPORARY EXTENSION OF ORDERS OF PROTECTION FOR 90 DAYS

As we know from previous newsletters and RIAC trainings, a violation of an Order of Protection can mean deportation for a noncitizen client, whether or not there is a conviction for criminal contempt. A finding, by a judge on the record in court, will be enough to land your client in removal proceedings. Given the current extension of Orders of Protection for a period of 90 days, and possibly beyond, it is imperative that you inform your clients immediately and explain the extension, what it means, and what violating that order can mean. The courts have been instructed to mail a copy of the extended order to the client, but if the address has changed or your client does not have a permanent address, this will be meaningless. Your client must be contacted, given a copy of the order either telephonically or through email or mail to a known address, and the order must be explained to your client. Unless your client is fluent in English, this should be done, in his or her native language, using an interpreter.

ICE ENFORCEMENT: DO YOU HAVE A NONCITIZEN IN CUSTODY WHO COULD BE RELEASED?

ICE has explained its enforcement policies under the current spread of COVID-19 on its website:

“ICE ERO will focus enforcement on public safety risks and individuals subject to mandatory detention based on criminal grounds. For those individuals who do not fall into those categories, ERO will exercise discretion to delay enforcement actions until after the crisis or utilize alternatives to detention, as appropriate.”

Also per the website, ICE enforcement will continue for their “stated” priorities: child exploitation, gangs, narcotics trafficking, human trafficking, human smuggling, and continued participation on the Joint Terrorism Task Force.



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**Chief Defenders & Assigned
Counsel Administrators:**

**Contact the RIAC2 to
schedule your 2020 training,
lunch hour or other session
in your office/county.
We will provide CLE credit!**

What if there is a detainer lodged against my client?

Attached to this newsletter you will find a practice resource from the Immigrant Defense Project (IDP) that will help you determine whether to ask for your client's release **even if** there is a detainer lodged by ICE. (The attachment outlines what we have talked about in our trainings about ICE detainers.) However, there are no set guidelines, just general policies, and what is happening in upstate New York is entirely different than what is happening downstate.

A phone call on April 1, 2020 to the Syracuse ERO (Enforcement and Removal Operations) yielded little except that "everything is on hold." When asked if that meant no one would be picked up upon release, the officer on duty (they are also working with one person in the office at a time) could not say for sure whether they would, in fact, pick someone up under certain circumstances. It is a case-by-case determination, and he repeated that "everything is on hold."

What this means is that you should contact the RIAC so that we can weigh the facts and circumstances of your client's case (having all of the necessary information) to determine whether you should seek release of your client.

THE RIAC IS CONTINUING OUR WORK UNINTERRUPTED BY CURRENT CIRCUMSTANCES

Now is the perfect time to review the files for your noncitizen clients and contact the RIAC:

1. **To give us the information we need:** Intake form, charging docs, rap sheet and client immigration documents.
2. **To give us an update:** If you have gotten emails from us, or even if you haven't, send us an update. Is there a bench warrant? Client hired private counsel? No client contact? Case disposed of (and final disposition)? Client picked up by ICE? Client is a USC and you have proof of citizenship?
3. **To get an advisal pre-indictment** to negotiate a plea (without plea bargaining restrictions) that can avoid your client getting deported.
4. **To attend an Online CLE:** We have successfully adapted to provide online CLEs via Webex. These are FREE and we give CLE credit. Contact us if you are interested in attending a training. Let us know what you would like us to cover and times for availability. We can set these up in relatively short time if we have enough participants.

Need diversity/inclusion elimination of bias credits? We have that covered as well through our relationship with the Mohawk Valley Resource Center for Refugees (MVRCCR, now The Center). In addition to the CLE credits, this is a highly insightful training to help you understand and communicate more effectively with clients who come from different cultures with very different traditions and perspectives.



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.¹ In advocating for the release of immigrant clients, defense attorneys must also determine the risk their clients will be transferred to ICE custody.² 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.

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.³ However, many local law enforcement agencies provide information to ICE to facilitate transfer without additional detention time.⁴

¹ 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>.

² 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.

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

⁴ 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.⁵ 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.

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.

In Central New York (RIAC2 - Region 2):

Office: 315-356-5794 Sharon Ames: Extension 222 Tina Hartwell: Extension 223

Cell: Sharon Ames: 315-272-0505 Tina Hartwell: 315-264-9217

In other parts of New York State:

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

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

⁵ 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>.