

Note §5A. ICE DETAINERS

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I. Introduction to ICE Detainers

Immigration detainers, also called ICE holds, raise a variety of issues in a criminal case, from access to pre-trial release to a client's ability to appear in court. This advisory provides guidance to criminal defense counsel about how to best represent clients subject to an immigration detainer.¹

An ICE detainer is a request from Immigration and Customs Enforcement (ICE) to a jail to facilitate transfer of a person in the jail's custody directly to immigration authorities. Specifically, a detainer asks the jail (a) to notify ICE as to when the person will be released from criminal custody, and (b) to keep the person in custody for an additional period of up to 48 hours, to give ICE more time to pick the person up.² As discussed below, the California Values Act (SB 54) limits California jailors' responses to these detainer requests.

The ICE detainer itself does not prove immigration status or lack of it and does not determine specific immigration consequences. The detainer indicates ICE's interest in arresting the person upon their release from criminal custody, even before the criminal case is concluded. Immigration detainers are the primary immigration enforcement tool ICE uses to apprehend suspected noncitizens. **An estimated 70% of ICE arrests nationwide result from a detainer and transfer of custody from another law enforcement agency.**

A. Why should criminal defense counsel be concerned about an ICE detainer?

ICE detainers affect many aspects of a criminal case because they present an imminent danger of ICE arrest and detention. Defense attorneys representing noncitizen clients must consider these risks and discuss them with their clients.

1. *Immigration consequences and Padilla obligations*³ – For immigrants who have few or no defenses to deportation (e.g., undocumented clients with no current eligibility for immigration

¹ Contact Lena Graber at lgraber@ilrc.org with any questions.

² See Form I-247A in Appendix I, and see 8 C.F.R. § 287.7. See also ILRC's annotated ICE detainer: <https://www.ilrc.org/annotated-detainer-form-2021>.

³ The Supreme Court's 2010 decision in *Padilla v. Kentucky* clarified that criminal defense counsel's Sixth Amendment duty includes advising immigrant clients on the immigration consequences that could stem from a criminal case. *Padilla v.*

relief), avoiding apprehension by ICE may be their highest priority. Defense counsel should discuss this with clients and also offer them know-your-rights materials in case they do encounter federal immigration agents.⁴

2. *Pre-trial release strategy* – An ICE detainer might mean that it is not in the client’s interest to seek release from jail while the case is pending. ICE may take immediate custody of people who have been ordered released while criminal charges remain pending, such as after they post bail or are released on recognizance, or some other supervision. This affects their ability to defend against the criminal charges, and if they do not attend the criminal hearing because they are in ICE custody they could end up with a warrant for failure to appear and also forfeit their bail money. The existence of an ICE detainer and threat of immigration detention also can affect the court’s willingness to grant bail or release.
3. *Custody classifications and access to diversion programs* – In some places an ICE detainer can inhibit a client’s access to diversion programs and can also affect custody classification decisions in jail.
4. *Likelihood of immigration enforcement* – An ICE detainer signals that a client is likely (but not guaranteed!) to be transferred to ICE rather than released, which could lead to immigration detention and potential deportation.

Key Questions about ICE Detainers for Evaluating a Criminal Case

1. Should my client pursue pre-trial release if they have an ICE detainer, and how?
2. Is the detainer valid?
3. Can the detainer be lifted? By ICE? By the sheriff?⁵
4. How should I advise my client about immigration consequences of their criminal case?

B. Legal Framework for ICE detainers

Federal immigration law at 8 U.S.C. § 1357(d) contains express authority for issuing detainers. Detainers serve to advise the agency holding the person that the Department of Homeland Security (DHS) “seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien.”⁶ The statute provides that ICE shall “expeditiously take custody of the alien”

Kentucky, 559 U.S. 356 (2010). It has become a standard of practice for defense attorneys to ask all clients where they were born during the intake process to determine whether advice on immigration consequences will be required. California cases had imposed this duty long before *Padilla*. See, e.g., *People v. Soriano*, 194 Cal.App.3d 1470 (1987); *People v. Barocio*, 216 Cal. App. 3d 99 (1989); and discussion in Penal Code § 1016.2.

⁴ ACLU has detailed know-your-rights information for immigrants at: <https://www.aclu.org/know-your-rights/immigrants-rights>.

⁵ This advisory will regularly refer to the sheriff as the custodian and local decisionmaker with power to reject or comply with the ICE detainer, because that is most commonly a sheriff. But the analysis applies to any jail and the particular authority in charge of it.

⁶ 8 C.F.R. § 287.7(a).

once they are no longer otherwise detained in criminal custody.⁷ The current detainer form (I-247A) is available in Appendix I.

Current federal regulations at 8 CFR § 287.7 state that if a detainer is issued, the receiving agency “shall” maintain custody of the person for up to 48 hours beyond the criminal custody period.⁸ Despite this directive language, however, even ICE acknowledges that **a detainer is merely a request to state or local law enforcement.**⁹ No federal law requires local law enforcement to work with ICE.¹⁰ ICE detainers are voluntary requests, and they can be disregarded by the local agency.¹¹ In fact, California state law forbids local law enforcement from implementing *any* “48-hour hold” pursuant to an ICE detainer, as well as other proscriptions discussed in Part III below.¹²

This presents an important avenue of advocacy on behalf of a client. If the jail is not permitted to, or chooses not to, comply with an ICE detainer, the chances of transfer to ICE directly from criminal custody are extremely low.

C. How ICE Works with Jails

ICE relies heavily on the criminal legal system in order to identify, detain, and deport people. If a locality does not have a very strong sanctuary policy, the default is generally that sheriffs work closely with ICE, sharing information and funneling noncitizens directly into the deportation pipeline. Even under the restrictions of California law, sheriffs find loopholes to partner with ICE and get people deported. Understanding the basic mechanics of this relationship is essential to protecting your immigrant clients’ interests.

ICE is automatically notified every time anyone is booked into jail anywhere in the country, because their fingerprints are sent to ICE to be checked against its databases. This automated immigration check is known as “Secure Communities.” ICE uses Secure Communities fingerprint checks to target people for detainers and removal, or for further investigation. These fingerprint checks often result in a detainer being lodged within an hour of a person’s arrest. Although California law limits interactions with ICE, California does not control this automated fingerprint sharing with ICE. And although ICE knows that California law limits the response to an ICE detainer, that doesn’t stop them from issuing it.

⁷ The daily practice of how ICE uses detainers looks almost nothing like the statute, which requires the local agency to generate the detainer inquiry; in fact ICE usually initiates a detainer without input or request. The reality of ICE detainers more closely resembles the regulations at 8 CFR § 287.7. Notably, the statute limits the issuance of detainers to cases of noncitizens charged with *controlled substance violations*, but the regulations say nothing of this, and ICE issues detainers in cases of all kinds.

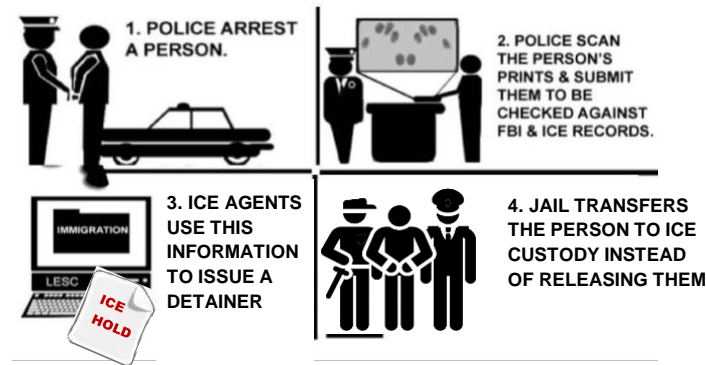
⁸ See 8 C.F.R. § 287.7(d). Note that while the regulation states that the 48-hour period excludes “Saturdays, Sundays, and holidays,” that is no longer the case. See text in I-247A at Appendix I, below.

⁹ See e.g. *Galarza v. Szalczyk*, 745 F.3d 642, 645 (3d Cir. 2014) (ICE detainer is a voluntary request). See also I-247A Form (“IT IS THEREFORE REQUESTED ...”).

¹⁰ *United States v. California*, 921 F.3d 865 (9th Cir. 2019) (California is not obligated to do immigration enforcement).

¹¹ *Galarza v. Szalczyk*, 745 F.3d 642, 645 (3d Cir. 2014) and see, e.g., *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-CV-02317-ST, 2014 WL 1414305, at *4 (D. Or. Apr. 11, 2014) (ICE detainer is just a request).

¹² CA Govt C § 7284.6(a)(1)(B).



ICE agents also work closely with sheriffs and jailors to get other information about who is in custody. Many jails publish lists of people booked into jail online, allow ICE to access jail databases, or even establish a permanent desk or office for ICE agents within the jail – although the latter was banned in California by SB54. These efforts are part of the “Criminal Alien Program,” which includes other information sharing and coordination between jails and ICE.

ICE frequently seeks to interrogate people in local custody to see if they may be subject to removal. In particular, if the fingerprint results through Secure Communities are inconclusive, ICE will try to speak to the person about their place of birth, immigration status, or other immigration history in order to place a detainer on them. The California Truth Act requires sheriffs to provide a written consent form in advance of any such ICE interviews, explaining the purpose for the interview, that the interview is voluntary, and that the individual has the right to decline the interview, or consent on condition of having their attorney present.¹³ **If asked, you should in almost all cases advise a client to decline such interviews, since they are for the purpose of ICE getting information or admissions to use against the person in removal proceedings.** If ICE is not able to talk with a client in jail, they may later travel to the person’s home. For this reason, it is critical to provide clients with know-your-rights information, such as “red cards.”¹⁴

Additionally, ICE contracts with jails around the country to rent beds to detain people in removal proceedings. In California, these contracts have been largely phased out, but there is still one local contract in Yuba County. Legally, these are detainees in ICE custody, but in fact they are held in local jails, and the jails typically make a profit by renting beds to ICE. All other ICE detention facilities in California are currently run by private prison companies. An interactive map of ICE detention facilities and contracts is available here: <https://www.freedomforimmigrants.org/map>.

D. California State Rules on ICE Detainers

In California, state laws and local ordinances regulate responses to ICE detainers. In particular, the California Values Act (also called SB54) and the Truth Act require certain procedural responses to ICE detainers, while limiting the degree to which a sheriff may respond to ICE. SB54 prohibits sheriffs from

¹³ Cal. Govt. Code § 7283.1(a).

¹⁴ See here for information about ILRC’s red cards and how to order them for your office: <https://www.ilrc.org/red-cards>.

holding anyone for extra time based on an ICE detainer, but that doesn't necessarily prevent someone from getting handed to ICE. An ICE detainer asks the current jailor for two things: 1) *notify* ICE about the person's time and date of release, and 2) *hold* them for an extra 48 hours after the end of criminal custody, to give ICE time to arrive pick them up.¹⁵ Both of these requests work together to facilitate the direct transfer to ICE custody, but they are separate functions. Holds are prohibited; notifications and "transfers" (referring to the physical handoff of custody separate from any prolonged detention or advance notification), are limited but allowed. See further discussion of these rules in Section III, below.

On top of this, many counties in California have local rules that impose more restrictions on sheriffs than state law does. Some are enshrined in local laws, and others are administrative policies of the sheriff's department. These local rules and practices may significantly affect your strategy for a given client.

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it is essential to know if your client has an ICE detainer, and to get a copy of it! Some sheriff's departments in California (e.g., Los Angeles, Sonoma, Alameda) automatically forward all ICE detainers to the public defender's office to ensure that counsel is informed of the detainer. The public defenders will then forward it to conflicts counsel or other counsel of record, if applicable. See further discussion at Part II below.

Ask for a copy of any ICE detainers on all your clients! If the sheriff's department will not agree to forward detainers automatically, then routinely ask the sheriff for ICE detainers on all your clients. This will help you to avoid being caught off guard.

II. Considering Pre-Trial Release for Clients with ICE Detainers

The existence of an ICE detainer can impact a client's case early on by affecting their access to bail or other pre-trial release. If a client subject to an ICE detainer is released on recognizance or posts bail, they may be transferred to ICE instead of actually being released. If a client posts bail and is transferred to immigration detention, they must seek release from the immigration system, which presents many more challenges. If they are unable to secure their release from immigration detention, they may miss hearings in their criminal case, and it is often extremely difficult to get them transferred back.

So right off the bat, ICE detainers affect a client's case strategy. **If your client's release on recognizance means they will be immediately transferred to ICE, you need to make a decision with your client about their immigration goals before that happens.** This underscores the value of getting the jail to always immediately forward ICE detainers to the public defenders or prior counsel of record, so that they can be prepared to strategize around it, even before arraignment. If you are unaware of the

¹⁵ See 8 C.F.R. 287.7(a) and (d).

ICE detainer, your client may be taken without your knowledge. This can unfairly result in a failure to appear and bench warrant and bail forfeiture, often creating more difficulties for your client.

A. Release *Without* Transfer to ICE

The goal of a pre-trial release strategy for a client subject to a detainer is to get the client released without being transferred to ICE. There are a variety of ways this can happen.

1. Client gets released before ICE files the detainer with the jail. Often ICE detainers are issued within a couple hours of arrest, so this may be rare -- but it can happen, especially for clients who have had no prior contact with the criminal and immigration systems and therefore do not appear in ICE's databases. If a detainer is not placed immediately, the client may be released from the jail prior to counsel even being retained.
2. If a client with an ICE detainer is released on recognizance from court and is not brought back to the jail for out processing, then they may be at liberty and not transferred to ICE. This depends very much on local practices and procedures at the court and the sheriff's department. Investigate local patterns so that this can be part of your defense strategy.
3. Some jails have a relatively standard schedule when ICE may arrive, often depending on how far they are from the nearest ICE office. If your client can post bail after ICE has very recently visited the jail, then they might be released before ICE returns. Posting bail late at night on a weekend, for example, might be a safer time to seek release.
4. Some jails will not comply with ICE detainers, at least in some circumstances. The jail may not comply with the detainer on a particular person because the person is protected by the SB54.¹⁶ Some jails do not comply with *any* ICE detainers because of strong local policies, such as in Santa Clara County. Finally, a sheriff always has discretion to ignore a detainer. Regardless of state law or the general practice of the jail, if you can secure an agreement from the jail to reject your specific client's detainer, then you can get your client released without the threat of transfer to ICE.
5. If ICE is persuaded to lift the detainer,¹⁷ then the client can safely seek release without being transferred directly to immigration detention. This does not prevent ICE from making a later arrest at the person's home or work, but if ICE agreed to lift the detainer, it makes such an arrest quite unlikely.

¹⁶ See Section III.C. for more details on SB54.

¹⁷ "Lifting" a detainer is the same as rescinding, withdrawing, or cancelling it. Technically this is under ICE's control and is ICE's decision, but a sheriff might also refer to their own decision on how to respond as having placed or lifted the detainer. Essentially, there is no universal or official legal term for decisions to place or remove a detainer, nor to honor it or refuse it, so whatever language is used locally will be most effective. In this advisory, we will typically use the term "issue" or "place" when ICE sends a detainer request, "lift" or "withdraw" for when ICE takes back a detainer that was previously issued. We use "comply" or "reject" for the decisions made by the sheriff or other jailor on whether to respond to it.

B. If Transfer to ICE is Inevitable

If pre-trial release *without* transfer to ICE is unlikely or impossible, the client should consider remaining in criminal custody while planning their immigration defense strategy. This decision will depend on the client's particular case and priorities, as well as an evaluation of their eligibility for immigration bond and their removal defense options.

Individuals transferred to ICE custody may in some cases be able to obtain release from immigration detention – either through release on their own recognizance, through payment of an immigration bond, or through alternatives to detention. However, many individuals may not be eligible for release from ICE custody *at all*, depending on their criminal history and/or manner of entry to the United States. This is known as mandatory detention, and it can apply to immigrants even with quite minor criminal convictions.¹⁸

ICE custody has tremendous disadvantages. The client will not be guaranteed counsel in removal proceedings; over 80% of ICE detainees go through their removal hearing without representation.¹⁹ They can be transferred far away to any ICE detention facility in the country, which are often in remote areas, and outside the jurisdiction of the Ninth Circuit so that some immigration defenses no longer apply. In most cases it is very difficult to get a client back from ICE detention in order to attend state court proceedings. Intentionally remaining in criminal custody is obviously a difficult choice but may be strategic for some clients to allow them time to assess the likelihood of release from ICE custody and prepare their immigration and criminal defense. Remaining in local custody allows easier access to communicate with counsel and family, as ICE detention is often more remote and may involve transfer across the country.

If the client will be eligible for, likely to obtain²⁰, and able to afford an immigration bond²¹, then consider advising them to post bail in the criminal case, anticipating transfer to ICE, but then seeking to bond out of immigration detention as well.²² This enables the client to be at liberty while pursuing both their criminal and immigration defenses. This may require close collaboration with an immigration attorney who can represent the client in immigration court.

¹⁸ For more information about mandatory immigration detention, see:

https://www.ilrc.org/sites/default/files/resources/mandatory_detention_update_11.2020.pdf.

¹⁹ See Ingrid Eagly and Steven Shafer, Access to Counsel in Immigration Court, American Immigration Council 2016, available at <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>.

²⁰ Immigration bond is discretionary, so even if a person is eligible, they may still be denied an immigration bond. Alternatively, they may be issued a very high immigration bond that they are unable to pay.

²¹ Unlike bond in criminal proceedings, immigration bonds must be paid in full. The statutory minimum for an immigration bond is \$1500, but most bonds are often much higher. Talk to your client and their loved ones about whether they can pay an immigration bond, or if they need more time to gather money before the client is transferred to ICE. If a person is assessed an immigration bond that they cannot pay, immigration proceedings will continue while the person remains detained, and hearings will occur at a much faster pace than non-detained proceedings.

²² For information on who is ineligible for bond during removal proceedings, see: <https://www.ilrc.org/how-avoid-mandatory-ice-detention>.

Finally, if the client knows they will be transferred to ICE and deported, but has few defenses to deportation or does not wish to fight deportation, it could be in their interest to post bail and accept quick deportation, rather than face a long jail sentence. However, they could run the risk of extradition charges, particularly if it's a serious charge.

C. Effect on Bail Determinations

The ICE detainer form I-247A says on its face that “This detainer arises from DHS authorities and should not impact decisions about the alien’s bail, rehabilitation, parole, release, diversion, custody classification, work, quarter assignments, or other matters”.²³ Nonetheless, prosecutors and judges may sometimes try to use immigration status and/or the existence of an ICE detainer as a negative factor in a person’s request for bail or other pre-trial release, or to disqualify the defendant from diversion programs.

If a judge or prosecutor is citing your client’s immigration status as a negative factor for bail, you should push back. Penal Code § 1275 provides bail factors, which do not include anything related to immigration status. And California Evidence Code § 351.4 prohibits the disclosure of a person’s immigration status in open court. The Ninth Circuit has held that an ICE detainer (or any evidence of a person’s lack of citizenship or lawful immigration status) cannot be a blanket ban on bail eligibility.²⁴ The court rejected the idea that undocumented immigrants, *per se*, present an unmanageable flight risk to justify pre-trial detention. Moreover, there is no reason that a person’s lack of lawful immigration status or citizenship, on its own, should affect bail determinations. Do not let ignorance about immigration status or foreignness limit your client’s pre-trial release options. Countless immigrants living in the United States have deep community ties, work for or own local businesses, own homes, have children in school, etc. They are no more likely to be a flight risk than a U.S. citizen.

ICE detainers present a slightly different bail problem: the clear risk of impending ICE arrest. Judges and prosecutors may be particularly concerned that an ICE detainer means that the person, if released on bail, will be transferred to ICE and will be unavailable to appear for their criminal case. Such concerns are not unjustified; they are a significant consideration for your defensive strategy as well. However, if you are trying to get your client out of custody or into a diversion program, there are several arguments to raise in response to the ICE detainer concerns.

1. An ICE detainer is not a guarantee of ICE arrest.²⁵ ICE frequently issues detainers that it does not act upon, and only occasionally does the agency officially withdraw the detainer, as opposed to simply not coming to pick the person up. In particular, under the new

²³ See Form I-247A (2017) available in the appendix and at <https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf>. In practice, jails rarely read the fine print on the detainer and are unaware of this language.

²⁴ *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014) (striking down Arizona law that banned bail for undocumented immigrants for violating due process).

²⁵ *United States v. Xulam*, 84 F.3d 441, 441 n.1 (D.C. Cir. 1996) (“The fact that a detainer has been lodged does not mean appellant necessarily will be taken into custody by the INS if released by this Court.”).

enforcement policies promulgated by the Biden-Harris administration,²⁶ ICE has declined to arrest many people that they had previously placed detainers on, because those individuals are determined no longer to be priorities for enforcement actions.

2. The existence of an ICE detainer tends to indicate that a person is not a citizen,²⁷ and is thus regulated by Evidence Code § 351.4, which provides that “(a) In a criminal action, evidence of a person’s immigration status shall not be disclosed in open court by a party or his or her attorney unless the judge presiding over the matter first determines that the evidence is admissible in an in camera hearing requested by the party seeking disclosure of the person’s immigration status.” Therefore, it should not be raised in court as a factor for consideration on pre-trial release or diversion.
3. Your client may be eligible for bond out of ICE custody, in which case even if the detainer is acted upon, they would be able to appear for their future state court proceedings. (Note that while this may be helpful in arguing for your client’s pre-trial release, immigration bonds are highly discretionary and also may be unaffordable, so the reality may be more complicated. See Part B, above, for more discussion.)
4. Several federal courts, and at least one state court, have found that the question of flight risk for a fair bail determination only applies to flight of the defendant’s own volition.²⁸ The Supreme Court of New Jersey recently ruled against pre-trial detention on the basis of an ICE detainer or threat of deportation, holding that the relevant factors to be considered are based on the defendant’s own conduct, not the possible actions of outside agencies or third parties.²⁹

D. Diversion Programs

Immigration status and the existence of ICE detainers can also affect prosecutors’ willingness to offer diversion, probation, or other alternatives to incarceration as part of a plea agreement to resolve charges. (Note also that a “pre-trial” diversion program that permits a plea of “not guilty” before diversion is not a conviction for immigration purposes, almost any diversion program that requires a guilty plea will be counted as a conviction for immigration purposes, even if it results in a dismissal under state law.³⁰)

²⁶ A advisory on DHS enforcement priorities specifically for criminal defense attorneys is available here: <https://www.ilrc.org/practice-advisory-criminal-defense-attorneys-final-enforcement-priorities>.

²⁷ Because ICE detainers are merely allegations of an ICE agent, ICE detainers do not actually prove foreign nationality. And in fact, they are frequently issued in error. But they nonetheless should be considered evidence of immigration status for purposes of Evidence Code 351.4.

²⁸ See e.g. *United States v. Barrera-Omana*, 638 F. Supp. 2d 1108, 1110 (D. Minn. 2009) (court refused to consider the detainer as indicating flight risk because it was “an externality not under defendant’s control”); *United States v. Villanueva-Martinez*, 707 F. Supp. 2d 855, 857 (N.D. Iowa 2010) (holding that if the government prevents a defendant from appearing, that is not a situation where the defendant has “failed” to appear).

²⁹ See e.g. *New Jersey v. Lopez-Carrera*, 245 N.J. 596 (Mar. 30, 2021) (holding that New Jersey law regarding risk of flight meant flight by defendant’s own volition, not risk that the federal government would interfere).

³⁰ For further discussion of California pre-trial diversion programs see ILRC, 2021 *California Laws That Can Help Immigrants Charged With or Convicted of Crimes* (June 2021) at <https://www.ilrc.org/2021-california-laws-can-help-immigrants-charged-or-convicted-crimes>. To see what types of diversion agreements or pre-trial stipulations constitute a conviction for immigration purposes, see ILRC, *Immigration Consequences of Pretrial Diversion and Intervention Agreements*, (June 2021), <https://www.ilrc.org/immigration-consequences-pretrial-diversion-and-intervention-agreements-0>.

Because the defendant could be directly transferred to ICE detention upon release from criminal custody, prosecutors may be concerned that the defendant will be unable to complete the obligations contained in a diversion agreement. The same arguments mentioned above may help demonstrate why the defendant will not be transferred to ICE, or may be released from ICE custody quickly, and therefore able to comply with the conditions of their diversion or other pretrial agreement.

On the defense side, if your client is likely to be transferred to ICE, you may want to reconsider entering into a time-bound diversion agreement that your client cannot comply with. Diversion agreements often include several waivers of rights, and if your client does not comply, it may put them in a worse situation than before. In addition, if the prosecutor requires that the defendant complete certain requirements before they will agree to dismiss the charges, but the defendant is stuck in ICE detention, you may need to seek an alternative case disposition or push to continue proceedings until the client is able to be released from ICE custody.

E. Custody Classifications

As discussed above, the ICE detainer form I-247A says on its face that it should not affect custody classification decisions.³¹ In California, SB54 further protects immigrants in CDCR custody from getting different treatment because of an ICE detainer. CDCR cannot add points to a person's classification score based on having an ICE detainer or being likely to get one, although a hold or even a potential hold will be recorded in the person's classification documents.³² Also, CDCR shall not "restrict access to any in-person educational or rehabilitative programming, or credit-earning opportunity" on the basis of an ICE detainer.³³

III. Legal Arguments Against ICE Issuing or a Sheriff Complying with an ICE Detainer

If your client is subject to an ICE detainer that is illegal or invalid, or your client is not an enforcement priority for ICE, then that detainer should be lifted by ICE, and/or rejected by the local jail on constitutional or state law grounds. You may be able to make this happen.

There are several bases to challenge an ICE detainer, either by challenging ICE for having improperly or illegally issued it, or challenging the sheriff's intention to comply with it. In terms of ICE, there may be practical defects with the detainer; for example, it may be placed on the wrong person, or lack or misstate essential information. There may also be legal defects based on constitutional requirements, as well as ICE's limited statutory authority. The detainer may have been placed on someone who is not

³¹ See Form I-247A (2017) available in the appendix and at <https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf>. In practice, jails rarely read the fine print on the detainer and are unaware of this language.

³² See Heather MacKay and the Prison Law Office, *The California Prison and Parole Law Handbook*, Ch. 13 (2019) available at <https://prisonlaw.com/wp-content/uploads/2019/01/Handbook-Chapter-13.pdf>.

³³ Government Code § 7284.10(b); CDCR, Memorandum Re: Implementation of California Senate Bill 54, "The California Values Act" (Jan. 2, 2018)

actually removable or does not fit ICE's current enforcement priorities. For all these reasons, it's important to get a copy of the detainer and review it. If the detainer is invalid, you may be able to get the sheriff to reject it or get ICE to lift it. But in either case, be careful that the defect will not simply be cured by ICE issuing a new detainer. On the state/local side, even if ICE legally issued the detainer, SB54 may prevent the sheriff or CDCR from responding to it.

A. Challenges to ICE Issuance of a Detainer

1. Argue that the Detainer is Illegally Imposed

Constitutional and Statutory Limits. ICE must have probable cause that a person is subject to deportation in order to issue a detainer.³⁴ Holding someone on an ICE detainer after they would otherwise be released is a new arrest subject to Fourth Amendment requirements, and as a result, courts have held that ICE must have probable cause of removability prior to issuing the detainer.³⁵ Even though in California, actual prolonged detention on an ICE detainer is illegal under state law, ICE is still bound by these constitutional requirements.

Second, ICE must also attach an administrative arrest warrant.³⁶ This is required by the statute defining ICE's arrest authority, and as a matter of policy and practice is now routine. But if the ICE warrant is for some reason not also provided to the jail, that is in violation of 8 U.S.C. § 1357(a).³⁷

Third, the Ninth Circuit has held that the Fourth Amendment "requires a prompt probable cause determination by a neutral and detached magistrate" to justify continued detention on an ICE detainer.³⁸ Such a procedure does not currently exist in the immigration system, but this litigation is ongoing: see <https://www.ilrc.org/explaining-gonzalez-v-ice-injunction>.

The Person Must be a Removable Noncitizen. Legally, the requirement of probable cause means ICE can only issue a detainer against (a) a noncitizen, who (b) is already "removable." A removable noncitizen is someone who legally could be put in removal proceedings for possible deportation (regardless of whether they might be eligible to apply for some waiver or relief in those proceedings). For example, undocumented people, and permanent residents who already have been convicted of a deportable offense, are removable noncitizens and an ICE detainer is not necessarily illegal. But a permanent resident who is not yet deportable is not removable, and a detainer would be illegal. No U.S. citizen is a proper subject of a detainer (although many U.S. citizens have been the mistaken subject of ICE detainers and even prolonged detention and removal, despite their assertion of citizenship).

³⁴ *Morales v. Chadbourne*, 235 F. Supp. 3d 388 (D.R.I. 2017). See *Gonzalez v. Immigration and Customs Enf't*, 975 F.3d 788 (Ninth Cir. 2020).

³⁵ *Morales v. Chadbourne*, 235 F. Supp. 3d 388 (D.R.I. 2017).

³⁶ *Jimenez Moreno v. Napolitano*, 213 F. Supp. 3d 999, 1006 (N.D. Ill. 2016) (ICE's statutory arrest authority requires probable cause and either a warrant or a determination that the person is likely to escape before a warrant can be obtained). The ICE warrant is basically meaningless for the sheriff who receives it, but they are required to attach it to the detainer. For more information about ICE warrants, see <https://www.ilrc.org/legal-analysis-ice-warrants>.

³⁷ *Id.*

³⁸ *Gonzalez v. Immigration & Customs Enf't*, 975 F.3d 788, 817 (9th Cir. 2020).

Example: Maurice is a lawful permanent resident who is not deportable. However, recently he was arrested, jailed, and charged with Penal Code § 273.5. He wants to be released on OR pending his criminal case, but you discover that he has an ICE detainer. The ICE detainer against Maurice is illegal, because he is not subject to deportation. If in the future Maurice is convicted of § 273.5, then he will be “removable,” because § 273.5 is a removable offense under immigration law. At that point, a detainer may be lawful. But *until* Maurice is convicted of that offense, ICE cannot legally lodge a detainer and they should lift it.

This is important to keep in mind, because ICE frequently makes mistakes and issues detainers against U.S. citizens or against noncitizens who have lawful immigration status and are not currently removable. These detainers that lack probable cause are illegal, and ICE must withdraw them or face liability.³⁹

Database Checks and *Gonzalez v. ICE*. Additionally, ICE has historically issued many of its detainers solely on the basis of database checks, and those have important limitations.⁴⁰

- First, ICE has conceded in litigation that evidence of a person’s foreign birth, combined with a lack of other information about that person in immigration databases, is insufficient to establish probable cause of removability to issue a detainer.⁴¹
- Second, even if there is information about a person in federal immigration databases, those databases are prone to errors and may be insufficient to provide probable cause. This question is the subject of ongoing litigation in *Gonzalez v. ICE*. Although the injunction issued in that case is no longer valid, the court record documents many specific details about the flaws and high error rates of ICE databases.⁴² You can still raise arguments that ICE lacks probable cause when it issues a detainer based only on database information. In particular, watch out for people who may have derived or acquired citizenship,⁴³ or who have had no prior contact with DHS, and thus ICE is relying only on some indicia of foreign birth. For explanation of how to identify a database-detainer and more information on the *Gonzalez* litigation, see ILRC, *Explaining the Gonzalez v. ICE injunction* (Feb. 2021). <https://www.ilrc.org/explaining-gonzalez-v-ice-injunction>.

Example: Anya was born in Hungary but came to the United States as a permanent resident with her parents when she was five. Anya’s parents naturalized six years later, when Anya was eleven. In 2020, Ada was arrested by local police and taken to the county jail. Her public

³⁹ See cases against ICE for detainers on U.S. citizens, e.g. *Morales v. Chadbourne*, 235 F. Supp. 3d 388 (D.R.I. 2017); *Gonzalez v. Immigration & Customs Enf’t*, 416 F. Supp. 3d 995 (C.D. Cal. 2019).

⁴⁰ *Gonzalez v. Immigration & Customs Enf’t*, 416 F. Supp. 3d 995 (C.D. Cal. 2019).

⁴¹ *Id.*

⁴² *Id.* The court’s findings of fact include details such as: “[I]ndividuals familiar with CLAIMS 3 [database of applications that would show someone has been granted legal status] consider the database’s error rate to be close to 30 percent.” “Both CLAIMS 3 and CLAIMS 4 destroy information after 15 years.” “As recently as 2017, the DHS OIG found that ADIS [a particular enforcement database] incorrectly identified visa overstays more than 42 percent of the time.” “ICE has never had access to any database of derivative or acquired citizens, because none exists.”

⁴³ See <https://www.ilrc.org/acquisition-derivation-quick-reference-charts>.

defender has been informed that she is subject to an ICE hold, and when they received a copy of it from the sheriff's department, the detainer says that it is based on box 3: "biometric confirmation of the alien's identity..." Based on her parents' naturalization when she was a child with LPR status, Anya is already a U.S. citizen, but this is not reflected in immigration databases. The detainer is illegal.

2. Argue that the ICE Detainer is Outside of Applicable Enforcement Priorities.

Even if a detainer is legally issued, you still can assert that ICE should lift it if the person does not come within current enforcement priorities set out by DHS. ICE can lift a detainer as a matter of discretion at any time. Under the Biden-Harris administration, DHS has issued policy guidance on how ICE should use their discretion, and that applies to issuing detainers as well as many other immigration enforcement actions. Federal policy guidance lays out specific enforcement priorities and provides a basis to challenge a detainer placed on a client who does not fall in the priority categories.

These policies always can change, but as of December 2021, only the following removable noncitizens are classed as enforcement priorities:

1. "National Security" – This will be used against people who ICE alleges are involved in terrorism, spying, or other threats to "national security." This does not apply to general criminal activity.
2. "Border Security" – This applies to anyone who is attempting to enter the United States unlawfully at a port of entry (e.g., with fake papers) or who entered unlawfully on or after November 1, 2020.
3. "Public Safety" - People whom DHS thinks pose a current threat to public safety, based on serious criminal conduct.

An advisory that explains more about the current ICE enforcement priorities and how they apply is available here: <https://www.ilrc.org/practice-advisory-criminal-defense-attorneys-final-enforcement-priorities>.

Example: Say that LPR Maurice in the above example was convicted of misdemeanor PC § 273.5 and sentenced to 4 days with credit for time served. While he now is a removable noncitizen,⁴⁴ he can argue that he does not present any threat to public safety or come within any of the current enforcement priority categories. Based on this, you can ask ICE to use their discretion to lift, or not to impose, a detainer. In many parts of the state, ICE is agreeing, or is not coming to pick up such people.

⁴⁴ In this situation, with good immigration advice, the defender should have been able to negotiate a plea that did not make Maurice removable.

One also can ask ICE to lift a detainer even if the person clearly comes within an enforcement priority. Detainers are issued under ICE's discretion, and they can be lifted at any time.

3. Asking ICE to Lift a Detainer

To request that ICE lift a detainer, generally counsel should send a written letter/email to the ICE Field Office describing why the detainer is invalid or should otherwise be withdrawn as a matter of discretion. Include legal arguments as well as humanitarian arguments about why your client is not a priority for immigration enforcement. A sample letter is included in Appendix II, below. ICE operates out of regional field offices, and requests should be directed to the local field office or suboffice that covers where your client is detained. A list of ICE Field Offices and contact information is available here: <https://www.ice.gov/contact/field-offices>. Enforcement and Removal Operations (ERO) is usually the branch that handles ICE detainers.

Individuals representing people before ICE typically file a notice of their representation on form [G-28](#). In many cases, ICE will require such a form in order to speak with counsel or provide any information about someone in their custody. This can be a roadblock for many public defenders who may not be authorized to complete such a form, because such representation is considered to be outside the scope of their criminal defense. However, state defense counsel who wish to discuss ICE detainers is one area where the G-28 requirement is often loosened. Many public defenders have established points of contact in the local ICE field office for issues regarding ICE detainers, and have successfully gotten ICE to lift detainers without filing a G-28 on the case. You can also note on the G-28 that the scope of your representation before ICE is limited to detainer advocacy only.

If you request that ICE lift a detainer and the request is denied, you can seek a higher review of that decision through ICE's Case Review Process: <https://www.ice.gov/ICEcasereview> or by escalating the request up the chain of command within the ICE field office.

B. California State Law Limits Law Enforcement Cooperation with ICE Detainers

1. California Values Act / SB54

The California Values Act, Cal. Gov't Code § 7284, (also called SB54) imposes several limitations and requirements on law enforcement's discretion to comply with ICE detainers.

First, SB54 prevents law enforcement agencies from detaining a person based on an ICE detainer past their release from criminal custody in all cases. In other words, no state or local agency in California ever can comply with the 48-hour request, for any person.⁴⁵

Second, California regulates when sheriffs (a) can notify ICE of release dates, and separately, (b) when they can transfer someone directly to ICE custody from within the jail. Both notifications and transfers

⁴⁵ This limitation does not specifically apply to CDCR, but by current policy, CDCR does not hold individuals extra time on ICE detainers.

are prohibited under SB54, but significant exceptions are set out in Cal. Gov't Code §§ 7284.6(a)(1)(C) & (a)(4) respectively.

Assessing whether an exception applies is complex. For example, for a sheriff to provide notice of release dates, the individual must fall into one of the criminal history-based exceptions in § 7282.5, or their release date and time must be publicly available. Because of this rule, many sheriffs post all release dates and times publicly, and may provide affirmative notice to ICE as well. For transfers, ICE must have a judicial warrant, or a criminal exception referenced by § 7282.5(a) must apply. Broadly, the §7282.5 criminal exceptions apply to people who have been: a) arrested and held to answer for a serious (Pen C §1192.7(c)), violent (Pen C §667.7(c)), or state prison felony; b) convicted of a serious or violent or state prison felony; or c) convicted within the past 5 years of a misdemeanor for certain enumerated wobbler offenses or convicted within 15 years of certain enumerated felony offenses (See Govt C §7282.5(a)(3)(A)-(Q)).

To further assess whether a person falls under one of these exceptions in §7282.5, review our Values Act Guide for Criminal Defenders available at <https://www.ilrc.org/sb-54-and-california-values-act-guide-criminal-defenders> Also, note that the rules are different for the California Department of Corrections and Rehabilitation (CDCR) than for local agencies.)

2. California Truth Act Requirements

Beyond limitations on when law enforcement can have discretion to respond to ICE detainers, the California Truth Act provides that if ICE wants to interview someone in CA custody, the jail must provide a written consent form to the person, advising them that the interview is voluntary and that they may agree to talk to ICE, refuse to do so, or agree only if their lawyer is present.⁴⁶ **It is almost always against the person's interest to agree to an ICE interview, which will be for the purpose of gathering information to use to issue an ICE detainer and/or deport them.**

The Truth Act also places certain requirements to provide certain rights to persons who are subject to an ICE detainer. Under Cal. Gov't Code § 7283.1(b), when a law enforcement receives an ICE detainer, they must provide a copy to the person and inform them as to whether they intend to comply with the request. Similarly, if a sheriff complies with a notification request by providing ICE with a person's release date or time, then they are also required to promptly provide a written notification to the person and to their attorney or other representative that this notice to ICE has occurred.

3. Asking a Sheriff to Reject an ICE Detainer

While SB54 constrains sheriffs on ICE detainers in several ways, they still have a lot of power. As discussed above, many sheriffs will notify ICE of a person's release date whenever permitted under SB54, with the specific purpose of enabling ICE to arrive at the time of release to take custody. The jail may also permit ICE to come into the release area or receive transfers of custody in the sally port or other secure areas of the jail where the person would have no opportunity to walk out. On the other hand, many counties have stronger policies that limit or prohibit these activities that may apply as well.

⁴⁶ See CA Govt Code § 7283.1(a).

And some sheriffs' departments have established internal policies and practices regarding ICE detainers that also guide these decisions, although they may not exactly be binding on any given case.

Procedures or points of contact for advocacy on an ICE detainer will vary from jail to jail, but generally you can start with informal communications with jail staff, and then take issues to their legal counsel or higher command if necessary.

1. Ask the jail how they plan to respond to the ICE detainer. The Truth Act requires the jail to serve a copy of the detainer on the subject and also to advise them whether the jail intends to comply with it.⁴⁷ The Truth Act also requires that if the jail does notify ICE of a release date, they must inform the person that this has happened.
2. If they intend to comply with the detainer by either notifying ICE of release or facilitating a transfer, find out who has authority to review or reverse that decision and what options you have to get a commitment from them not to honor the detainer or transfer your client to ICE.
 - a. If your client is protected by SB54, be aggressive about warning the jail that they cannot transfer the person to ICE without a judicial warrant.
 - b. If your client is not protected by SB54, you may still be able to get them not to honor the detainer. Employ whatever legal or discretionary arguments discussed above may be the most useful. Transferring someone to ICE detention can result in their deportation and permanent exile from the country. It is certainly a guarantee that the person will be transferred into a punitive immigration system that lacks basic legal protections. Personal, family, humanitarian, medical, or other individual circumstances might be a basis for a sheriff to agree to reject a particular ICE detainer.
 - c. Be careful not to divulge unnecessary information about your client or their actual immigration status. You can point to the detainer without giving any answers regarding your client's underlying immigration situation. On the other hand, if your client has lawful status or is a U.S. citizen, it may be beneficial to demonstrate this affirmatively.

IV. Summary: Step by Step Analysis Of The Legal Arguments Against A Detainer

If the following requirements are not met, ICE or the local jail may be liable for violating either federal or California law. This is a basis to demand that the jail reject the detainer, or to demand that ICE withdraw it.

1. Get a copy of the detainer to see what ICE says it's based on – a prior order of removal, ongoing removal proceedings, database checks, or admissions by the person themself.

⁴⁷ See Govt Code § 7283.1(b): "Upon receiving any ICE hold, notification, or transfer request, the local law enforcement agency shall provide a copy of the request to the individual and inform him or her whether the law enforcement agency intends to comply with the request. If a local law enforcement agency provides ICE with notification that an individual is being, or will be, released on a certain date, the local law enforcement agency shall promptly provide the same notification in writing to the individual and to his or her attorney or to one additional person who the individual shall be permitted to designate."

2. Is ICE's issuance of the detainer legal or appropriate?
 - A. Is the person actually subject to removal? Check with an immigration expert!
 - i. Are they a U.S. citizen? ICE is particularly likely to miss acquired and derivative citizenship.⁴⁸
 - ii. If client is LPR, do they really have a deportable conviction? (Mere charges don't count.)
 - iii. If some other status, do they already have a conviction that undermines that status?
 - B. Does ICE actually have probable cause of removability? What information does ICE have on this individual?
 - i. ICE has conceded in litigation that foreign birth plus no other immigration records is insufficient for probable cause to issue a detainer.⁴⁹
 - ii. If your client has never filed any immigration applications and has had no prior contact with DHS officials (which can be tricky to ascertain), then you have a good argument that ICE lacks probable cause for the detainer.
 - iii. If you work closely with an immigration attorney or do immigration cases, obtaining a copy of ICE's I-213 record⁵⁰ may reveal their basis for issuing the detainer.
 - C. Is the person within ICE's enforcement priorities?
 - i. Are they possibly a national security risk or entered unlawfully since November 1, 2020?
 - ii. Do they present a current public safety threat?
3. Does California state law or local rules prevent the jail from complying with the detainer, by providing notice of release date or facilitating transfer to ICE?
 - A. Is the client protected by SB54? (See <https://www.ilrc.org/sb-54-and-california-values-act-guide-criminal-defenders>)
 - B. Do they have a conviction (or in a few cases, charges) that allows the sheriff to notify ICE of their release or transfer them to ICE?
 - C. Is the client protected by an additional local law that places further limits on cooperation with ICE?
4. Does the client have sympathetic factors that could persuade the jail to ignore the detainer as a matter of discretion?

⁴⁸ See ILRC, Acquisition & Derivation Quick Reference Charts (2020) <https://www.ilrc.org/acquisition-derivation-quick-reference-charts>.

⁴⁹ *Gonzalez v. Immigration & Customs Enf't*, 975 F.3d 788, 817 (9th Cir. 2020).

⁵⁰ An I-213 is the form ICE uses to document an arrest, including a detainer, and should list how ICE encountered the individual, as well as what database records they checked on the person.

DEPARTMENT OF HOMELAND SECURITY
IMMIGRATION DETAINER - NOTICE OF ACTION

Subject ID:
Event #:

File No:
Date:

TO: (Name and Title of Institution - OR Any Subsequent Law Enforcement Agency)

FROM: (Department of Homeland Security Office Address)

Name of Alien: _____

Date of Birth: _____ Citizenship: _____ Sex: _____

1. DHS HAS DETERMINED THAT PROBABLE CAUSE EXISTS THAT THE SUBJECT IS A REMOVABLE ALIEN. THIS DETERMINATION IS BASED ON (complete box 1 or 2).

- A final order of removal against the alien;
- The pendency of ongoing removal proceedings against the alien;
- Biometric confirmation of the alien's identity and a records check of federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the alien either lacks immigration status or notwithstanding such status is removable under U.S. immigration law; and/or
- Statements made by the alien to an immigration officer and/or other reliable evidence that affirmatively indicate the alien either lacks immigration status or notwithstanding such status is removable under U.S. immigration law.

2. DHS TRANSFERRED THE ALIEN TO YOUR CUSTODY FOR A PROCEEDING OR INVESTIGATION (complete box 1 or 2).

- Upon completion of the proceeding or investigation for which the alien was transferred to your custody, DHS intends to resume custody of the alien to complete processing and/or make an admissibility determination.

IT IS THEREFORE REQUESTED THAT YOU:

- **Notify DHS** as early as practicable (at least 48 hours, if possible) before the alien is released from your custody. Please notify DHS by calling U.S. Immigration and Customs Enforcement (ICE) or U.S. Customs and Border Protection (CBP) at _____. If you cannot reach an official at the number(s) provided, please contact the Law Enforcement Support Center at: (802) 872-6020.
 - **Maintain custody** of the alien for a period **NOT TO EXCEED 48 HOURS** beyond the time when he/she would otherwise have been released from your custody to allow DHS to assume custody. The alien **must be served with a copy of this form** for the detainer to take effect. This detainer arises from DHS authorities and should not impact decisions about the alien's bail, rehabilitation, parole, release, diversion, custody classification, work, quarter assignments, or other matters
 - Relay this detainer to any other law enforcement agency to which you transfer custody of the alien.
 - Notify this office in the event of the alien's death, hospitalization or transfer to another institution.
- If checked: please cancel the detainer related to this alien previously submitted to you on _____ (date).

(Name and title of Immigration Officer)

(Signature of Immigration Officer) (Sign in ink)

Notice: If the alien may be the victim of a crime or you want the alien to remain in the United States for a law enforcement purpose, notify the ICE Law Enforcement Support Center at (802) 872-6020. You may also call this number if you have any other questions or concerns about this matter.

TO BE COMPLETED BY THE LAW ENFORCEMENT AGENCY CURRENTLY HOLDING THE ALIEN WHO IS THE SUBJECT OF THIS NOTICE:

Please provide the information below, sign, and return to DHS by mailing, emailing or faxing a copy to _____.

Local Booking/Inmate #: _____ Estimated release date/time: _____

Date of latest criminal charge/conviction: _____ Last offense charged/conviction: _____

This form was served upon the alien on _____, in the following manner:

- in person
- by inmate mail delivery
- other (please specify): _____

(Name and title of Officer)

(Signature of Officer) (Sign in ink)