

Chapter 7

Procedures Related to Removal

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This chapter reviews procedures and practices related to the identification of noncitizens subject to removal, immigration detainers, and removal proceedings. Defense counsel should have a general understanding of procedures related to removal to advise clients, particularly those in custody, about what they are likely to encounter. The chapter begins with a general description of the removal process. It then focuses on removal-related procedures with respect to clients who are in custody on state criminal charges.

7.1 Summary of Procedures Related to Removal

U.S. Immigration and Customs Enforcement (ICE) is responsible for the detention and removal of noncitizens. One of the agency's priorities is removing certain noncitizens in jails and prisons. Currently, five counties in North Carolina—Wake, Mecklenburg, Gaston, Cabarrus, and Henderson—have also prioritized the removal of noncitizens in the criminal justice system by entering into agreements with the federal government to enforce federal immigration law. ICE and cooperating law enforcement agents generally identify such individuals for removal by submitting their fingerprints through various federal databases.

If an individual may be removable based on a lack of status or a prior criminal conviction, ICE takes the position that it can issue a detainer pretrial to assume custody of the individual. *See infra* § 7.3A, Purpose of Detainer. If an individual with lawful status

becomes removable upon conviction, ICE will likely assume custody of the individual upon completion of any jail or prison sentence. Even if ICE does not take any immediate action against someone who has become removable due to a conviction, such an individual may still be placed into removal proceedings upon a future contact with immigration officials. For example, noncitizens have been placed in removal proceedings when returning to the U.S. after traveling abroad, when applying for a green card, or when applying to naturalize. There is no statute of limitations on how long after a conviction ICE can initiate removal proceedings against a noncitizen.

Once an individual has been formally charged as removable, ICE has broad discretion to detain the person pending removal. Some noncitizens are eligible for immigration bond, but many noncitizens with criminal convictions are not eligible for release on bond and are therefore detained pending the completion of removal proceedings. *See infra* § 7.4A, Mandatory Detention.

There are different types of removal procedures. Many noncitizens receive a hearing in immigration court. At a removal hearing, the immigration court determines whether the noncitizen is removable under the charged grounds of inadmissibility or deportability and eligible for any relief from removal. *See infra* § 7.4B, Removal Proceedings.

7.2 Identification of In-Custody Persons Subject to Removal

The federal government currently uses existing information-sharing programs between local, state, and federal law enforcement agencies to determine the immigration status of arrested individuals. Local law enforcement officers send the fingerprints of all individuals arrested and taken into custody to the FBI, which are automatically forwarded to ICE to be checked against federal immigration databases to determine whether noncitizen arrestees may be removable.

In addition, North Carolina law requires administrators of jails and correctional facilities to determine the immigration status of any person charged with a felony or impaired driving offense by questioning such individuals and submitting a query to ICE. *See* G.S. 162-62; *see also* John Rubin, [2007 Legislation Affecting Criminal Law and Procedure](#), Administration of Justice Bulletin 2008/01 at 33–34 (Jan. 2008).

Noncitizens interviewed or questioned by federal immigration agents or local law enforcement do not have to discuss their immigration status or manner of entry into the U.S. The Fifth Amendment privilege against self-incrimination covers immigration status if that information could lead to a criminal prosecution. Certain immigration violations are federal crimes, including entering the U.S. without inspection. *See supra* § 2.3D, Advise Your Clients of Their Rights.

Noncitizens have also been identified as subject to removal when serving a sentence of imprisonment in a Division of Adult Correction facility or serving a sentence of probation. Community Corrections, now a part of the Department of Public Safety, has

issued a policy guidance regarding undocumented immigrants. *See* North Carolina Department of Public Safety, Division of Adult Correction and Juvenile Justice, [Community Corrections Policy & Procedures](#), Chapter C Offender Supervision § .0624 Undocumented Immigrants and Deportation (Aug. 2016). It states that the division will assist ICE with the identification and possible removal of undocumented immigrants placed on probation. It directs probation officers to notify ICE of any information regarding a probationer's undocumented status.

7.3 Immigration Detainer

A. Purpose of Detainer

An ICE detainer—or “immigration hold”—is one of the key tools ICE uses to apprehend individuals who come in contact with local and state law enforcement agencies and to place them in removal proceedings.

B. Definition

An immigration detainer is a written request to a local law enforcement agency to detain a named individual for up to 48 hours after that person would otherwise be released (excluding Saturdays, Sundays, and holidays), in order to provide ICE an opportunity to assume custody of that individual for removal purposes. *See* 8 C.F.R. § 287.7. The 48-hour period begins to run when the named individual is no longer subject to detention by the local law enforcement agency—that is, after the individual has posted bond or completed a jail or prison sentence. Law enforcement agencies include jails and prisons that have custody of the named individual.

The detainer is neither a warrant nor an order by a judge. It is a request and is not mandatory, *see, e.g., Galarza v. Szalczyk*, 745 F.3d 634 (3rd Cir. 2014), though most law enforcement agencies in North Carolina honor ICE detainers. Hundreds of jurisdictions across the country—including many in Washington, Illinois, California, Oregon, and Vermont—no longer comply with ICE detainer requests, or they comply with them in limited circumstances only. Further, several federal courts have held that holding an individual on an ICE detainer is an illegal arrest in violation of the Fourth Amendment where it is not based on a judicial determination of probable cause. *See, e.g., Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015). Thus, a court could find that where a local jail holds an individual on a detainer that is not based on probable cause, when the individual has posted bail or is otherwise entitled to release, the jail may be liable for money damages based on an unconstitutional detention. *See, e.g., Miranda-Olivares v. Clackamas County*, 2014 WL 1414305, No. 3:12-cv-02317-ST (D. Or. Apr. 11, 2014).

In addition, the highest court in Massachusetts has ruled that Massachusetts courts and law enforcement officials—including sheriffs and police officers—are not authorized to hold people based solely on immigration detainers. *Lunn v. Commonwealth*, 78 N.E.3d 1143 (Mass. 2017). Specifically, the Court found that detention based on an immigration

detainer constitutes an arrest, which must be authorized under state law. *Id.* at 1153–54. It further found that there was no authority under state law—either statutory or common law—for an arrest for civil immigration purposes. *Id.* at 1154–56.

ICE no longer uses Form I-247 (Immigration Detainer-Notice of Action), which has been deemed problematic by courts for the reasons mentioned above. It uses the following new form:

- *Form I-247A, Notice of Action:* Form I-247A requests that the law enforcement agency (LEA) notify ICE as early as practicable (at least 48 hours, if possible) of the pending release from custody of the named individual and maintain custody of the named individual for a period not to exceed 48 hours *beyond* the time when he or she would have otherwise been released from custody. On this form, ICE must identify the basis for ICE’s determination of probable cause. (The form does *not* represent a judge’s determination of probable cause.) The LEA must serve a copy of the request on the individual for it to take effect.

Effective April 2, 2017, ICE issued a new policy directing that all ICE detainers be accompanied by an immigration warrant signed by an authorized ICE officer. *See* Immigration and Customs Enforcement Policy Number 10074.2, [Issuance of Immigration Detainers by ICE Immigration Officers](#) (Mar. 24, 2017). ICE warrants direct authorized federal immigration officers to arrest an individual for civil violations of immigration law, not criminal charges. *See* 8 C.F.R. § 287.5. Because these warrants are not reviewed by a judge or any neutral party, they do not appear to satisfy the probable cause requirement. *See e.g., El Badrawi v. Dep’t of Homeland Security*, 579 F. Supp. 2d. 249, 275 (D. Conn. 2008) (finding that an arrest based on an immigration warrant is considered “warrantless” for federal constitutional law purposes) Immigration warrants also do not provide authority for local law enforcement to arrest or detain someone for a crime.

C. Detention During and Beyond the 48-Hour Hold

If a detainer is lodged pretrial against an individual and he or she posts bail, the cases discussed in B., above, indicate that the local jail or correctional facility may not have the authority to detain an individual during the 48-hour period without a judicial finding of probable cause. The law is certainly clear that if the jail holds the person for the 48-hour period and ICE fails to assume custody of the individual during that period, the individual should be immediately released. Even assuming the initial 48-hour detention is permissible, the local jail or correctional facility has no authority to detain an individual once the detainer has expired. Any additional detention is unlawful and in violation of state pretrial release laws and could subject the facility to suit for false imprisonment. Similarly, the state lacks authority to hold someone who has served his or her maximum sentence for the offense. In practice, however, jails and correctional facilities may be reluctant to release the detained individual.

When clients have been detained pursuant to an ICE hold without a judicial finding of probable cause or beyond the 48-hour hold, some defense attorneys have contacted counsel for the sheriff or the jail and pressed them to release their clients. If the client is not released, a writ of habeas corpus can be filed to secure release under G.S. 17-1 et seq. The filing of a writ of habeas corpus could prompt ICE to pick up the detained individual, making the action moot.

D. Bond Considerations for a Client with an Immigration Detainer

An immigration detainer is often lodged against a client before he or she has an opportunity to post bond. In those circumstances, if the client posts bond, the jail may transfer immediate custody of him or her to ICE. If ICE takes your client into custody and detains him or her, he or she will likely be sent to an out-of-state immigration detention facility for the institution of removal proceedings. To date, immigration authorities generally have not transported clients so that they can attend state court proceedings, but it is unclear whether prosecutors have made that request. As a result, the client may be called and failed in the state criminal case, be the subject of an order for arrest, and have the bond forfeited (though defense counsel should argue against the issuance of a failure to appear). *See* 1 NORTH CAROLINA DEFENDER MANUAL § 1.9H, Post-Release Issues Affecting Noncitizen Clients (2d ed. 2013). The time spent in a detention center will not count toward jail credit if your client is later convicted and sentenced in the criminal case.

Another possibility is that ICE will deport your client before resolution of the criminal case.

7.4 What Happens after Your Client is Released into the Custody of ICE

Once your client has been picked up by ICE officers, he or she will likely be taken to an immigration detention facility in South Carolina or Georgia.

A. Mandatory Detention

If your client is eligible for and able to post an immigration bond, he or she will be released during the removal proceedings. Many clients with criminal convictions, however, are not eligible for release on immigration bond and therefore will be detained pending completion of removal proceedings. The U.S. Supreme Court is considering the constitutionality of mandatory detention. *Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016), *granting cert.*, 804 F.3d 1060 (9th Cir. 2015).

Mandatory detention provisions apply to the following people who are released from physical custody after October 9, 1998 (as set forth in INA § 236(c)(1), 8 U.S.C. § 1226(c)(1)). They apply to people who are:

- inadmissible by reason of having committed any offense covered in the criminal grounds of inadmissibility
- deportable for having committed two or more crimes involving moral turpitude (CMT)
- deportable for an aggravated felony
- deportable for a drug offense
- deportable for a firearm offense
- deportable for security-related crimes
- deportable for having committed a CMT for which the actual sentence of imprisonment is one year or more; and
- involved in terrorist activity.

The mandatory detention provisions do not apply to people who are:

- deportable for having committed one CMT for which the actual sentence of imprisonment is less than one year; and
- deportable for a domestic violence-related offense.

B. Removal Proceedings

There are several procedures for removing noncitizens. Your clients are likely to encounter one of the proceedings described below.

Removal Proceedings in Immigration Court. Many of your clients will have a hearing in immigration court. Removal proceedings for a detained client are to take place expeditiously. At this time, most removal proceedings for detained clients take place in Georgia, where they are detained, and for non-detained clients in the immigration court in Charlotte.

Removal proceedings in immigration court commence when the government files a charging document known as a Notice to Appear (NTA) with the immigration court. The NTA specifies the formal charges, the statutory provisions allegedly violated, and the individual's acts or conduct that allegedly violate the law. *See* INA § 239(a), 8 U.S.C. § 1229(a). A noncitizen has a right to an attorney at his or her own expense in the removal proceedings. A noncitizen does not have a right to a court-appointed attorney because such proceedings are considered civil in nature and not criminal.

The immigration court first determines whether a noncitizen is removable under the grounds of inadmissibility or deportability alleged in the NTA. If the noncitizen is found removable, the court can consider and grant an application for some form of relief from removal, if he or she qualifies, allowing the noncitizen to remain in the U.S. Generally, after the completion of the hearing there will be one of three outcomes: (1) the immigration judge orders the noncitizen removed from the U.S.; (2) the immigration judge grants some form of relief from removal; or (3) the immigration judge terminates the proceedings because removability has not been established by the government. In some cases, the immigration judge may administratively close the case, which means the

case is removed from the docket with the possibility of it being re-calendared later by the government. Either party can appeal the decision of the immigration judge to the Board of Immigration Appeals (BIA).

Immigration authorities may remove a person from the U.S. without a formal removal hearing. Those circumstances are discussed below.

Administrative Removal. Administrative removal applies to noncitizens who are not lawful permanent residents of the U.S. and are charged with having been convicted of an aggravated felony. INA § 238(b), 8 U.S.C. § 1228(b). This summary removal process is essentially a paper process without a formal hearing and provides the noncitizen with ten days to rebut the government's charge. There is no opportunity to apply for discretionary relief from removal, though individuals may be able to apply for withholding of removal if they express a credible fear of persecution. A designated immigration officer decides whether the noncitizen's conviction qualifies as an aggravated felony.

Reinstatement. Reinstatement generally applies to noncitizens who return to the U. S. without authorization after having removed under a prior removal order. The government simply "reinstates" the prior order of removal. Reinstatements generally account for more deportations than any other procedure.

Expedited Removal. Expedited removal currently applies to people who arrive at a port-of-entry or within 100 miles of the border with fraudulent or insufficient documents. Immigration officers patrolling the border are authorized to issue the removal orders in this context. There is limited process and opportunities for appeal, though individuals may be able to apply for asylum if they express a credible fear of persecution.

Stipulation of Removal. A stipulated removal order involves a noncitizen who agrees to accept a removal order and waives his or her right to an immigration court hearing. The immigration court enters the order based on a review of the written stipulation and charging document, often in the absence of the parties. In practice, some clients sign such a stipulation when initially interviewed by an immigration officer, agreeing to removal and waiving their right to a hearing before an immigration judge (sometimes unknowingly). These individuals are processed for immediate removal. You should advise your clients not to waive their rights to a hearing until all of their options are fully evaluated.

C. Order of Removal

If your client is ordered removed, ICE is generally required to physically remove your client from the U.S. within a period of 90 days from the date of a final order of removal. *See* INA § 241(a)(1)(A), 8 U.S.C. § 1231(a)(1)(A). ICE is required to detain your client, without bond or other pre-removal condition of release, during the 90-day period. *See* INA § 241(a)(2), 8 U.S.C. § 1231(a)(2). Not all noncitizens, however, are removed during the 90-day period, particularly those who have meritorious arguments and continue to litigate their cases in the Courts of Appeal.