

CRIMINAL DEFENSE OF IMMIGRANT CLIENTS IN ICE CUSTODY

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PRESENTATION ROADMAP

- About the speakers
- Preparing clients in criminal custody for ICE contact
- After client's transfer to ICE custody
- Defense strategies in criminal court
- Coordinating with immigration counsel
- Resources for clients

NOTE ON SCOPE:

This presentation will focus on the particular challenges of representing immigrant clients in criminal court before and after they have been detained by Immigration and Customs Enforcement (ICE).


It will not cover the specific consequences of criminal convictions for your immigrant clients. For an introduction to the immigration consequences of criminal cases, please check out WDAIP's webinar *Crimmigration 101: How to Comply with your Padilla Duties*, presented by Jonathan Moore on May 18, 2018. It is available to all WDA members at <https://defensenet.org/resources/wdaips-crimmigration-101-how-to-comply-with-your-padilla-duties-5-18-18/> (login required).

ABOUT TODAY'S SPEAKERS

- **Camila Maturana** is a staff attorney at the Northwest Immigrant Rights Project's Tacoma office. She provides in-depth case assessments and direct representation to immigrants detained at the Northwest Detention Center, with a particular emphasis on individuals who have been in the King County criminal justice system. She received a J.D. from Washington University in St. Louis and a B.A. from University of Chicago.
- **Jared R. Varo** operates Varo Law, primarily focusing in Criminal Defense and Family Law, as well as related civil and administrative matters. Jared attended the New England School of Law, where he was an editor on The New England Law Review. He has practiced in Pierce County and surrounding areas since 2014. He is also a card-carrying member of the Washington Defender Association, or at least would be if they issued cards.

TODAY'S SPEAKERS, CONT.

- **Kelly Vomacka** is a criminal defense attorney in Seattle. After a long career as a public defender, she is now in private practice, focusing on juvenile defense, appeals, and post-conviction relief for immigrants. She has successfully challenged convictions for heroin delivery, domestic violence, and many other crimes, on both *Padilla* and non-*Padilla* grounds.
- **Sara Sluszka** is the Immigration Resource Attorney at the Washington Defender Association's Immigration Project. Sara spent four years as a detention staff attorney at NWIRP's Tacoma office representing detained immigrants facing deportation, conducting know-your-rights trainings for immigrants, and regularly presenting at CLE trainings. She worked for two years on the U.S.- Mexico border at Casa de Proyecto Libertad in Harlingen, Texas. She earned her J.D. from Northeastern University School of Law, and B.A. from Lewis and Clark College.

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PREPARING CLIENTS IN CRIMINAL CUSTODY FOR ICE CONTACT

FIRST MEETING AT THE JAIL

- After you have informed your client of your general duty of confidentiality, let them know:
 - I don't work for immigration authorities (ICE); I work for you.
 - I need some information from you to help you avoid getting deported based on this charge if you are not a U.S. citizen.
 - To do this, I need to ask you where you were born and your immigration status. Can you share those with me?



GATHER CRITICAL INFORMATION



- Ask all questions on [WDAIP Immigration Intake](#).
- If immigration status is unclear, refer to our [Determining Immigration Status](#) questionnaire for other questions to ask.
- Get “Alien Registration”/A # if they have it.
 - A# is how ICE tracks people
 - Undocumented clients with no prior US immigration contact will not have one.
- Get contact info for people who might have missing info. and permission to contact them.

IF CLIENT IS NOT U.S. CITIZEN, ADVISE THEM:

- “Don’t talk to ICE or police without me. Don’t sign anything until we discuss it.”
- “Contact me (your criminal defense attorney) if you get detained by ICE and need any documents from your criminal case.”
- “Call me and tell me where you are if your criminal case is still open when you get detained by ICE.”
- “I will look into how your charges may affect your immigration status and let you know soon.”
- “You should speak with an immigration attorney to learn your options for staying in the U.S. and gaining or keeping lawful status”

Give them handouts listed in “Resources for Clients” (on last slide)

ADVICE: SILENCE



*“You have a **right to remain silent** and to **refuse to sign any documents**: ICE or jail officials might ask you questions about your place of birth or whether you have permission to be in the U.S., but you do not have to answer them. If you admit these things, it will give ICE proof they need to put you in deportation proceedings.”*

“It’s also possible that ICE will talk to you, but will decide not to put you in deportation proceedings or detain you.” (So don’t panic, just be prepared.)

Give them WDAIP handout, *Your Rights in an Immigration Interview While in Washington Jails or Prisons* (link at the end of this presentation)

ADVICE: HELPFUL DOCS



“If ICE believes they have a reason to deport you, they can detain you even before your criminal case is finished. If that happens, here is my card/number. You or your family can call me to let me know where you are, and to ask for copies of any documents from this criminal case you may need.”

The most common documents needed in immigration court are:

- Judgment and Sentence; plea statement; charging document (Information/Complaint); probable cause statement; police report.

Other documents that may be helpful:

- Court docket; WATCH report or other list of prior criminal history (most helpful if it includes original charge and final disposition, including sentence imposed and served); diversion agreement; docs that show rehabilitation or mitigating circumstances.

ICE DETAINERS

- Get a copy of any documents filed by ICE (these most commonly include: Form I-247A (Immigration Detainer – Notice of Action), and Form I-200 (Warrant for Arrest of Alien) or Form I-205 (Warrant of Removal/Deportation)).
- If you are in a jurisdiction that *does* honor ICE hold and notification requests, you should warn your client that they are likely to be detained by ICE upon their release from criminal custody.
 - If the client is considering paying their criminal bail, you should warn them that they will likely lose their money if ICE detains them.
- Even in jurisdictions that *do not* honor ICE requests, it is helpful to know if ICE has filed a detainer on your client because it can warn them of ICE's interest in them.

See [here](#) for more on ICE enforcement issues.

ADVICE: IF DETAINED

“If ICE decides to detain you, they will likely come here to the jail and bring you to the Northwest Detention Center (NWDC) in Tacoma. ICE might also detain you somewhere else, such as your work, home or while driving. They might also tell you to come to their offices in Tukwila. If you get a call or letter from ICE to report to Tukwila, contact me or an immigration lawyer ASAP.”

“I am giving you some information about what to expect at NWDC, for you to read and share with your family. The guide explains things like how your family can visit you, talk to you and send you money and mail; how to get legal help; and who is eligible to ask to be released on bond.”

“I am also giving you information about what to expect during deportation proceedings and how to fight your case. Depending on your immigration situation, you will either see an immigration judge or will be deported without seeing a judge. If you do not want to be deported, you might have ways to stay in the U.S. even if you are put in deportation proceedings. You should talk with an immigration lawyer ASAP to learn about your options.”

Give clients handouts: WDAIP Guide to Immigration Proceedings for Criminal Defendants; NWIRP Guide for Detained Immigrants; NWIRP Guide to the Northwest Detention Center; and WDAIP Immigration Attorney Referrals list.

NORTHWEST DETENTION CENTER



INSIDE THE NWDC “PODS”



NORTHWEST IMMIGRANT RIGHTS PROJECT

NWIRP runs a legal orientation program at NWDC where they assist noncitizens in identifying and applying for any discretionary relief that they may be eligible to pursue that would allow them to remain in the U.S. They also provide information about obtaining release on bond, where possible.

After a group rights presentation, the person can sign up to speak with NWIRP individually and see what options they may have.

To be seen by NWIRP: The client can either call directly, or have someone call on their behalf and leave a message. If you have a client whom you know is being taken to the detention center, you can call (253) 383-0519 or email Tacoma at tacoma@nwirp.org. Leave the client's name and, if possible, the "A number."

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AFTER CLIENT'S TRANSFER TO ICE CUSTODY

FINDING YOUR CLIENT

If you know or suspect your client is in ICE custody, you can verify this by:

1. Accessing the [ICE Online Detainee Locator System](#)
2. Calling ICE at (253) 779-6000 ext 14
3. Visiting the NWDC and asking to speak with ICE

You will need your client's country of birth, and either full name or A number (e.g. A12-234-678 or A012-345-678).

CONTACTING YOUR CLIENT

By phone:

- You cannot call your client directly at NWDC, but you can leave them a message and they can call you back. Call the NWDC (253-396-1611) and ask for the Front Desk, and tell them you want to leave a message for a client. Messages are delivered by GEO guards around 8:00 p.m. daily, so if urgent, this is not ideal.
- In general, phone calls made by detainees are recorded and are not confidential.

By mail: Legal mail can be sent to:

[Name and A#]

c/o Northwest Detention Center

1623 East “J” Street, Suite 5

Tacoma, WA 98421

To better ensure confidentiality, write “Confidential Legal Mail: Open only in the presence of [client name].” Still, there’s no guarantee.

VISITING YOUR CLIENT

- If you need to meet with your client in person, attorneys can visit between the hours of 8:00 a.m. and 10:00 p.m., everyday.
- Try to avoid court, which is currently at 10:00 a.m. and 4:20 p.m. and lasts about an hour. Afternoons (1:00 p.m.-5:00 p.m.) are especially busy.
- Any attorney with a bar card can visit (non-attorneys need to be accompanied by an attorney or have pre-approved clearance). No clearance or notice is needed for attorney visits, though you may try to save a place in line by calling the Front Desk of the NWDC (253-396-1611) when you are on your way.
- You will need your client's name and A number (if you don't have the A# you can look it up at the kiosk inside NWDC once you arrive).
- Laptops are allowed (you'll need to sign a release at check-in).
- You can give your client documents, but no binder clips, paper clips or other hard/sharp objects are allowed.

CHECKING IMMIGRATION COURT DATES/CASE STATUS

- The EOIR (Executive Office for Immigration Review) automated number for case information is 1-800-898-7180.
- You will need your client's A#.
- This is helpful:
 - To find out if your client has a prior deportation order, in which case they could be deported quickly without seeing a judge and it is crucial to notify NWIRP of the urgency of the referral.
 - To advise client in resolution of criminal case; clients with final orders may make different decisions about pleas and trials given high odds of deportation with prior order.

IMMIGRATION BOND ISSUES

- Some noncitizens will be eligible for bond. Some will not. See NWIRP's [Guide to the NWDC](#) for more info.
- **Mandatory detention:** Noncitizens are subject to mandatory detention and are ineligible for bond if they are detained by ICE “when released” from criminal custody after conviction for certain crimes (e.g. controlled substances; CIMTs; aggravated felonies). See 8 USC 1226(c) and [Nielsen v. Preap](#) (pending SCOTUS).
 - Tip: If clients are detained while the case is *pending*, they would not be subject to mandatory detention, regardless of the charges. Avoid clients returning to jail if they manage to miss ICE after their initial arrests if they may be convicted of certain crimes.

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QUESTIONS?



DEFENSE STRATEGIES IN CRIMINAL COURT

COMMON SCENARIOS IN PENDING CRIMINAL CASES

- Client still in ICE custody
 - Client released on criminal bail or PR'd but picked up by ICE (at jail)
 - Client released on criminal bail or PR'd but picked up by ICE (at home/work, etc.)
- Client not in ICE custody
 - Client not detained by ICE, not in removal proceedings
 - Client detained but then released on immigration bond
 - Client detained and immigration case was resolved (favorably)

STRATEGIES - CLIENT IN ICE CUSTODY

- ✓ Transport order and/or writ *ad prosequendum* or *ad testificandum*
- ✓ Motion for telephonic appearance and/or to waive client's appearance
- ✓ Motion to quash warrant
- ✓ Motion to continue
- ✓ Motions to dismiss
 1. "Governmental misconduct"
 2. Speedy trial violation if client won't be in court due to ICE action
 3. New charges filed connected to client being in ICE custody (e.g. Bail Jumping)

DEFENSE GOALS FOR CLIENT IN ICE CUSTODY

Depending on client's immigration status, it may be in their interest to resolve their criminal case before they resolve their immigration case.

Example #1: A lawful permanent resident (LPR) charged with possession of cocaine but already in removal proceedings for violating a DV no-contact order may be better off being convicted of the PCS (assuming an alternative immigration-safe plea cannot be negotiated) before the immigration judge decides his application for relief. If he is convicted of PCS now, he is still eligible for relief, but if he is granted relief and is later convicted, he will be deportable again and will be placed back in removal proceedings, this time without the ability to get the same relief.

Defense goal: Resolve criminal charges before final immigration decision (Immigration-safe plea or PGAC)

Strategies: Obtain transport order for sheriff to bring client back to criminal court. If not feasible, move for telephonic appearance or to waive client's appearance.

TRANSPORT ORDERS

- How to obtain the order
- Who to notify at ICE to get approval for release
 - Note: ICE may not approve for low-level misdemeanors (e.g. DWLS, DUI) if person has more serious priors; then, local ICE says interest of U.S. is better served by having the person removed
- Follow-up with jail/sheriff to make sure client is brought to court and back to NWDC (or released) (watch out for limbo)



See sample order from King County Superior Court in the materials, courtesy of Kelly Vomacka.

MOTION FOR TELEPHONIC APPEARANCE

- ICE will facilitate telephone court appearances with an appropriate judicial order to do so.
- This is particularly helpful for misdemeanor practice, as the limited jurisdiction court judges are usually less likely to sign a transport order.

WAIVER OF CLIENT'S APPEARANCE

- When appearance in person or by phone is not possible, try to get client's appearance excused by the court "for good cause shown"
- E.g., if you have negotiated a resolution and client wants to resolve the case before the conclusion of their immigration case.

DEFENSE GOALS, CONT.

Conversely, for some clients it will be better to keep their criminal case pending until after an immigration decision is made.

Example #2: For example, an undocumented client applying for “10-year cancellation of removal” needs to prove “good moral character” (GMC). There is a bar to GMC when a person has actually served 180 days or more as a result of any conviction. Such person would not lose their newly-obtained LPR status by serving 180 days after begin granted cancellation, but would be barred from a grant if they served the time before their final hearing.

Defense goal: Dismiss charges (avoid conviction), or delay until after immigration case is resolved (delay conviction).

Strategies: Motion to continue; motion to dismiss; avoid warrant and bail jump charges



MOTIONS TO CONTINUE OR DISMISS

Basis:

1. “Governmental misconduct” (CrR 8.3(b); CrRLJ 8.3(b))
 - Example: Prosecutor asked ICE to come get client, admitted to it; defender filed declaration and submitted emails prosecutor turned over showing they had communicated with ICE.
2. Speedy trial violation when client not likely to return to court (deported or in long-term ICE custody)
 - See *State v. Chavez-Romero*, 170 Wash.App. 568, 578-79, 584 (2012)
 - See generally, WDA’s [Speedy Trial advisory](#) by Cindy Arends-Elsberry
3. New charges are connected to client failing to appear or report (e.g. Bail Jumping)

CHALLENGING WARRANTS

(AVOID ISSUANCE OF NEW WARRANTS AND MOVE TO QUASH EXISTING WARRANTS)

- Policy arguments for avoiding warrant and dismissing case:
 - When client facing deportation: Court should not be issuing warrants for people who are involuntarily detained, especially as the existence of warrants could impact later proceedings and custody.
 - When client already deported:
 - Does not make sense to issue a warrant to get a defendant to court where it was now illegal for him to re-enter the country in which the court is located. Doesn't serve any purpose, and clogs our systems with extra warrants that we can be sure won't ever get served.
 - Additionally, even if the person did return, it would either be in such a distant time that the evidence and witnesses on the current case would be stale.
- **Tip:** Proving client is/was in ICE custody or has been deported:
 - ICE has a [form](#) that can be submitted by any “criminal justice stakeholder” to request such proof. See [FAQ here](#).
 - Ask imm atty for affidavit stating when client was in ICE custody

CASE SUCCESS STORY: TACOMA MUNICIPAL COURT

- Client facing misdemeanor charges
- Was taken into ICE custody and transferred out of state by ICE
- Prosecuted for illegal reentry and deported
- Based on policy arguments, counsel, Jared Varo, was able to request continuances and avoid warrants while client was in the U.S., and once he was deported, counsel made an oral motion to dismiss, which the court granted.

MISCELLANEOUS STRATEGIES – CLIENT NOT IN ICE CUSTODY

- **Courthouse arrests:** ICE says this method is not their 1st choice, but it still happens. Some judges and prosecutors also notify ICE when a person has court.
 - **Tip:** Warn clients and report any ICE courthouse activity to WDA using our [Google form](#).
- **Bond cancellation:** If your client is released from NWDC on an immigration bond, and is returning to criminal court to answer existing charges, ICE says they will generally not “cancel” their bond and redetain them if they are convicted on charges that existed at the time they were granted a bond. However, we have heard of ICE cancelling a bond when the person served more than 30 days on the existing charge.
 - **Tip:** Contact the ICE deportation officer assigned to their client and warn them that client is about to be convicted on an existing charge; this may help avoid bond cancellation.
 - **Tip:** Get a sentence that will result in client spending less than 30 days in jail.
- **Credit for time served:**
 - **Tip:** If client is being sentenced after being in ICE custody, ask for credit for time they spent there.

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COORDINATING WITH IMMIGRATION COUNSEL

BEST PRACTICES FOR MUTUAL REPRESENTATION

- **Keep harmful records out** of the “record of conviction” to prevent them from being used against the client.
- **Make records available for clients:** Defense counsel can play a significant role in ensuring that non-citizen clients can fight their removal by providing criminal records if requested.
- **Provide updates on criminal case:** It’s helpful for immigration counsel to know about relevant upcoming criminal court dates, pending charges, and all priors.
- **Ask the immigration lawyer** for info you may need from them (e.g. client’s immigration status, case posture, timing)

BEST PRACTICES, CONT.

- **Consult with WDAIP:** Not all immigration attorneys have expertise regarding criminal issues; they (or you) can feel free to consult with WDA to assess consequences.
- **Notify NWIRP:** If you have a client whom you know is being taken to the detention center, contact the Northwest Immigrant Rights Project (NWIRP) at (253) 383-0519 or email Tacoma at tacoma@nwirp.org. Leave client's name and A# if you have it.



QUESTIONS?



EMAIL US!

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NWIRP Tacoma Office - Tacoma@nwirp.org

RESOURCES FOR CLIENTS

- [Guide to Immigration Proceedings for Criminal Defendants \(English & Spanish\)](#)
- [Your Rights When Questioned by Immigration Agents in Jail \(English & Spanish\)](#)
- [NWIRP: A Guide to the Northwest Detention Center](#)
- [NWIRP: Una Guía al Centro de Detención](#)
- [NWIRP: Guide for Detained Immigrants \(English & Spanish\)](#)
- [Protect Yourself From Immigration Raids \(English & Spanish\)](#)
- [ILRC: Family Preparedness Plan \(English & Spanish\)](#)
- [IDP: Emergency Preparedness \(English and Spanish\)](#)

For advisories on immigration consequences of specific crimes and other resources, visit: <https://defensenet.org/resource-category/immigration-resources/>