



PRACTICE ADVISORY: GETTING CLIENTS WITH ICE DETAINERS OUT OF DOC CUSTODY

WHY YOU SHOULD READ THIS: Over the past few months, public defenders have secured release for dozens of clients from DOC custody by challenging the constitutionality of ICE detainers. This advisory outlines how you can get your client out of DOC custody by filing, or threatening to file, a writ of habeas corpus or order to show cause against DOC.

WHO IS ELIGIBLE: Any detained client with an ICE detainer not covered under the existing NYC detainer law whose case will result in a disposition with a non-jail sentence, whose family can pay bail, whose criminal sentence in DOC custody has expired or is set to expire soon, or who is eligible for 170.70 or 180.80 or is otherwise not being held on any bail.

SHOULD YOUR CLIENT WAIT FOR THE NEW DETAINER LAW?

The new law will require ICE to obtain a judicial warrant from a Federal Judge before DOC can honor a detainer. Since ICE currently has no mechanism for obtaining such a warrant, previously ineligible noncitizens are expected to be released. However, the new law doesn't go into effect until 30 days after signing, and this advisory outlines a way for you to obtain liberty for your client now. If your client is likely to spend 30 days or more in Rikers (and thus become eligible for release under the new law), it may be advisable to wait.

BACKGROUND: In June, the Legal Aid Society started a city-wide campaign to challenge ICE detainers using state habeas petitions and orders to show cause. Initially, DOC fought the challenges, but by late summer, DOC's legal department was regularly conceding and released more than 25 of LAS's clients. On October 15th, 2014, LAS's campaign culminated in a victory before Judge Parker, of Kings County Supreme Court, who held that it was a violation of the Fourth Amendment of the U.S. Constitution and Article 1, Section 12 of the New York Constitution for DOC to hold their client on an ICE detainer following the termination of criminal proceedings. In the wake of the Judge Parker decision, BDS has also used writs of habeas corpus to secure release for a number of its clients.

BASIC STRATEGY

STEP 1: Email DOC Legal Department notifying them of intent to file court documents.

STEP 2: Pick a Litigation Method: Writ of Habeas Corpus or Order to Show Cause.

STEP 3: File and Argue the Writ or Order to Show Cause.

STEP 1: EMAIL DOC LEGAL

First, call or email DOC Legal and verify that your client will be held on an ICE detainer upon payment of bail, disposition with a non-jail sentence, or expiration of a criminal sentence in DOC custody.

Second, once you verify that DOC plans to detain your client after their legal authority to do so has ended, send an email to DOC's Legal Department notifying them that such continued detention would be illegal. For this reason, a new detainer law will require ICE to provide a warrant from a Federal Judge before DOC may honor a detainer. The letter should notify DOC that you will file a writ or order to show cause if they do not release your client when their legal authorization to hold her expires. **A sample letter is attached.**

WORDS OF CAUTION: There is always a risk that ICE could be called or try to pick up your client before the writ or order to show cause can be heard. Attorneys haven't seen this happen since the summer, but you should discuss this risk with your client.

Who to Contact: Email the letter to Heidi.Grossman@doc.nyc.gov, William.Horan@doc.nyc.gov, and Florina.Getman@doc.nyc.gov. Please BCC the Immigrant Defense Project at lwang@immigrantdefenseproject.org so that we can track these requests. DOC is already flooded with these requests so it is advisable to send the letter as soon as possible and to follow-up with a phone call when your client's release is imminent. Bill Horan and Florina Getman are the primary point people handling these requests.

- **PRACTICE TIP:** Some attorneys have obtained release for their clients by simply sending an email to DOC and not preparing court documents. Others have been told that court documents were necessary to trigger review of their client's case. If you don't have the resources to prepare court documents, it may still be worth trying an email to DOC.

STEP 2: PICK A LITIGATION METHOD

Advocates have used two litigation methods depending on whether clients were pre- or post-disposition.

- 1) **Writs of habeas corpus:** for clients who are going to be released from criminal custody because of disposition without jail sentence, payment of bail, or completion of their sentence in DOC custody.
- 2) **Orders to Show Cause:** for clients who are pre-disposition but want get out of criminal custody. Depending on what county you are in, you may need to file an OSC in criminal court or reformat the order as a civil Article 78.

This advisory was prepared by the Immigrant Defense Project. The information contained herein does not constitute legal advice and attorneys should conduct their own research as they deem necessary. Further questions about this advisory should be directed to Lee Wang, lwang@immigrantdefenseproject.org.

Your litigation method may also depend on the county where you file. According to attorneys, some judges insist that they do not have jurisdiction to hear writs or orders to show cause. Below is the most current information we have from attorneys on what can be filed where.

- **BRONX: WRITS AND OSC (CRIMINAL)**
- **STATEN ISLAND: ATTORNEYS HAVE ONLY FILED IN BRONX AND BROOKLYN.**
- **BROOKLYN: WRITS AND OSC (ART.78)**
- **MANHATTAN: WRITS AND OSC (CRIMINAL)**
- **QUEENS: OSC (ART.78) ONLY**

STEP 3: FILE AND ARGUE THE WRIT or ORDER TO SHOW CAUSE

If DOC refuses to release your client after receiving the email, or insists that it needs court documents to review your client's case, go ahead and file. **Sample documents are attached.**

	WRIT	ORDER TO SHOW CAUSE (CRIM /ART. 78)
TIMING	File and serve the same day as disposition.	File and serve at least one week before disposition.
DOCUMENTS TO FILE	1) Writ of Habeas Corpus 2) Verified Petition 3) Memorandum of Law	OSC- Crim 1) Order to Show Cause 2) Affirmation 3) Memorandum of Law OSC-Art. 78 1) Order to Show Cause 2) Verified Petition 3) Memorandum of Law
WHERE TO FILE	Supreme Court Civil: File in county where criminal charges were brought or county of detention.	OSC-Crim: Supreme Court Criminal in the county where criminal charges were brought. OSC- Art. 78: Supreme Court Civil in the

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		county where criminal charges were brought.
# OF COPIES	6 copies- self; DOC (local); DOC (headquarters); local DA's office; Supreme Court civil justice	6 copies- self; DOC (local); DOC (headquarters); local DA's office; Supreme Court criminal judge or civil justice
SERVING	Local County DA Clerk's Office Courtesy to part DOC Headquarters Queens (closes at 6 pm)- 75-20 Astoria Blvd., East Elmhurst, NY 11370	Local County DA Clerk's Office Courtesy to part DOC Headquarters Queens (closes at 6 pm) - 75-20 Astoria Blvd., East Elmhurst, NY 11370
THINGS TO DOCUMENT	<ul style="list-style-type: none"> ✓ Document what time client takes disposition ✓ Prior to filing, check the Rikers inmate look up and verify that your client is still there and not handed over to ICE. Document the time and result. ✓ Document time Judge signs the writ/order. ✓ Document time that all parties are served. ✓ After serving, check DOC's website and make sure client isn't released to ICE. Document the time and result. 	
PRACTICE TIPS	<ul style="list-style-type: none"> ✓ Once the client takes the plea, put on the record that the clerk should fill out a Certificate of Disposition. ✓ If your client's family can pay bail, provide an affidavit from the family. ✓ Don't waive your client's appearance. That way you can file a contempt motion if your client fails to appear. ✓ For writs, when the judge asks when you want return of your client, you can request return in the afternoon if the disposition was in the morning, or return the next morning if disposition was in the afternoon. ✓ Writs are logistically difficult because you have to get everything done in one day. If you can, use two attorneys: one to witness the final disposition and 	

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	another to file the writ as soon as final disposition is confirmed. Also, immediately after the judge signs the writ, email or fax it to DOC in addition to personal service. Some attorneys have negotiated later service deadlines to DOC headquarters in Queens.
ARGUING THE WRIT	<ul style="list-style-type: none"> ✓ Most writs have been heard at 2:30 pm the day after they're filed. ✓ If DOC doesn't show up, or if your client is handed over to ICE, you should still show to argue the writ and make a record. ✓ Argue that 1) DOC was properly served; 2) DOC still handed over the client despite being put on notice; and 3) DOC should be held in contempt.

ATTACHMENTS

Sample Email to DOC Legal Department

Sample Writ of Habeas Corpus

Sample Order to Show Cause (Criminal)

Sample Order to Show Cause (Article 78)

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