Contact: Maria Cilenti - Director of Legislative Affairs - mcilenti@nycbar.org - (212) 382-6655

February 3, 2011

The Honorable Christine C. Quinn
Speaker, New York City Council
250 Broadway, Suite 1856
New York, NY 10007

Re: Proposal to Limit Collaboration Between New York City Department of Correction ("DOC") and U.S. Immigration and Customs Enforcement ("ICE")

Dear Speaker Quinn:

On behalf of the New York City Bar Association's Criminal Courts Committee, Immigration and Nationality Law Committee and Corrections Committee, we write to urge the City Council to pass legislation that would limit DOC's collaboration with ICE in the holding of immigrant New Yorkers under ICE detainers. DOC's current collaboration policy costs the City millions of dollars every year, imposing a tremendous financial burden on the City's limited resources. The policy also causes significant harm to the City's residents while creating substantial roadblocks in the criminal justice system. Nothing proposed in this letter would serve as a legal impediment to ICE's power to place any individual in removal proceedings.[1]

About Us

The Criminal Courts Committee of the New York City Bar Association ("City Bar") is composed of city judges, prosecutors, defense attorneys, and law professors with a range of perspectives who together seek to improve the operations of the New York City Criminal Court and the Criminal Term of the New York State Supreme Court. The Immigration and Nationality Law Committee of the City Bar, composed of immigration lawyers, addresses legal issues that arise from immigration and nationality law. The Corrections Committee of the City Bar is composed of judges and government, public-interest and private-sector lawyers, and addresses legal issues including conditions of confinement; access to justice for prisoners, detainees and people with conviction histories; and prisoner reentry.

[1] ICE can always initiate removal proceedings against an individual by serving him with a Notice to Appear or other charging document and filing that document with an immigration court.

Action to Limit DOC's Collaboration with ICE Would be Timely and Justified

The City Council's attention to ICE's presence and activities on Rikers Island and DOC's collaboration with ICE on federal immigration enforcement comes at a critical time. Comprehensive immigration reform at the federal level has become unlikely in the near future. As a result, the City's large and thriving immigrant population remains vulnerable to the federal government's enforcement-only agenda of detection, detention and deportation. ICE's placement of immigration detainers against both pre-conviction and post-conviction immigrant detainees at DOC facilities comprises the single largest means by which New Yorkers end up in immigration detention; each year 3,000-4,000 New Yorkers are transferred from DOC to ICE custody.[2] Given the federal government's emphasis on enforcement, these numbers will likely increase if DOC continues to accede to every ICE detainer request.[3]

Many New York City immigrants have valid and strong defenses against deportation when placed in removal proceedings. Many immigrants are lawful permanent residents, refugees, and other immigrants who may be eligible for waivers of deportation. Even undocumented immigrants may also have strong defenses against removal. For example, undocumented immigrants may have a current or foreseeable basis to obtain lawful permanent residence through a family member. They may have been victims of trafficking or other crimes that provide a basis for their obtaining special visas designed to protect them. They may have legitimate asylum claims based on their fear of persecution if returned to their home countries. In addition, their criminal case may result in a dismissal or other disposition that does not block the availability of these defenses. Nevertheless, if they spend any time at Rikers and an immigration detainer is lodged against them, these individuals end up trying to fight their deportation cases from detention facilities as remote as Louisiana and Texas, far away from family and access to adequate legal counsel; as a result they are often unable to defend themselves against their removal charges.[4]

If left unexamined and unrestrained, DOC's extensive collaboration with ICE would remain inconsistent with New York City's interests in protecting the due process and other rights of its immigrant residents. As elaborated below, ongoing and unlimited collaboration also raises economic and public safety concerns. Finally, it would run counter to the City's criminal justice goals.

---

[2] *See* ICE FOIA Response Letter to Prof. Nancy Morawetz, New York University School of Law, dated Dec. 12, 2008.

[3] The City Bar, through its Civil Rights Committee, is urging New York State to rescind its May 10, 2010 memorandum of agreement with ICE to participate in the Secure Communities program. This program would permit ICE to access the fingerprints of individuals in local law enforcement custody and compare those prints with ICE's own database.

[4] *See, e.g.*, Human Rights Watch.*Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States* (Dec. 2, 2009); Office of Inspector General, Dep't of Homeland Security, *Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers*,OIG 10-13 (Nov. 2009).

DOC's Current Collaboration Policy Wastes Valuable City Resources

Recent preliminary findings by Justice Strategies indicate that noncitizens at Rikers Island with an immigration detainer spend an average of *73 days longer in jail* before being discharged than people without an ICE detainer.[5] The unreimbursed cost to the City of this prolonged detention, if the cost of DOC personnel and facilities necessary to hold these thousands of immigrant New Yorkers each year is included, surely runs in the tens of millions of dollars.[6] The unreimbursed cost to the City must run an additional millions of dollars if the costs of delayed justice are factored into the equation. Because the immigration detainer complicates a plea bargaining resolution that would otherwise be straightforward, practical, and just, these costs of delayed justice include the costs to the City for transportation of detainees to and from court, as well as extended case processing costs for the District Attorneys' offices, the public defense providers, and the courts.

The City has Authority to Pass Legislation that Limits DOC's Holding of New Yorkers Under ICE Immigration Detainers

As ICE publicly recognizes, its civil detainers are *requests* - not mandates - to local law enforcement agencies to detain named individuals for up to forty-eight hours after they would otherwise be released from criminal custody, to allow ICE the opportunity to take these individuals into immigration custody.[7] *New York City and DOC, therefore, are not legally obligated to collaborate with federal immigration detention requests.*

Nevertheless, DOC currently collaborates extensively with ICE toward its enforcement policy. DOC: (i) allows ICE agents to maintain a presence at DOC's facilities; (ii) allows ICE agents to interview DOC detainees and sentenced inmates at DOC's facilities; (iii) shares DOC inmate database information with ICE, including whether or not a DOC inmate is foreign-born; and (iv) detains people at DOC facilities on civil immigration detainers issued by ICE for up to 48 hours after they would otherwise been released from DOC facilities.[8] DOC engages in this

---

[5] Justice Strategies, *New York City Enforcement of Immigration Detainers, Preliminary Findings* (October 2010).

[6] *See* City of New York, Office of the Mayor, *Mayor's Management Report* (September 2010) at 150, which indicates average cost per inmate per year to be more than $76,229 in FY 2010). Based on that figure, the average cost per inmate per day is $208, which multiplied by 73 days comes to a cost of more than $15,000 per each of the 3,000-4,000 New Yorkers transferred from DOC to ICE custody every year.

DOC receives some federal money every year under the State Criminal Alien Assistance Program ("SCAAP"), a program that provides federal payments to localities to cover a fraction of the costs incurred for incarcerating certain pre-trial, undocumented immigrants (those with one felony or two misdemeanor convictions and who have been incarcerated for at least four consecutive days). This SCAAP funding is not, however, dependent on DOC's holding people under ICE detainers. DOC's receipt of SCAAP funding should therefore remain unaffected by anything proposed in this letter. In any event, any possible reduction in SCAAP funding as a result of legislation proposed in this letter (to the extent such legislation reduces pre-trial incarceration of qualified immigrants) would only be caused by a much greater reduction in DOC's overall costs of holding immigrants under ICE detainers.

[7] *See, e.g.,* Letter from David Venturella, Assistant Director of ICE, to Miguel Martinez, County Counsel, County of Santa Clara, California, in or about September 2010.

[8] NYC Council FY 2011 Preliminary Budget Hearing, March 10, 2010, NYC Council FY 2011 Executive Budget Hearing, June 1, 2010.

collaboration with ICE as a matter of course without any apparent exercise of discretion, against immigrant New Yorkers *before* they have been convicted of any crime, and whether or not they have been in the United States for many years. Current DOC practice even allows for immigration detainers to issue against teenagers and other young people under 21 years old, victims of trafficking and other crimes, the physically and mentally disabled, primary caretakers of children, and people with U.S. citizen immediate relatives.

City legislation should impose limits on the scope and nature of DOC's collaboration with ICE. It should create a framework for the collaboration that would allow immigrant New Yorkers to face deportation charges here in New York, rather than in remote places far away from supportive family members and available *pro bono* or otherwise affordable legal counsel. These limitations would result in significant cost-saving, as well as fair and reasonable parameters for DOC's practices in the holding of immigrants under ICE detainers.

The following are our legislative recommendations:

- <u>Where no criminal conviction has yet resulted: (i) prohibit DOC from holding immigrants under ICE detainers; and (ii) condition DOC's sharing of pre-trial detainee records with ICE on the severity of the crime charged</u>. Every year, thousands of pre-trial detainees held at Rikers Island are there because they have been arrested for low-level, non-felony criminal charges (such as smoking marijuana in public, jumping a subway turnstile, or shoplifting) and, because they are indigent, are unable to post even a modest bail amount set by the criminal court.[9] Our understanding is that ICE's enforcement priorities focus on a much more select group of removable immigrants who have been *convicted* of serious crimes, such as "aggravated felonies," or who already have deportation orders entered against them. Yet ICE currently issues detainers against both pre-trial Rikers detainees whom it suspects are removable, as well as post-conviction inmates who are serving time on their sentences. DOC currently shares with ICE internal data on immigrants who have only been charged, but not convicted, of criminal offenses. Furthermore, DOC shares this data even in the cases of individuals with low-level, non-felony charges. Finally, DOC keeps these people under ICE detainers even when the criminal court has set a relatively low criminal bail that the defendant's family is ready and willing to pay.

  To ensure that the City assists ICE only in a manner more consistent with ICE's own enforcement priorities, the City should prevent DOC from holding pre-trial detainees under ICE detainers, at least unless and until a conviction for a crime is entered by the criminal court. Moreover, the City should limit DOC's potential sharing of its data on immigrants who have not yet been convicted of a crime. DOC should limit that potential data sharing to those instances where the top charge is for a felony. If a person has been charged with a felony, DOC should then exercise its discretion as to whether to share information with ICE. Factors to consider in this exercise of discretion should include whether a person is suffering from serious physical or mental illness, disabled, elderly, a juvenile, pregnant, nursing, or otherwise particularly vulnerable.[10]

---

[9] *See* Secret, Mosi, "N.Y.C. Misdemeanor Defendants Lack Bail Money," *New York Times* (Dec. 12, 2010).

[10] Indeed this would be consistent with ICE's own stated enforcement priorities. "*Absent extraordinary circumstances or the requirements of mandatory detention, field office directors should not expend detention*

- Where a criminal conviction does ensue, condition DOC's holding an individual under an ICE detainer on the severity of the conviction. For the thousands of pre-trial detainees facing low-level charges, the disposition of their cases often results in a conviction for a violation such as Disorderly Conduct, or another lesser offense than the crime charged, if it results in a conviction at all. Other detainees who are ultimately convicted of a crime often receive a non-jail sentence, such as probation or community service, or receive only a modest jail sentence because the severity of the crime does not merit more. The City should require DOC to limit its potential holding of people under ICE detainers to only those instances where the conviction is a serious one. We propose that the threshold conviction be (i) for a felony that (ii) resulted in a jail sentence of more than six months. If a person has been convicted of a felony and sentenced to more than six months, DOC should then exercise its discretion as to whether to comply with an ICE detainer with respect to a particularly vulnerable individual.[11] In this manner, the City would ensure that individuals who have been convicted of minor offenses, or who are particularly vulnerable, remain free from routine ICE detention. ICE can still, if it so chooses, initiate removal proceedings against any individual it believes appropriate by serving him with a Notice to Appear or other charging document and filing that document with an immigration court.

- Even where a felony conviction ensues and the sentence imposed exceeds 6 months, condition DOC's compliance with an ICE detainer on sufficient evidence from ICE demonstrating the legitimate basis for the detainer's issuance. DOC should ensure that its compliance with ICE detainers is based on sufficient evidence of the detainer's legitimate basis, such as evidence that a Notice to Appear or other ICE charging document has been served on the individual *and* filed with the local immigration court. This additional restriction on DOC's compliance with ICE detainers would serve two purposes. First, it would provide the City some assurance that ICE has performed a sufficient level of investigation regarding the immigration charges underlying the detainer. Second, it would afford New Yorkers transferred from DOC to immigration custody the opportunity to face their removal charges here in New York.

  Currently ICE issues its detainer on a Form I-247, which informs the local law enforcement agency that ICE has taken one of four actions which purport to serve as the basis for the request to hold someone for up to 48 hours beyond their normal release date from criminal custody: (1) investigation has been initiated to determine whether the individual is removable; (2) a Notice to Appear or other charging document has already been served on the individual; (3) a warrant of arrest in removal proceedings has already been issued; or (4) deportation or removal has already been ordered. A detainer that

---

resources on aliens who are known to be suffering from serious physical or mental illness, or who are disabled, elderly, pregnant, or nursing, or demonstrate that they are primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest." *See* Morton, John, ICE Assistant Secretary, "Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens" (Policy No. 10072.1; FEA No. 601-14). And in the exercise of prosecutorial discretion, "[p]articular care should be given when dealing with lawful permanent residents, juveniles, and the immediate family members of U.S. citizens." *Id.*

[11] See footnote 10 above.

confirms merely that "investigation has been initiated" falls far short of any adequate explanation as to why an individual should be held by DOC for up to 48 hours beyond his normal release date. It is extremely disturbing that the City restrains a person's liberty upon on a mere "notice," issued by a non-judicial ICE officer and without basis in any showing of probable cause. Such a policy might well deprive individuals of their liberty without due process of law. More so where no detailed explanation of the "investigation" is given. Rather than take ICE's word on the mere existence of an investigation, the City should prohibit DOC compliance with any detainer that does not confirm that a charging document has been served on the individual and filed in the local court, and that does not attach a copy of that charging document to the detainer.[12] In this manner, the City can ensure that individuals are afforded notice of ICE's factual allegations and charges of removal against them (the purported basis for the detainer).

Where a Notice to Appear or other charging document has not been served on an individual *and filed* with the New York Immigration Courts, the individual held by DOC beyond his or her normal release date from Rikers may subsequently be detained by ICE and placed in removal proceedings anywhere in the country, often far from New York. The City cannot dictate to ICE where to detain immigrants or where to file a charging document. By limiting the circumstances under which DOC will accede to ICE "requests," however, the City *can* protect New Yorkers against the onerous and prejudicial circumstance of remote detention. Requiring a detainer to confirm that a charging document has been served and filed in a local immigration court as a condition of DOC compliance with the detainer would ensure that New Yorkers transferred from Rikers to immigration custody are afforded the opportunity to face the removal charges against them here in New York, even if they are detained during the proceedings.[13]

Additional Reasons Why Limiting DOC's Collaboration with ICE is Warranted

Current DOC collaboration with ICE undermines public safety. It also interferes with the criminal justice system's goals and priorities.

- Undermines public safety. The perception that a criminal arrest will automatically lead to immigration detention and deportation undermines the trust of the immigrant and ethnic communities in local law enforcement. This perception, and DOC's contribution to it through its extensive collaboration with ICE, can have a chilling effect on immigrant New Yorkers who may wish to report a crime for fear that any interaction with police and the courts will result in the deportation of their immigrant family member or loved one. As a matter of public safety, the City's police and prosecutors have cultivated a

[12] We do not request here that DOC should be prohibited from compliance where a warrant of arrest has been issued or where deportation or removal has already been ordered.

[13] The City would incur no increased costs if New Yorkers were transferred to and held in immigration detention facilities in or near New York, as opposed to in remote locations. The cost of immigration detention is assumed by the federal government.

relationship of trust with the immigrant communities.[14] Immigrant fear of coming forward to report a crime will result in a less safe New York. This result is most apparent in the domestic violence context. Many victims of domestic violence will be reluctant to come forward to report abuse if they fear that doing so will lead to their abuser's deportation. Others who do come forward often are shocked and appalled to learn that their coming forward results in such a disproportionate result as detention and deportation. As a result, they refuse to press charges. Most of the domestic violence incidents in the judicial system are misdemeanor charges, and in many instances the defendant is the family's primary or sole provider, one with whom the complainant has been for many years, and with whom the complainant shares children. District Attorney offices work closely with domestic violence victims to ensure proper punishments and to prioritize the needs of the victim and the victim's children (statistics show that the vast majority of domestic violence "victims" are women). The appropriate punishment, and the needs of the victim, in many cases call for a resolution that keeps the family together, often requiring a defendant to engage in "counseling" and to abide by an order of protection, yet permitting the defendant to have contact with, and to provide support for, the victim and children. Deportation, for many of these cases, is the last result that the victim and her children want or need. If victims know that DOC collaboration with ICE will result in an immigration detainer against the abuser, victims will stop calling the police.

- Interferes with criminal justice system goals and priorities.

  - In New York City, there are multiple alternative to incarceration possibilities for criminal defendants - citizen and noncitizen alike - who pose no threat to public safety and are strong candidates for pre-conviction participation in mental health court, drug treatment programs, and other diversion programs. There are many instances in which judge, prosecutor, defense attorney, defendant and other criminal justice stakeholders all agree that such alternative is the best course of action for the defendant, our community, and in the interest of justice. To participate in such programs, however, the client must be at liberty, and the issuance of an immigration detainer prevents this possibility.[15]

  - In other instances, at arraignment, the Criminal Court judges set only a low bail amount for a noncitizen defendant, after determination that the defendant poses little risk of flight. If the defendant's family or friends cannot post the bail on the day of that determination, the defendant is then taken to Rikers, where the ICE detainer is issued against him. Issuance of the ICE detainer prevents the defendant's release, even when family and friends are later ready to post the criminal bail. The result is forced detention of people, sometimes for months or years, before final disposition of their criminal case. This places a heavy burden

[14] As part of this effort, for example, District Attorney offices make no distinction between crime victims who are citizens and those who are not (except when they may assist undocumented crime victims to achieve certain immigration protections).

[15] *See* New York City Bar Association, Committee on Criminal Justice Operations, *Immigration Detainers Need Not Bar Access to Jail Diversion Programs* (2009).

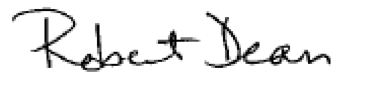
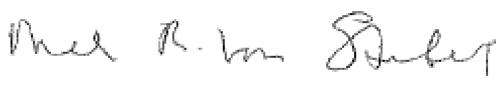
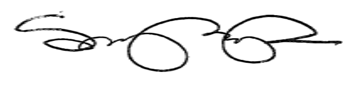
on criminal justice system resources. Defense counsel who would otherwise counsel their clients toward speedier resolution of a case are forced instead to request multiple continuances as they investigate the impact of immigration considerations on the criminal case. Prosecutors' offices are forced to maintain these cases over longer periods of time. Within a system that is already burdened by overwhelming dockets, courts are frustrated by the difficult and lengthy processing of these cases in particular.

- Some judges may set a high bail for an undocumented defendant even if the defendant poses no risk of flight. These judges are concerned that if a low bail is set, the defendant will "disappear" into immigration detention once their family members post bail. Often, many noncitizen defendants do indeed get whisked away to remote ICE detention facilities. Although they may wish to answer their criminal charges, they are either never produced in criminal court by ICE, or are produced only with great difficulty and expenditure of time and resources by the criminal justice system.

Conclusion

For the above reasons, we urge the City Council to enact legislation that limits DOC's sharing of information with ICE and holding of New Yorkers under immigration detainers. In the ways proposed above, the City would save valuable resources for which it is not reimbursed by the federal government, while ensuring that there are reasonable restraints in place that protect immigrant New Yorkers from a federal immigration enforcement policy that does not serve the ends of justice.

Very truly yours,

Robert Dean, Chair
Criminal Courts Committee
Committee

Mark Von Sternberg, Chair
Immigration & Nationality Committee

Sara Manaugh, Chair
Corrections

cc: Councilmember Domenic Recchia
Chair, City Council Finance Committee

Councilmember Daniel Dromm
Chair, City Council Immigration Committee

Councilmember Elizabeth Crowley
Chair, City Council Fire and Criminal Justice Committee