

New York Lawyers for the Public Interest Guidance to Nonprofits Regarding Immigration Enforcement

We have entered a startling era of uncertainty in the long battle for civil rights and social justice. For 40 years, New York Lawyers for the Public Interest (NYLPI) has partnered with the private bar and community leaders to bring the power of law and organizing to where it's needed most. NYLPI works with hundreds of nonprofit partners towards creating a New York where all people can thrive in their communities, with quality healthcare and housing, safe jobs, equal schools, and healthy neighborhoods. With the rise in aggressive immigration enforcement by the current administration, dozens of nonprofits approached NYLPI for advice about how to conduct business and convey to their clients that they may continue to seek services.

With pro bono partners Paul, Weiss, Rifkind, Wharton & Garrison LLP and Stroock & Stroock & Lavan LLP, we developed this guide to outline the rights of nonprofits to protect their immigrant clients and establish best practices. This guide was also heavily informed by a stellar advisory drafted by Northwest Immigrant Rights Project. The significant increase in immigration arrests—including in and around courts, public buildings, and sensitive locations such as places of worship and schools—has caused feelings of panic in immigrant communities. Many of our own clients express fear of going to court and to health care providers to receive life-saving medical care because of the perceived dangers of immigration enforcement. Nonprofits and service providers must send a strong message to immigrant communities by establishing explicit policies.

About NYLPI

Founded 40 years ago by leaders of the bar, New York Lawyers for the Public Interest pursues equality and justice for all New Yorkers. NYLPI's community-driven approach powers its commitments to civil rights and to health, disability, immigrant, and environmental justice. NYLPI seeks lasting change through legal representation, community organizing, policy advocacy, pro bono service, public education, and litigation. Our Pro Bono Clearinghouse strengthens communities by providing innovative nonprofits with free legal services, drawing on lawyers from New York's most prestigious law firms and corporate law departments. It helps nonprofits and community groups thrive by providing resources that help organizations overcome legal obstacles, build capacity, and develop more effective programs. Through educational workshops, trainings for nonprofit leaders, individual counseling, and a series of publications, the Clearinghouse is at the forefront of helping nonprofits maximize their performance and their impact on our community.

For more information please visit us at www.nylpi.org or call us at 212.244.4664 for pro bono assistance with your organization. Disclaimer: These resources are for informational purposes only and do not constitute legal advice. For answers to specific legal problems, issues or questions, obtain the advice of a qualified attorney in your area.

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How likely is it that immigration agents might come to a nonprofit service provider?

No one can be sure given the shifting immigration enforcement priorities, but as of the issuance of this document we have not seen any pattern of enforcement actions by Immigration and Customs Enforcement (ICE) at or near nonprofit service providers. Given the significant increase in immigration arrests recently, nonprofits serving immigrant communities should establish policies to ensure that their clients are protected to the fullest extent of the law when using their facilities and services (see model policies in Appendix A).

Can a nonprofit deny immigration agents entry into its facility?

Areas open to the general public (*i.e.*, public space—such as a reception area or a library reading room) are also open to immigration agents, and they may enter without a warrant.¹ In doing so, ICE agents must observe the same rules that any member of the public would. For example, ICE agents operating without a warrant would not have the right to disrupt the nonprofit’s activities or mission. Note that ICE agents may take photographs in public spaces.

ICE agents must have a **judicial** search or arrest warrant to lawfully access nonpublic areas (*i.e.*, areas not open to the public—such as private offices or areas in a homeless shelter where people sleep).² Such a warrant is always signed by a judge or magistrate within 14 calendar days and identifies specific areas to be searched (see example of a judicial search warrant at Appendix B). ICE agents may have “administrative” warrants signed by an immigration officer, not signed by a judge or magistrate. Administrative warrants, unlike judicial search warrants, do **not** authorize ICE entry to nonpublic areas (see excerpt of an administrative warrant at Appendix C). If agents seek entry into nonpublic areas with an administrative warrant, not a judicial warrant, it is lawful to deny entry—so a nonprofit should instruct staff not to consent to entry in such circumstances.

Note that ICE agents sometimes wear uniforms that say “Police,” even though they are not police officers. Staff may ask whether those seeking entry are police or ICE agents. No matter the agency involved, the same judicial warrant requirement applies—meaning that both police and ICE agents must have a judicial search warrant to enter nonpublic areas. If ICE agents do not have a judicial warrant, staff should ask the agents to wait to enter any nonpublic areas until the staff contacts counsel

¹ Whether a space be considered “public” or “private” under Fourth Amendment standards is a fact specific inquiry that would be unique to a particular nonprofit facility.

² While a warrant is generally required, in certain circumstances law enforcement may enter non-public areas without a warrant and/or make an arrest without a warrant. Typically those limited exceptions to the warrant requirement are triggered by some urgency related to an investigation of specific criminal activity (e.g., an “exigency”). However, a warrant is required for immigration enforcement actions as described here, which target individuals simply based on their undocumented status.

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and are legally entitled to tell the agents to leave the premises. If ICE agents do have a judicial warrant, staff may ask the agents to wait to enter any nonpublic area until staff contacts counsel, but the agents need not wait if the judicial warrant authorizes them to enter nonpublic areas.

Nonprofits should not provide information about clients unless ICE agents have a judicial warrant or subpoena specifically requiring the release of that information or the client consents to the release of this information. If ICE enters with a subpoena rather than a judicial warrant, staff should contact counsel before complying with the subpoena. As is also discussed below, however, nonprofits may be prohibited from releasing certain information as a matter of law. ICE agents may not require access to information contained on a personal phone or email account without a judicial warrant. However, any information saved on a publicly accessible computer (e.g., in a library reading room) can be accessed without a warrant.

What can staff tell clients during an immigration enforcement action?

Staff members should tell clients that they have the right to ask for an attorney and to remain silent if ICE agents ask questions. Staff may also encourage clients to remain calm and not attempt to leave while ICE agents are present. Staff should not hide or conceal any person on the premises. However, this does not mean that staff is obligated to produce a client for ICE agents, unless the agents have a judicial arrest warrant (i.e., a warrant signed by a judge authorizing the arrest of a specific individual).

What should staff members do if ICE agents question them?

Staff members should ask ICE agents if they are free to go. If the agent says “yes,” the person is free to leave. If the agent says “no,” the person should ask to consult with an attorney and should otherwise remain silent. Staff should **never** make a false statement (e.g., if ICE agents ask about an individual who is in the building, staff should not say the person is not there). They should instead decline to answer questions and consult with a supervisor who has been trained to handle this situation by calling counsel.

Are there special protections for certain nonprofits based on the nature of service provided?

The same general rule applies to all nonprofits: ICE agents may enter any space open to the public and must have a judicial arrest or search warrant to enter space not open to the public. However, “sensitive locations” policies adopted by ICE in the past discourage enforcement actions at certain locations and require agents go through supervisory review if actions are undertaken (except in certain exigent circumstances).³ The list of “sensitive locations” includes, but is not limited to, schools, hospitals, and institutions of worship. Additionally, ICE agents have been instructed to use particular

³ U.S. Immigration and Customs Enforcement, *Enforcement Actions at or Focused on Sensitive Locations* (Oct. 24, 2011), available at: <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf>.

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care with organizations that assist children, pregnant women, victims of crime or abuse, or individuals with significant mental or physical disabilities. Note that this general sensitive location policy is subject to change or termination by ICE at any time.

What if a client is detained in or near the nonprofit facility?

Staff has the right to observe from a reasonable distance but should not interfere with the actions of ICE agents. Staff may ask for the names of ICE agents. If agents are in plainclothes, staff may ask to see credentials and make note of agents' names and badge numbers. Staff may lawfully take video to make a record of the action.⁴ Staff may ask ICE agents' permission to obtain from a detained client the contact information of anyone who should be informed of the client's detention (e.g., a family member, friend or attorney). Staff may also ask where the client will be detained. If the detained client authorizes them to do so, staff may provide all information obtained from ICE agents to the friend or family member so identified.

May nonprofits provide clients with "Know Your Rights" resources?

Yes. Nonprofits may offer written materials or presentations for clients. Note that many civil rights and immigrants' rights organizations have prepared "Know Your Rights" guides.⁵

What is the appropriate way to handle a "subpoena" related to ICE enforcement activities?

A subpoena is a written request for information. A subpoena is not a court order, is typically not signed by a judge, and **always gives a certain amount of time to comply**. Failure to respond to a valid subpoena may result in a contempt of court finding. Upon receipt of a subpoena, nonprofits should take note of the date it was served, method of service, and deadline for responding. Nonprofits should then promptly engage counsel and instruct staff to preserve potentially relevant documents.

Can a nonprofit avoid disclosure of information in response to a subpoena?

Federal law protects certain personal information from a subpoena. The Health Insurance Portability and Accountability Act ("HIPAA") protects individually identifiable health information, which generally can only be disclosed in response to a subpoena after the nonprofit holding the requested information has taken certain steps, including notifying the patient or obtaining the patient's authorization. The Family Educational Rights and Privacy Act (often called "FERPA") protects students' education records, which schools generally may not produce without taking certain steps to notify the student or parent.

⁴ Nonprofits may elect to advise employees to first announce their intent to video—not because doing so is legally required in this context—but in order to prevent a dispute with ICE agents who may not understand the relevant legal protections.

⁵ For example, ACLU's Know Your Rights guide is available at <https://www.aclu.org/files/kyr/MKG17-KYR-PoliceImmigrationFBI-OnePager-English-v01.pdf>, and a toolkit jointly prepared by the Immigrant Defense Project and Center for Constitutional Rights is available at <https://www.immigrantdefenseproject.org/raids-toolkit/>

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Nonprofits will likely be most concerned about subpoenas that request clients' confidential information like names, addresses, phone numbers, Social Security numbers, and other personal identifying information. This information may be protected from disclosure through the methods discussed above. When responding to a subpoena, nonprofits should only turn over those non-privileged documents requested and should not volunteer information.

As a general matter, nonprofits that receive a subpoena requesting clients' personal information should consult counsel to determine if the subpoena can be blocked in whole or in part. Moreover, in order to ensure maximum privacy for clients, nonprofits should consider instructing staff to avoid memorializing information about undocumented clients' immigration status unless this would interfere with the function of the organization.

What if a subpoena is issued to nonprofit legal services providers?

Legal services providers and other nonprofits must be careful not to produce privileged documents. Documents containing communications with an attorney for the purpose of obtaining/rendering legal advice are protected by the "attorney-client privilege" and should not be produced. Documents prepared for purposes of litigation by counsel, or prepared by a client at the direction of counsel, are protected by the "attorney work-product doctrine" and should not be produced. Instead, counsel for a nonprofit will produce a "privilege log" cataloging all such protected documents.

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APPENDIX A⁶

SAMPLE PROTOCOL REGARDING INTERACTIONS WITH IMMIGRATION AGENCIES

Note: This template is a generic protocol. We encourage each agency to consult with counsel to evaluate and provide advice as to appropriate policies and procedures.

POLICY

It is the policy of [Nonprofit] to ensure that our clients are safe and protected when they use our facilities and services. [Nonprofit] will take steps to the greatest extent possible under the law to protect our clients and their information. It is the policy of [Nonprofit] not to allow agents or employees of U.S. Immigration and Customs Enforcement (ICE) access to our facilities, records or information unless this is required by law or a valid judicial warrant. The same policies and procedures apply to police officers who may act with ICE to enforce the immigration laws.

PROCEDURES

Procedures regarding access to [Nonprofit] facilities/buildings:

If any agents or employees from ICE should attempt to enter [Agency]'s buildings or facilities, staff will follow this protocol:

1. If ICE agents claim to have a warrant to enter the facility/building, reception staff should ask for a copy of the warrant, ask agents to wait at a specified location, and immediately contact a supervisor for assistance. *[include information on supervisor(s) to be contacted and how]*
2. Staff *[or insert front-line staff title]* should inform ICE agents that they do NOT have consent to enter the nonpublic areas of the facility unless they have a valid judicial warrant.
3. Supervisor should review the warrant to ensure that a) it is signed by a judge or magistrate, b) it describes [Nonprofit]'s building as the place to be searched, c) it has the correct date and was issued within the past 14 days, and d) the search does not exceed the scope of the items authorized to be searched. Administrative warrants signed by an immigration officer, not a judge, do not require ICE be allowed to enter non-public areas of the facility.
4. *[If applicable because Nonprofit qualifies as a "sensitive location"]* Staff should inform ICE agents that [Nonprofit] is as a "sensitive location" under ICE policy and explain why.
5. Supervisors should be advised to immediately contact legal counsel. *[include information on who should be contacted and how]*
6. Staff may advise clients that they have the right to remain silent, but should not direct clients not to answer questions. Staff may not assist clients in escaping or hiding.
7. Staff should not answer questions posed by agents without consulting a supervisor. In particular, staff should not answer questions about whether a particular person (client or staff) is currently in the facility, but instead state that they are not authorized to answer questions.
8. Staff should document the name/contact information of the ICE agents seeking access to the facility. This can be done by asking for a business card, or name and badge number.
9. Staff may record any interactions with the agents, but they must announce that they are doing so. Staff should remain a reasonable distance from such incidents so as not to interfere.
10. Staff and clients should know (or be informed) that if they are engaged in questioning by immigration agents, they can ask the agents if they are free to go. If the agent says yes, they are free to leave. If the agent says the person is not free to go, they should explain that they would like the opportunity to consult with an attorney and otherwise remain silent.

Procedures regarding immigration agents' request for access to [Nonprofit] records/files:

If any ICE agent should request access to records or documents regarding [Nonprofit]'s clients or staff:

1. Staff—preferably a supervisor—should inform agents that [Nonprofit]'s policy is not to release information without a client's consent, unless disclosure is required by judicial order or subpoena specifically requiring the release of the information, or otherwise required by law.
2. If agents claim to have a warrant or subpoena, staff should not release information without consulting with a supervisor. Staff—preferably a supervisor—should request a copy of the warrant or subpoena, ask for the agents' contact information and consult with a supervisor.
3. If such information is requested, a supervisor should immediately contact counsel, as above.

Procedures regarding completing a report after an ICE enforcement action:

1. Immediately after an enforcement action has concluded, a supervisor must complete a report on the enforcement action in order to collect the information identified below.

⁶ See Lowenstein Sandler LLP, *Advisory to Nonprofit Organizations and Social Service Providers Regarding Immigration Enforcement*, Appendices C and D (2017), available at: <https://www.lowenstein.com/files/upload/Advisory%20for%20Nonprofits%20on%20Immigration%20Enforcement.PDF>; Northwest Immigrant Rights Project, *Advisory to Nonprofit Organizations and Social Service Providers Regarding Immigration Enforcement*, Appendix A (April 3, 2017), available at: <http://nwirp.org/nonprofit-org-advisory.pdf>.

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APPENDIX A (continued)

INFORMATION TO BE COLLECTED BY EMPLOYEES AFTER AN ICE ENFORCEMENT ACTION

Date of enforcement action?

Time action began and ended?

Describe the enforcement action:

- How many agents?
- What agency conducted the action (*i.e.*, ICE, local police or state police)?
- Names and/or badge numbers of the agents:
- How did their uniforms identify them?
- Why did they say they were there?
- Did you ask to see a warrant?
- Did the agents present a warrant?
- If not, did you deny them consent to enter? What did you say?
- How did they react if you denied them consent to enter?
- If the agents presented a warrant, was a supervisor alerted? Who?
- Was the warrant an administrative warrant, signed by an immigration official?
- If it was an administrative warrant, did you tell the agents that your organization has a policy of denying access to nonpublic areas in the absence of a judicial warrant? What did you say?
- How did the agents react if you denied them consent to enter based on an administrative warrant?
- Did the agents present a judicial warrant, signed by a judge?
- If so, please describe the warrant:
 - o What was the date of the warrant?
 - o What items or persons were the subjects of the search?
 - o What areas were identified to be searched?
 - o Which judge signed the warrant?
- Did you allow the agents entry based on a judicial warrant?
- If so, did you or another staff member accompany them on their search? Who?
- Did the agents stay within the areas they were authorized to search by the warrant? If not, what other areas did they enter? Did they look in closed closets, cabinets, or drawers? Did they ask permission first?
- Did they keep anyone from moving around freely? Who?
- Did they arrest anyone? Who?
- Did they seize any items? What?
- Did they take pictures of documents? If so, whose? How did they get the documents?
- Did they take fingerprints? If so, whose?
- Were there children present? If so, whose? How many?
- Did the agents yell at anyone? Who? Why? Which agents (if known)?
- Did the agents have guns drawn or were they touching their weapons?
- Is there anything else to add about the enforcement action?

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APPENDIX B

AO 93 (Rev. 11/13) Search and Seizure Warrant

UNITED STATES DISTRICT COURT
for the
District of New Jersey

In the Matter of the Search of _____)
(Briefly describe the property to be searched)
or identify the person by name and address) Case No. 17-1234
123 Broad Street, Newark, NJ, Apt. 4)
)
)

This judicial search and seizure warrant is legally sufficient to allow agents into homes and other non-public places.

SEARCH AND SEIZURE WARRANT

To: Any authorized law enforcement officer

An application by a federal law enforcement officer or an attorney for the government requests the search of the following person or property located in the _____ District of _____
(Identify the person or describe the property to be searched and give its location):
123 Broad Street, Newark, NJ: Apt. 4 and all common hall ways and lobby of building

I find that the affidavit(s), or any recorded testimony, establish probable cause to search and seize the person or property described above, and that such search will reveal (Identify the person or describe the property to be seized):
John Doe, A-123-456-789, a deportable alien with convictions for crimes involving moral turpitude;
Goods stolen from XYZ Retail at 123 Commercial Street, Newark, NJ, on April 1, 2017, in a robbery allegedly involving John Doe.

YOU ARE COMMANDED to execute this warrant on or before April 24, 2017 (not to exceed 14 days)
 in the daytime 6:00 a.m. to 10:00 p.m. at any time in the day or night because good cause has been established.

Unless delayed notice is authorized below, you must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken, or leave the copy and receipt at the place where the property was taken.

The officer executing this warrant, or an officer present during the execution of the warrant, must prepare an inventory as required by law and promptly return this warrant and inventory to Jane Smith, U.S.M.J.
(United States Magistrate Judge)

Pursuant to 18 U.S.C. § 3103a(b), I find that immediate notification may have an adverse result listed in 18 U.S.C. § 2705 (except for delay of trial), and authorize the officer executing this warrant to delay notice to the person who, or whose property, will be searched or seized (check the appropriate box)
 for _____ days (not to exceed 30) until, the facts justifying, the later specific date of _____

Date and time issued: 04/10/2017 10:00 am _____
City and state: Newark, NJ _____
Judge's signature
Jane Smith, United States Magistrate Judge
Printed name and title

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APPENDIX C

DEPARTMENT OF HOMELAND SECURITY
U.S. Immigration and Customs Enforcement
WARRANT OF REMOVAL/DEPORTATION

File No: _____
Date: _____

To any immigration officer of the United States Department of Homeland Security:

(Full name of alien)

who entered the United States at _____ on _____
(Place of entry) (Date of entry)

is subject to removal/deportation from the United States, based upon a final order by:

- an immigration judge in exclusion, deportation, or removal proceedings
- a designated official
- the Board of Immigration Appeals
- a United States District or Magistrate Court Judge

and pursuant to the following provisions of the Immigration and Nationality Act:

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Secretary of Homeland Security under the laws of the United States and by his or her direction, command you to take into custody and remove from the United States the above-named alien, pursuant to law, at the expense of:

(Signature of immigration officer)

(Title of immigration officer)

(Date and office location)

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This ICE Warrant is NOT legally sufficient to allow immigration agents into homes or the non-public areas of facilities, buildings, organizations, businesses, or other premises.

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