Vol. 30 No. 19 **July 21, 2015**

JONES & MAYER

Attorneys at Law

3777 N. Harbor Blvd.
Fullerton, CA 92835
Telephone: (714) 446-1400 ** Fax: (714) 446-1448 ** Website: www.Jones-Mayer.com

CLIENT ALERT MEMORANDUM

To: All Sheriffs & Chiefs of Police

From: Martin J. Mayer, Esq.

ICE DETAINERS PUT SHERIFFS IN AN UNTENABLE POSITION

On July 21, 2015, the Los Angeles Times reported that "A convicted sex offender charged last week with sexually assaulting a 14 year old girl in Santa Clarita is in the country illegally and had recently been released on bail from immigration custody, according to federal authorities."

In addition, recently the Los Angeles Times and other media outlets have published news stories about the tragic murder of a young woman in San Francisco. The accused killer had been deported four times, nonetheless, the San Francisco Sheriff's Department (SFSD) had released him from custody despite the fact that Immigration & Customs Enforcement (ICE) had issued a "detainer" asking the Sheriff to hold the suspect until ICE could take him into custody.

In a July 3, 2015 news article from San Diego, it was noted that "San Francisco Sheriff's Department (SFSD) details a March possession and April release of the suspect from San Francisco County Jail. Denying an ICE detainer request was in line with San Francisco and Sheriff's Department Policy. SFSD states that ICE detainer requests are 'not a legal basis to hold an individual.'"

SFSD states that a warrant or court order is required for SFSD to return an individual to ICE for deportation proceedings. That statement is accurate under the current state of the law.

One year ago, July 8, 2014, JONES & MAYER published a Client Alert Memo, Vol. 29, No. 21, setting forth the issues surrounding ICE "detainers" and discussing

whether or not one could be held, beyond the time he or she was to be released under state law, pursuant to the "request" from ICE? The situation has not changed from last year.

The U.S. Department of Justice, the California Attorney General, and ICE itself all agree that the detainer is only a request. No warrant has been issued, nor has there been any judicial review authorizing the detention of the subject once state law mandates his or her release (e.g. charges dismissed, bail posted, released on his/her own recognizance, etc.).

Tragedies can, and have, occurred due to the release of persons who would otherwise be subject to deportation. However, as of this date, the law does not give Sheriffs' authorization to hold the person based only on the ICE detainer.

There also appears to be a challenge to a Sheriff even notifying ICE of the pending release of a subject for whom a detainer was issued. However, there does not appear to be any legal reason that notification cannot be made, as long as the individual is not detained beyond the time he or she is due to be released. If ICE officials are present at the time of release, and if they have the legal basis to arrest the person, ICE can then take that person into custody.

The Client Alert Memo from last year is set forth below. As in all situations involving the law, it is imperative that your agency seek out and secure legal advice and guidance from your designated legal counsel. Should any of you wish to discuss this matter in greater detail, please feel free to contact me at (714) 446 – 1400 or via email at mjm@jones-mayer.com.

CLIENT ALERT

ICE Detainers and ACLU Threat of Litigation

On July 3, 2014, the American Civil Liberties Union of California (ACLU) sent letters to many city police chiefs and/or city attorneys referencing a recent federal court decision which held that ICE detainers are mere requests, not mandates, and honoring them violated the individuals' constitutional rights. This letter to the cities states that "(y)our police department should immediately cease complying with immigration detainers, or else risk legal liability for detaining individuals in violation of the Fourth Amendment." Previously, on May 2, 2014, the ACLU sent a letter to most, if not all, counties in the state regarding the ICE detainers with a similar message.

[Prior to the court decision referred to by the ACLU, JONES & MAYER issued a Client Alert Memo, dated April 9, 2014, entitled "ICE Says Detainers are Optional."]

Recently there has been significant media coverage regarding these detainers. For example, on June 1, 2014, the L.A. Times wrote: "More than a dozen California counties have stopped honoring requests from immigration agents to hold potentially deportable inmates beyond the length of their jail terms, saying the practice may expose local sheriffs to liability. In recent weeks, officials in counties including Los Angeles, San Diego, Riverside and San Bernardino have stopped complying with so-called ICE detainers, citing a federal court ruling in April that found an Oregon county liable for damages after it held an inmate beyond her release date so she could be transferred into Immigration and Customs Enforcement custody."

Today's LA Times (7/8/14) discusses LAPD's policy and states that: "In no longer heeding federal immigration requests to hold inmates who might be deportable past their jail terms unless a judge has vetted the request, the Los Angeles Police Department is joining scores of other cities and counties that have stopped the practice."

The 5/2/14 ACLU letter refers to a recent court decision from the United States District Court of Oregon, *Miranda-Olivares v. Clackamas County*, issued April 11, 2014. In that case, United States Magistrate Judge Janice M. Stewart held that once Miranda-Olivares posted bail, "(t)he seizures that allegedly violated her Fourth Amendment rights were not a continuation of her initial arrest, but new seizures independent of the initial finding of probable cause for violating state law."

The court's ruling was based on the fact that, after she was arrested for violating a domestic violence restraining order and was booked into the county jail, "the Jail received an immigration detainer (Form I-247) issued by ICE," and the detainer was honored.

The court found that "(w)hen the Jail receives an ICE detainer, it holds the person subject to the detainer for up to 48 hours, not including Saturdays, Sundays, and holidays, beyond the time when the person would otherwise be released, even if the person posts bail. The Jail's practice is the same whether or not the ICE detainer is accompanied by an arrest warrant, statement of probable cause, or removal or deportation order."

The court noted that "Miranda-Olivares challenges her confinement by the County from March 15 through March 30, 2012, and specifically the County's custom and practice of incarcerating persons who are subject to ICE detainers after the lawful custody on state charges has ended. The County responds that federal law requires this custom and practice because ICE detainers (Form I-247) are issued pursuant to 28 CFR § 287.7 which, in its view, mandates the detention of a suspected alien by a local law enforcement agency for up to 48 hours."

However, the court disagreed with the county and held that "neither 28 CFR § 287.7 nor the form of ICE detainer at issue here are mandatory. As a result, the County violated Miranda-Olivares' Fourth Amendment rights."

The letter from the ACLU refers to the *Miranda-Olivares* decision as "an important ruling by a federal court" and urges that California counties comply with the decision. What the ACLU does not state is that federal district court decisions bind only the parties before them; they have no precedential effect. [U.S. Court of Appeal decisions, however, are generally binding on the district courts within their circuits and the circuit court itself until it overrules its own precedent.] The ACLU also states that "California's TRUST Act doesn't alter the impact of the *Miranda-Oliveras* decision."

However, prior to that decision, on March 4, 2014, the U. S. Court of Appeals for the Third Circuit (Pennsylvania), in the case of *Galarza v. Szalczyk; City of Allentown, et. al.,* overruled a District Court which had decided that Lehigh County could not be held responsible for Galarza's detention because it was compelled to follow the immigration detainer.

Ernesto Galarza, a U.S. citizen who was arrested for a drug offense, posted bail, and instead of being released, was held in custody by Lehigh County under an immigration detainer issued by federal immigration officials. The Court of Appeal held that, contrary to the district court's opinion, "immigration detainers do not and cannot compel a state or local law enforcement agency to detain suspected aliens subject to removal."

In the Client Alert Memo referenced above, we stated that, "in light of this latest clarification" by the Acting Director of ICE, it appears that, as far as the federal government is concerned, compliance with a detainer served by ICE is not a mandate, notwithstanding the language in the CFR. As pointed out above, the court in *Miranda-Olivares* disagreed with our belief that the CFR mandates holding the alien once the detainer is served."

We also pointed out that, in addition to the court decision, the California Attorney General issued an Information Bulletin, dated December 4, 2012, in which she also stated that immigration holds based on the ICE detainer, are not mandatory.

Obviously, when one adds the recent court ruling to the letter from ICE, and the opinion of the California Attorney General, the question of whether or not to honor an ICE detainer becomes problematic.

Recently, on June 25, 2014, the California Attorney General issued another Bulletin reaffirming her original position and noting further that in light of the *Miranda-Olivares v. Clackamas Co*. decision, "because compliance with an ICE detainer is voluntary, a local agency could violate the Fourth Amendment by detaining an individual solely based on the request of ICE, without some other probable cause for arrest."

The Bulletin notes that if a California court adopts the reasoning of the district court in *Miranda-Olivares*, local jurisdictions could be held liable for damages for such an unlawful detention.

It is the position of the ACLU, as stated in its letter, that "only a policy that requires a

judicial finding of probable cause that individuals are subject to removal from the United States before you deprive them of their liberty is sufficient to meet the minimum constitutional requirements."

HOW THIS AFFECTS YOUR AGENCY

Both the federal government and the California Attorney General have taken a position that the detainer is not a mandate. As such, it appears that local governments will place themselves in legal jeopardy in an effort to support a federal regulation which, according to the federal (and state) government, is merely a request.

As noted above, the court decision cited by the ACLU is binding only on Oregon and the parties involved therein. Nonetheless, the decision of the Court of Appeals, cited above, is binding absent another district court of appeal issuing a contrary decision. That decision reinforces the conclusion that the detainers are a mere request and, therefore, local government is not under any obligation to enforce them.

In light of the letters sent by the ACLU, it appears likely that it might move against an entity complying with the ICE "request" to hold someone based on a detainer having been served pursuant to 8 CFR 287.7. It is our understanding that the ACLU has already filed suit against more than one jurisdiction which detains individuals based on the ICE detainer alone.

As such, we advise *our* clients to NOT honor ICE detainers unless there has been a probable cause hearing (which involves more than the arraignment). However, it is imperative that each Sheriff and Chief of Police seek out the advice and guidance of his/her agency's legal counsel before deciding on how to proceed.

As always, should you wish to discuss this matter in greater detail, please feel free to contact me at (714) 446 – 1400 or via email at mjm@jones-mayer.com.

Information on www.jones-mayer.com is for general use and is not legal advice. The mailing of this Client Alert Memorandum is not intended to create, and receipt of it does not constitute an attorney-client relationship.

.