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Chilling Effects of Aggressive ICE Enforcement at Our Courthouses

By Robert C. Flowers

The modern practitioner has to be aware of the potential consequences that an undocumented client may face in pursuing their legal remedies. The risk of potential immigration consequences can complicate a client's decision whether to bring their case to trial or to pursue relief in the first place. The following article gives a brief overview of some aspects of the complex legal landscape surrounding U.S. Immigration and Customs Enforcement (ICE) arrests at courthouses and its effects on the judiciary and the civil practitioner and highlights a few ways to navigate this delicate situation and manage your client's exposure to risk of immigration consequences.

Federal Immigration Enforcement Authority

It has long been clear that ICE agents can arrest persons "based on probable cause of removability—a civil immigration violation."

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Tenorio-Serrano v. Driscoll, 324 F. Supp. 3d 1053, 1066 (D. Ariz. 2018) (citing *Abel v. United States*, 362 U.S. 217, 230 (1960)).

ICE derives its authority to arrest individuals suspected of violating immigration laws primarily through 8 U.S.C. §§ 1226 and 1357. Section 1226(a) provides that ICE can arrest and detain any person not a citizen or national of the United States (any "Alien") pursuant to an administrative warrant issued by the Attorney General. Section 1357 provides ICE agents with various powers without a warrant, including some arrest powers.

Of particular interest in this context is that ICE agents are permitted to make warrantless arrest when the immigration officer has "reason to believe" the person entered the country unlawfully "and is likely to escape before a warrant can be obtained." 8 U.S.C. § 1357(a)(2). Courts have traditionally interpreted the "reason to believe" criteria as equivalent to the Fourth Amendment's probable cause standard. *See United States v. Sanchez-Velasco*, 956 F.3d 576, 581 (8th Cir. 2020). While ICE officers have broad authority to stop or arrest people, they must still satisfy standards of Fourth Amendment protections, and ICE officers cannot legally rely solely on racial or ethnic characteristics, language, or other generalized factors to justify stops or seizures. *See Noem v. Perdomo*, 222 L.Ed.2d 1213 (U.S. 2025). Such practices would violate constitutional protections against unreasonable searches and seizures. *Id.*

Moreover, unlike traditional law enforcement, ICE is an administrative agency whose administrative warrants are not reviewed by a neutral judge or magistrate and thus do not carry the same authority as a judicial arrest warrant. *See United States v. Malagerio*, 49 F.4th 911, 915 (5th Cir. 2022). This has led some to question whether such summary administrative detentions violate due process. *See Ceesay v. Kurzdorfer,* 781 F. Supp. 3d 137,144 (W.D.N.Y. 2025) ("Noncitizens, even those subject to a final removal order, have constitutional rights just like everyone else in the United States."). It is a long-held constitutional principle that immigrants have a right to due process when being removed from the country. *See generally Colmenar v. INS*, 210 F.3d 967 (9th Cir. 2000); *see also Biwot v. Gonzales*, 403 F.3d 1094 (9th Cir. 2005). "[A]n alien who faces deportation is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf." *Colmenar*, 210 F.3d at 971. And while the United States Department of Homeland Security ('DHS') might want to enforce this country's immigration laws efficiently, it cannot do that at the expense of fairness and due process. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-68 (1954).

Tension Between Competing Goals

In January 2025, the federal government reinstated the so-called "courthouse arrest policy," reversing a previous policy that had prohibited such actions. *See* Oliver Mercer, *ICE Targets Immigrants At Courthouses Under New 2025 Policy* (published July 8, 2025), available at https://www.visaverge.com/immigration/ice-targets-immigrants-at-courthouses-under-new-2025-policy/ (last visited Oct. 31, 2025); Chloe Durham, *Inside Courthouse Immigration Arrests: Controversy, Legal History, and Implications* (posted Oct. 1, 2025), available at https://ace-usa.org/blog/research/research-immigration/inside-courthouse-immigration-arrests-controversy-legal-history-and-implications/ (last visited Oct. 31, 2025).

A significant tension exists regarding the authority of ICE in courthouse settings.

Those who oppose the courthouse arrest policy argue that it creates substantial barriers to civil litigation for noncitizens and deters any court appearance for someone with an uncertain immigration status. Fear of potential deportation deters immigrants from attending court proceedings or even from cooperating with law enforcement. This fear extends beyond immigration proceedings to all court appearances, including various other legal matters such as personal injury, unlawful detainers, and domestic relations. The policy has resulted in missed court dates, which can lead to automatic deportation orders and adverse outcomes in civil cases. Additionally, noncitizen

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translators and crime victims are reportedly afraid of showing up to court, which compounds the already slow rate of processing and/or prosecuting cases and can lead to prosecutors being unable to proceed to trial.

Proponents of the courthouse arrest policy argue that the move is needed to promote national security by enforcing immigration laws and fast-tracking deportations for those here illegally. *See supra ICE Targets Immigrants*. They frame courthouse arrests as necessary interventions to promote public safety by removing criminals expeditiously and point to the backlog of immigration cases in the judicial system as justification for urgent administrative action. *See* U.S. Gov't Accountability Office, *U.S. Immigration Courts See a Significant and Growing Backlog* (posted Oct. 19, 2023), available at https://www.gao.gov/blog/u.s.-immigration-courts-see-significant-and-growing-backlog (last visited Oct. 31, 2025).

The use of plain-clothes officers or officers wearing masks during courthouse arrests only adds another layer of complexity. While there is no federal law or policy specifically addressing when and where ICE agents can or should wear plain clothes and/or masks, ICE agents historically have only done so when working undercover. *See* Emma Tucker, CNN, *As Trump's immigration crackdown continues, ethics questions are being raised over the use of masked federal agents* (published Apr. 8, 2025), available at https://www.cnn.com/2025/04/08/us/ice-masks-federal-agents-arrest-students (last visited Nov. 3, 2025). Supporters of these ICE tactics assert that plain clothes and/or masks are warranted "due to the concern agents will be targeted" by those who disagree with the immigration enforcement measures and that such opponents can now readily "use technology to expose an officer's personal information," thereby endangering the safety of the ICE agents and their families. *Id*.

Practical Considerations for the Civil Practitioner

The current enforcement environment creates significant challenges for attorneys representing noncitizens in civil matters. Clients may be reluctant to attend depositions, hearings, or other court proceedings due to the fear of arrest, detention, and/or deportation. At a minimum, this reluctance can compromise case preparation and litigation strategy. At worst, this reluctance can deprive clients of obtaining justice or at least their opportunity to be heard in court. And if the attorney pushes a reluctant client too hard, that could erode the client's trust in the attorney and thereby damage the attorney-client relationship and indirectly cause the client to move forward without any legal representation.

Another potentially difficult aspect of this issue involves the attorney's ethical obligations. On the one hand, the attorney must maintain client confidentiality and allow the client to direct the agreed-upon objectives of the representation. *See* Va. Sup. Ct. R. pt. 6, sec. II, 1.6(a) ("A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of

[1] "A lawyer may limit the objectives of the representation if the client consents after consultation." Va. Sup. Ct. R. pt. 6, sec. II, 1.2(b).

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which would be embarrassing or would be likely to be detrimental to the client[.]"); Va. Sup. Ct. R. pt. 6, sec. II, 1.2(a) ("A lawyer shall abide by a client's decisions concerning the objectives of representation[1] . . . and shall consult with the client as to the means by which they are to be pursued.").

On the other hand, attorneys must be honest in their dealings with others. *See* Va. Sup. Ct. R. pt. 6, sec. II, 4.1 ("In the course of representing a client a lawyer shall not knowingly" "make a false statement of fact" or "fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client."). Furthermore, attorneys must respect all applicable laws and cannot help a client violate the law. *See* Va. Sup. Ct. R. pt. 6, sec. II, 1.2(c) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent[.]"); Va. Sup. Ct. R. pt. 6, sec. II, Preamble ("A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.") (emphasis added).

A realistic hypothetical will bring these ethical tensions into sharp focus. Larry Lawyer represents Vicky Victim who was hurt in a car wreck with Danny Defendant. Vicky is a noncitizen and has told Larry she is afraid of being deported. After suit is filed, Danny propounds interrogatories to Vicky asking for her social security number and certain tax records. Although not directly inquiring about Vicky's immigration status, Danny's attorney may indirectly glean (whether intentionally or unintentionally) from Vicky's answers whether she is a U.S. citizen. Should Larry resist, by objection or by seeking a protective order, giving up that information? What if an ICE agent shows up at the courthouse on a day Vicky is going to be present?

Unfortunately, there are no clear answers here, only more questions. If Larry resists the discovery request, is Larry failing to disclose a fact that is necessary to avoid assisting Vicky to remain in the country unlawfully? *See supra* Rules 1.6 & 4.1. Is that fact relevant to the case if it only bears on Vicky's immigration status and not the case at hand? If Larry helps Vicky avoid ICE while she is at the courthouse, is Larry assisting unlawful conduct and/or not respecting ICE? *See supra* Rule 1.2(c) & Preamble. Can Larry's retainer agreement limit his representation of Vicky to the personal injury matter without implicating any immigration issues? See supra Rule 1.2(b)-(c) & 4.1.

The best way that a practitioner can avoid this sort of issue is through obtaining informed consent, managing expectations, and strategizing the case to conform to the client's needs. If the client is concerned about immigration-related issues, it is important to have these discussions early in the life of the case. For example, there is a strong argument that a client's immigration status, social security number, or tax history is not relevant to a civil tort case if they are not seeking reimbursement for lost wages. In that scenario, if a client doesn't want immigration status disclosed in the ongoing litigation, they must understand that the cost is not pursuing damages for lost wages, even if they have incurred significant damages of that sort. If the client is going to forgo their right to recover those damages, or wants to tailor any other part of their case to avoid immigration issues, it is important to have this strategy and understanding memorialized in writing and translated to the client's native language (if the client is not fluent in English).. These conversations and risk assessments need to happen very early (often with the help of a skilled translator or bilingual attorney), before the client takes steps that could expose them to risk they'd prefer to avoid.

"A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious." Va. Sup. Ct. R. pt. 6, sec. II, Preamble. "In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules, many difficult issues of

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professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules." *Id.* (emphasis added).

This concept is again repeated elsewhere in the Preamble. "The Rules do not . . . exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law." *Id.* While a lawyer has a "duty to uphold legal process," at the same time, "a lawyer is also guided by personal conscience." *Id.*

Changing Landscape

The legal landscape remains fluid, with over 15 bills proposed in the 118th and 119th Congressional sessions addressing both perspectives of this issue. For example, the proposed Protecting Sensitive Locations Act would specify where ICE can conduct arrests. *See* H.R. 529, available at https://www.congress.gov/bill/117th-congress/house-bill/529 (last visited Nov. 3, 2025). Other proposed legislation would broaden the number of individuals eligible for removal and expand local law enforcement officers' authority to perform immigration enforcement. *See* S.B. 1817, available at https://www.congress.gov/bill/119th-congress/senate-bill/1817/text (last visited Nov. 3, 2025).

Standing court orders have been used to protect courthouses from immigration enforcement but future prospects remain uncertain following *Trump v. CASA, Inc.*, wherein the U.S. Supreme Court limited the power of state courts to block national legislation from going into effect. *See* 606 U.S. 831, 861 (2025). With significant variability in courthouse arrest policies state-to-state (even courthouse to courthouse), understanding local attitudes and political actions is a must.

Conclusion

The issue of ICE's courthouse arrest policy underscores the tension between enforcement and justice. While the government certainly has a legitimate interest in upholding immigration laws, it is equally imperative that the immigration laws are not enforced at the expense of fairness and due process. As with most things in life, we need to find balance.

For civil practitioners in Virginia representing undocumented clients, understanding the federal enforcement framework is essential for effective representation. The ongoing legal challenges and legislative proposals suggest that this area of law will continue to evolve, requiring practitioners to stay informed about developments that may affect their clients and the lawyer's representation.


Heidi M. Wolff-Stanton

Understanding Maryland's Special Statute Regarding Injuries Caused By Dogs

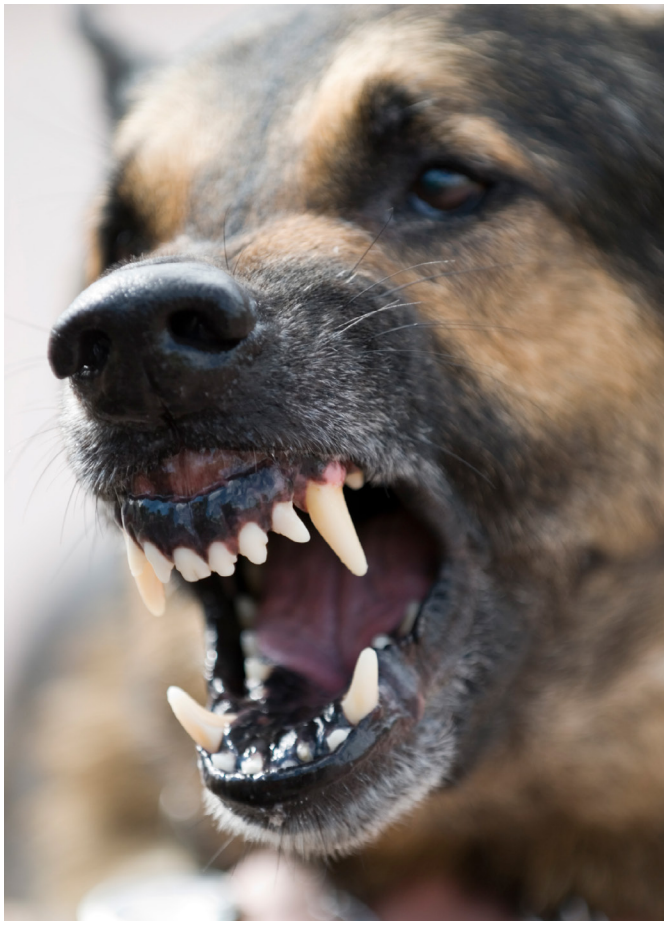
By Heidi Wolff-Stanton

In April 2014, Maryland enacted a statute to deal with personal injury or death caused by dogs. See Md. Code Ann., Cts. & Jud. Proc. § 3-1901. Prior to the statute, cases of this type were entirely governed by the common law and modifications to the common law developed by the Maryland courts. *See e.g. Tracey v. Solesky*, 427 Md. 627, 50 A.3d 1075 (2012). The new statute modified the common law in important ways.

Significantly, part of this statute imposes strict liability on the dog owner for injury or death caused by the dog under specified circumstances. The statutory provisions are not limited to injuries or death caused by dog bites but can be used to obtain compensation in other situations, such as injuries or death sustained when a dog jumps on a person and knocks them down. Pursuant to subsection (c) of the statute, the dog's owner is strictly liable for injuries or death caused by the dog while the dog is "running at large." Victims do not have to prove that the owner was negligent or that the dog was previously known to have vicious or dangerous propensities.

However, subsection (c) also sets forth three important exceptions under which the dog owner may not be liable. The law does not protect trespassers, those committing or attempting to commit a crime, or those tormenting, abusing, or provoking the dog.

Subsection (c) with its statutory strict liability places a clear duty on the dog owner to keep the dog under control so that the dog is not "running at large." The statute does not define the term "running at large." However, the Appellate Court of Maryland has interpreted the term to mean "free, unrestrained, or not under control." *Blitzer v. Breski,* 259 Md.App. 257, 275, 303 A.3d 88, 98 (2023), cert. denied, 486 Md. 237, 306 A.3d 648 (2023). The court has also held that liability can be imposed even though the dog bite or other injury occurred on the owner's premises (unless the victim was a trespasser or attempting to commit a crime). *See id.* at 276, 303 A.3d at 99 ("[A] dog owner could be liable if the owner's dog causes injury or death to a person while that person is on



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the owner's property, provided that that person was not committing or attempting to commit a trespass or other criminal offense.").

In addition, with strict liability, contributory negligence may not be a viable defense. *See May v. Air & Liquid Sys. Corp.,* 446 Md. 1, 24 n.21, 129 A.3d 984, 997 n.21 (2015) ("[C]ontributory negligence is not a defense to a strict liability claim."). However, consider the exception in subsection (c) regarding the victim "teasing, tormenting, abusing, or provoking the dog." This conduct is effectively a built-in (albeit limited) contributory negligence defense. Also, assumption of risk may still be available as a defense in a strict liability case. *See Ellsworth v. Sherne Lingerie, Inc.,* 303 Md. 581, 597, 495 A.2d 348, 356 (1985).

In addition to strict liability for dog owners under certain circumstances, subsection (d) of the statute also makes clear that the statute does not displace any common law cause of action, any common law defense (i.e. contributory negligence), or immunity. Thus, in addition to attempting to recover under the strict liability provision of the statute, a victim of a dog bite or other injury caused by a dog can seek to recover under a common law negligence theory even when the dog was not running at large if the dog owner fails to exercise reasonable care to prevent the dog from causing harm to others. For example, if the dog owner knows that the dog has a history of aggressiveness and does not take sufficient steps to secure or restrain the dog, the victim could perhaps recover for negligence even if the dog was leashed. However, with a common law cause of action also comes the potentially problematic common law defense of contributory negligence.

Much of Section 3-1901 talks about "the owner of a dog." The term "owner" is not defined in the statute and has been the source of litigation. *See e.g. Latz v. Parr*, 251 Md. App. 442, 445, 254 A.3d 509, 511 (2021) (defendant and his girlfriend jointly adopted the dog and, even though the girlfriend was the primary custodian, defendant was an "owner" under § 3-1901). But what about the potential liability of persons other than an owner? Subsection (b) covers this point by expressly retaining the common law as it "existed on April 1, 2012." Thus, to recover for the non-owner's negligence would require, among other things, evidence that the non-owner knew of the dog's vicious propensities.

Finally, subsection (a) of the statute creates a significant rebuttable presumption and rule. With evidence that the dog caused the injury, there is created a rebuttable presumption that the dog's owner knew or should have known that the dog had vicious or dangerous propensities. And, in a jury trial, the judge may not rule as a matter of law that the presumption has been rebutted before the jury returns a verdict. This rebuttable presumption would certainly be important in cases where strict liability is not involved.

To read the full text of Md. Code Ann., Cts. & Jud. Proc. § 3-1901, see https://mgaleg.maryland.gov/mgawebsite/laws/StatuteText?article=gcj&section=3-1901.

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