Representing Detained Clients in the Virtual Legal Landscape

AMERICAN IMMIGRATION LAWYERS ASSOCIATION and CAIR COALITION

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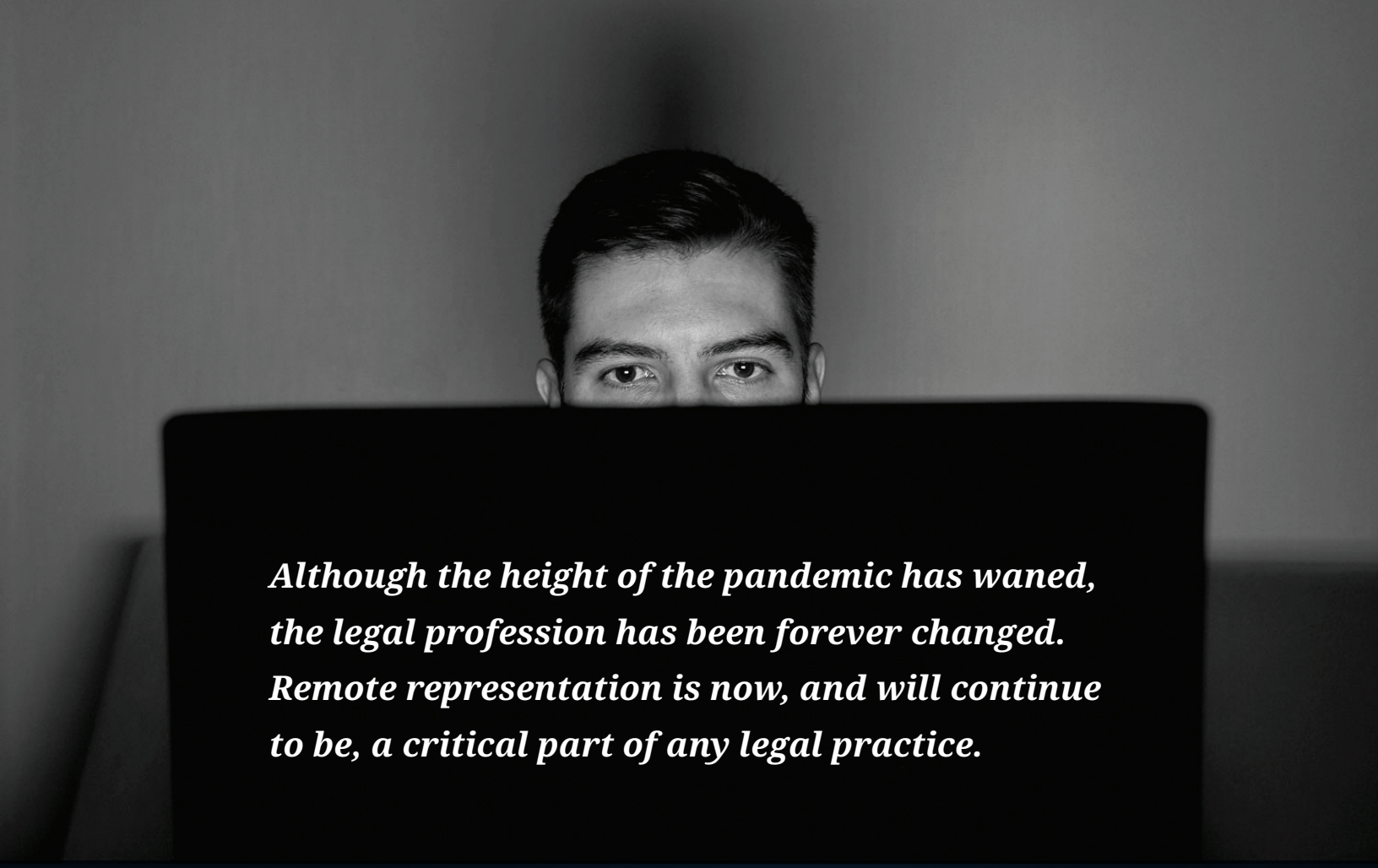

Although the height of the pandemic has waned, the legal profession has been forever changed. Remote representation is now, and will continue to be, a critical part of any legal practice.

Executive Summary

Immigration legal service providers have long explored how to provide legal representation to underserved communities, including by providing remote representation.[1] In the context of Immigration and Customs Enforcement (ICE) detention, for many years advocates have made efforts to connect with clients detained in remote locations using videoconferencing technologies.[2] The COVID-19 pandemic forced all attorneys to figure out how to provide high-quality representation remotely, and importantly, forced immigration agencies — including the Executive Office for Immigration Review (EOIR) — to heavily rely on remote appearances.[3]

Although the height of the pandemic has waned, the legal profession has been forever changed. Remote representation is now, and will continue to be, a critical part of any legal practice.

In representing detained noncitizens, this move toward remote work has many benefits, even beyond protecting lives during a pandemic.[4] Remote work has greatly expanded access to counsel by making it easier for attorneys to take on representation. For example, now there is often no need to travel to an (often far away) courtroom for a five-minute master calendar hearing. Instead, the attorney can save hours on travel and waiting time by doing the hearing virtually. Similarly, attorneys do not need to drive five hours (or more) to visit their client in a remote detention facility every time they need to communicate. Instead, client communication can often be accomplished via televideo or phone calls.[5] This huge time savings allow attorneys to take on representation of more detained individuals and allows more detained individuals to afford counsel. Moreover, remote options have allowed attorneys to continue to represent clients even if ICE transfers them to remote detention facilities.

In some ways, internet-based immigration court hearings have also made it possible to provide more robust and effective representation to clients. For example, a witness who is outside the United States may be able to testify in court via Webex (the immigration court's virtual hearing platform) even if they are unable to travel to the United States for a hearing. Similarly, a witness who is undocumented may be willing to testify via Webex even if they would be afraid to enter a physical courtroom. Additionally, it may be much easier to secure an expert witness if that expert can testify or conduct their evaluation from their office, instead of needing to go in person to a courtroom or to a detention center.

But remote work in the detained context also comes with significant challenges. This practice advisory will focus on challenges unique to the detention context[6] and how best to address some of the key challenges to effectively providing remote representation to detained noncitizens.

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1 Immigration Advocates Network, *Remote Legal Support: A Post-Pandemic Guide to Nonprofit and Pro Bono Innovation* (September 14, 2022), *available at* https://www.immigrationadvocates.org/nonprofit/alerts/780841.Remote_Legal_Support_A_PostPandemic_Guide_to_Nonprofit_and_Pro_Bono_Innovat; ILRC Practice Advisory: *Remote Immigration Legal Services-Here to Stay?* (July 2021) *available at* https://www.ilrc.org/sites/default/files/resources/7-21_remote_services_final.pdf.

2 Before the COVID-19 pandemic, some legal service providers, including the CAIR Coalition, utilized videoconferencing to communicate with individuals in ICE custody.

3 *See* note 1, *supra*; AILA and AIC, *Policy Brief: Use of Virtual Hearings in Removal Proceedings* (May 3, 2022), *available at* https://www.aila.org/advo-media/aila-policy-briefs/policy-brief-use-of-virtual-hearings-in-removal.

4 *See, e.g.,* Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review, Civil Action No. 20-9748 (D.N.J. Oct. 16, 2020) (lawsuit filed after the death of an immigration attorney who was forced to appear in person during the height of the COVID-19 pandemic).

5 *But see* ACLU, "Without Access to Counsel, Detained Immigrants Face Increased Risks of Prolonged Detention and Unlawful Deportation" *available at* https://www.aclu.org/news/immigrants-rights/without-access-to-counsel-detained-immigrants-face-increased-risks-of-prolonged-detention-and-unlawful-deportation (documenting communication barriers in ICE detention facilities); Complaint Regarding Telephone Access and Access to Counsel at the Pike County Correctional Facility filed with DHS Office of Civil Rights and Civil Liberties, Office of the Inspector General, and Office of the Immigration Detention Ombudsman, *available at* https://www.law.upenn.edu/live/files/12627-complaint-regarding-telephone-access-and-access-to.

6 General concerns with remote hearings — including concerns about due process and credibility determinations — are not new and have been well documented. *See, e.g.,* AILA and AIC, *Policy Brief: Use of Virtual Hearings in Removal Proceedings* (May 3, 2022), *available at* https://www.aila.org/advo-media/aila-policy-briefs/policy-brief-use-of-virtual-hearings-in-removal. This practice advisory will not rehash these arguments, but instead will focus specifically on the detention context and how best to respond to the fact that remote representation is here to stay.

Effectively Representing Your Client in a Hearing Via Webex

In the age of remote litigation, immigration judges (IJ) may give attorneys the option (or may even require them) to appear remotely for hearings.[7] Judges who are fully remote or sitting at an adjudication center will be unable to accommodate in-person appearance in their chambers. When IJs can accommodate in-person appearances, attorneys can choose whether to appear in person with the IJ and OPLA, or appear beside the client at the detention facility. A sample motion to request in-person appearance is attached as *Appendix C.*

> ***Internet-based video conferencing is inherently at odds with preserving confidentiality. An attorney cannot assume that communication with a client over Webex is private. For this reason, attorneys should discuss the client's goals regarding appeal or any other material decisions expected at trial before trial.***

One major benefit of appearing in person alongside the client for a Webex hearing is the preservation of communication. Clients may ask questions during breaks or share notes taken during a witness's testimony. Also, sitting directly beside the client during a hearing can be psychologically reassuring to the client.

Internet-based video conferencing is inherently at odds with preserving confidentiality. An attorney cannot assume that communication with a client over Webex is private.[8] For this reason, attorneys should discuss the client's goals regarding appeal or any other material decisions expected at trial *before* trial. If a decision needs to be made in court but the IJ will not permit the time or privacy to discuss it confidentially during a trial recess, attorneys should err on the side of requesting an adjournment to preserve confidentiality.[9]

Most judges will attempt to offer some privacy for the attorney and client to converse by pausing the digital audio recording (DAR) and excusing themselves from the courtroom. But there is no way of knowing that the DAR has actually stopped recording. Generally, interpreters, clerks, and OPLA will also excuse themselves from the courtroom, although attorneys should feel comfortable requesting that they step out if they do not affirmatively offer. On Webex, OPLA will generally mute and turn the camera off, but Webex may still be broadcasting the conversation to OPLA. Thus, when the IJ offers to recess, attorneys should politely ask that OPLA exit the Webex room altogether.

The detained client will probably not be able to see who else is present on Webex. They will not be able to warn the attorney if there is someone present that they do not want listening; do not assume a lack of protest is consent. Further, if the attorney is in the courtroom in person with the client on Webex, the attorney might also not be able to see who else is present on Webex besides the client. If the attorney is appearing with the client in the detention center, call for the court officer to disconnect from Webex during a private conversation.

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7 INA § 240(b)(2); 8 C.F.R. § 1003.25(c); Immigration Court Practice Manual, Chapter 1.5(a)(2); EOIR Guidance on Internet-Based Hearing, DM 22-07 (August 11, 2022), https://www.justice.gov/eoir/page/file/1525691/download. Where an IJ normally requires in person appearances, but an attorney or witness wishes to appear via Webex, a motion may be required. *See* Appendix D.

8 Removal proceedings are generally open to the public, but a respondent can request that a hearing on an application for protection be closed. 8 C.F.R. § 1240.10(b); Immigration Court Practice Manual, Chapter 4.9(a)(1).

9 Model Rules of Professional Conduct, Rule 1.6: Confidentiality of Information.

It is common for detained respondents to be accompanied to court by a representative from the facility where they are detained. Since this person usually sits at a desk off-camera, attorneys have no way of knowing whether that person is in the room with the client. Respondents may feel self-conscious presenting their cases in front of this person, particularly since life in the detention center might require the respondent to interact with this person daily. Prior to the hearing, attorneys should ask their client about this to know whether to move the court, either orally or in writing, to close proceedings to exclude this person. A motion for a closed hearing should note whether the hearing involves an application for asylum, withholding of removal, or protection under the Convention Against Torture; whether it involves an abused child; or whether information expected to arise in the hearing is subject to a protective order.[10] The immigration judge may limit attendance or close a hearing to protect parties, witnesses, or the public interest.[11]

Requesting the Recording of a Hearing

To get a copy of the DAR, attorneys can email a request with their E-28 entry of appearance to the email address specific to the administrative control court.

Attorneys are not permitted to record Webex proceedings with their own devices.[12] The IJ will make a DAR, which attorneys can request a copy of.[13] To get a copy of the DAR, attorneys can email a request with their E-28 entry of appearance to the email address specific to the administrative control court.[14] As of this writing, EOIR will also accept Form EOIR-59 with an accompanying E-28 entry of appearance by mail or at the filing window of the administrative control court.[15] Since it can take some time for court staff to prepare the DAR, it is a good idea to request the recording immediately after the hearing concludes.

Some practical considerations to keep in mind:

- When joining the Webex hearing, attorneys and witnesses should mute their microphones until the IJ calls on them to speak.
- Try to find out how the specific IJ conducts Webex hearings, for example, if they make attorneys remain in the waiting room until it is time for their case. AILA members can join the removal defense listserv and inquire about local practice across the country.
- Attorneys should add the last three digits of the client's alien number (or A number) after their Webex name when joining the meeting room to signal easily to the IJ or the legal assistant which respondent they are appearing on behalf of.
- Attorneys should add their client's full A number to the chat to "check in" with the legal assistant — some IJs will refer to the chat to see the order that attorneys arrived.
- Demonstrate Webex with witnesses before the hearing to ensure they can connect when needed. There is often a learning curve for witnesses not already familiar with internet-based hearings.

10 Immigration Court Practice Manual, Chapter 4.9(a)(1).
11 8 C.F.R. § 1003.27(b).
12 8 C.F.R. § 1003.28.
13 Immigration Court Practice Manual, Chapter 1.5(c)(4).
14 Executive Office of Immigration Review, *Request an ROP By Email (Immigration Court),* https://www.justice.gov/eoir/request-rop-email-immigration-courts; *see also,* CAIR Coalition Immigration Impact Lab, Requesting ROPS and DARs from EOIR (May 9, 2023), https://www.caircoalition.org/sites/default/files/EOIR%20Records%20Access%20Practice%20Advisory.pdf
15 Executive Office of Immigration Review, *Request an ROP,* https://www.justice.gov/eoir/ROPrequest.

- Courtroom decorum still applies to Webex hearings — dress in business attire,[16] do not eat or drink on video, and do not talk over or argue with other attendees.[17]

Confidentiality Concerns when Communicating with Detained Clients

Representing individuals detained in ICE custody presents a unique set of challenges for lawyers who have the duty to maintain confidentiality of their client's communications. This becomes especially complicated as detention facilities continue to open in increasingly remote areas, far removed from immigration practitioners.

Attorneys may face challenges in securing confidential conversations with their detained clients if ICE facilities refuse to allow attorneys to schedule private visits in advance. This, coupled with the limited number of attorney visitation rooms at facilities, means that attorneys who travel long distances to visit clients in person may find themselves waiting extended periods of time for private rooms to become available.[18] Moreover, attorneys may be unable to bring in their computers and phones to prepare and review confidential documents with clients. Some ICE facilities are also restricting access to free private attorney calls or videos.[19] As a result, detained individuals are often left with no option other than to call their attorneys from crowded dorms where other detainees can overhear their conversations or where the calls may be recorded and monitored.

To secure access to confidential communications and thereby more effectively and competently represent clients, attorneys should spend time familiarizing themselves with the communication protocols of the ICE detention facilities where their clients are held.

Speaking to their attorneys in open dorms without privacy has a chilling effect on clients. Forcing a client to discuss delicate topics in an open space may also expose them to risk from others in detention. Clients may also be uncomfortable discussing past abuse and torture in such settings. This understandable discomfort has a direct impact on the likelihood of securing release from detention and relief from removal.[20]

To secure access to confidential communications and thereby more effectively and competently represent clients, attorneys should spend time familiarizing themselves with the communication protocols of the ICE detention facilities where their clients are held. This can be done by checking the ICE's attorney access webpage[21] or by reaching out to the local AILA chapter in the area[22] where the detention center is located or the center's legal services orientation provider. Attorneys can consult

16 Don't be that lawyer who accidentally stands up in front of their webcam without pants. *See, e.g.,* Liz Dye, Miami Judge Reminds Attorneys To Wear Pants For Zoom Hearings (April 14, 2020), Above the Law, https://abovethelaw.com/2020/04/miami-judge-reminds-attorneys-to-wear-pants-for-zoom-hearings/.
17 Immigration Court Practice Manual, Chapter 4.12.
18 2019 National Detention Standards for Non-Dedicated Facilities, 5.5 Visitation, G. Visits by Legal Representatives and Legal Assistances at 168, accessed from https://www.ice.gov/doclib/detention-standards/2019/nds2019.pdf.
19 Complaint Regarding Telephone Access and Access to Counsel at the Pike County Correctional Facility filed with DHS Office of Civil Rights and Civil Liberties, Office of the Inspector General, and Office of the Immigration Detention Ombudsman, *available at* https://www.law.upenn.edu/live/files/12627-complaint-regarding-telephone-access-and-access-to. For a list of facilities that still have free calls, see https://www.aila.org/infonet/ice-facilities-free-telephone-minutes.
20 *See* American Immigration Council, Special Report, Access to Counsel in Immigration Court, see https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.
21 https://www.ice.gov/detain/attorney-information-resources
22 *See* AILA's Group Directory, https://www.aila.org/group-directory

the EOIR pro bono representation list for names of organizations which potentially have a presence in those facilities.[23] Important questions to ask about in-person visitation include:

- How many rooms are designated for legal visits (and if they are also used for other purposes like meetings with United States Citizenship and Immigration Services (USCIS) asylum officials or family contact visits);
- What days and times attorneys may conduct visits;
- What technology is permitted and whether advance permission is required and from whom;
- Whether interpreters and paralegals are permitted in visitation spaces;
- How visits may be requested in advance; and
- What identification and/or documentation is required for visitation.

Important questions to ask about remote communication access include:

- How are private and confidential legal calls or videos scheduled;
- Where do legal calls take place;
- Are legal calls monitored in any way;
- How can attorneys have their phone numbers listed as unmonitored with the facility;
- How can attorneys quickly send documents for client signatures; and
- How can attorneys obtain evidence (such as photos of client scars or tattoos).

When communication or visitation issues arise, it is important to document them. Attorneys should then inform the court of the restrictions to access to counsel and the effect it has on the client's ability to share confidential information needed for their case.

Lastly, where communication issues impede access to counsel, attorneys may consider filing a complaint before the Office of the Immigration Detention Ombudsman (OIDO) or the Office for Civil Rights and Civil Liberties (CRCL).[24] Attorneys can also pursue federal litigation when the government and/or the facility refuse to respect a detained client's rights to access to counsel and confidentiality.[25]

ICE Transfers

Generally, ICE can transfer a detained individual to any of the hundreds of detention facilities in the United States at any time and without ample warning. ICE's discretion to transfer is nearly plenary, subject only to limitations imposed by court injunctions and ICE's own policies.

General Transfer Policy[26]

ICE's considerations for transfer are largely guided by necessity, such as venue of EOIR proceedings, facility closures,[27] or overcrowding.[28] Transfer requests (made by detained individuals or their counsel), medical and mental health care needs, as well as concerns about safety and security may also influence ICE's decision-making process.

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23 Executive Office for Immigration Review, List of Pro Bono Legal Service Providers, accessed from https://www.justice.gov/eoir/list-pro-bono-legal-service-providers.

24 Department of Homeland Security, Office of the Immigration Detention Ombudsman, accessed from https://www.dhs.gov/office-immigration-detention-ombudsman; Make A Civil Rights Complaint, accessed from https://www.dhs.gov/file-civil-rights-complaint. For more information, see section on Filing Administrative Complaints and Requesting Investigations on Behalf of Detained and Formerly Detained People, *infra*.

25 *See, e.g., Americans for Immigrant Justice, et al., v. U.S. Dep't of Homeland Security, et al.,* Case 1:22-cv-03118 (access to case documents at); *Torres v. DHS,* Case 5:18-cv-02604-JGB-SHK *(access to case documents at* https://www.aila.org/infonet/aila-others-sue-lack-of-access-to-counsel).

26 See Policy 11022.1: Detainee Transfers, issued on January 4, 2012 and can be accessed at https://www.ice.gov/doclib/detention-reform/pdf/hd-detainee-transfers.pdf.

27 Due to emergent situations, infrequent use, or failure to meet ICE detention standards.

28 *Id.* at Section 5.2(3).

Under the ICE Policy on Detainee Transfers (Policy 11022.1), individuals who have documentation showing that they have attorneys of record, pending or ongoing removal proceedings within the area of responsibility (AOR) of a specific detention center, or those who have been granted bond or have been scheduled for a bond hearing may not be transferred, unless ICE determines that a transfer is deemed necessary.

Under the ICE Policy on Detainee Transfers (Policy 11022.1),[29] individuals who have documentation showing that they have attorneys of record, pending or ongoing removal proceedings within the area of responsibility (AOR) of a specific detention center, or those who have been granted bond or have been scheduled for a bond hearing may not be transferred, unless ICE determines that a transfer is deemed necessary.[30] Despite this, individuals are still often transferred without notice or explanation to counsel.

Transfer Policies Pertaining to Noncitizen Parents and Legal Guardians

Geographical distance between a parent and a child may seriously impact the parental relationship. As such, ICE Policy 11022.1 instructs ICE to refrain from transferring noncitizens who can provide documentation that they have immediate family members[31] within the AOR, unless the transfer falls within the abovementioned necessity criteria.

An ICE Directive issued in 2021[32] known as the "Parental Interest Directive," requires ICE to ensure that a detained person is able to maintain visitation rights with their child or incapacitated adult for whom they serve as guardian.[33] Under this Directive, if any family court or child welfare or guardianship proceedings are within the AOR of initial apprehension, ICE must refrain from initially placing or subsequently transferring the person outside of the AOR of initial apprehension absent legal requirements, exceptional circumstances, or a showing of impracticability.[34]

In the limited circumstances in which detention is appropriate, ICE must place the parent as close as practicable to their minor child(ren) or ward and/or to the location of the noncitizen's family court or child welfare or guardianship.[35] Likewise, in cases in which the parent's minor children are located in a different geographic region from family court or child welfare or guardianship proceedings or if the AOR of initial apprehension or the detention facility is not the closest to the minor child(ren) or ward, ICE should, to the greatest extent possible, honor the wishes of the parent as to whether they prefer to be detained closer to their minor child(ren) or their ward, or to the location of the ongoing proceedings.[36]

Transfer Policy Pertaining to Transgender People[37]

A 2015 ICE memo on the care of transgender people in ICE custody directs ICE to place transgender people in facilities that demonstrate best practices in the care of lesbian, gay, bisexual, transgender, or intersex (LGBTI) individuals that are within the field office's AOR.[38] ICE is also required to conduct an individualized placement determination that ensures the transgender person's safety.[39] ICE has to consider whether the facility incorporates the ICE Detention Facility Contract Modification for Transgender Care or whether the facility operates a Protective Custody Unit (PCU) for transgender

29 *Supra* at 21.
30 *Id.* at Section 5.2(1).
31 Immediate family members may include mothers, fathers, stepparents, foster parents, brothers, sisters, stepbrothers, stepsisters, biological and adopted children, stepchildren, foster children, and spouses, including common-law marriage or civil unions and cohabitating domestic partnerships legally recognized by a state or other governmental entity. *Id.* at Section 3.3.
32 ICE Directive 11064.3, Interests of Noncitizens Parents and Legal Guardians of Minor Children or Incapacitated Adults. The Directive applies to noncitizen parents or legal guardians who are: 1) primary caretakers or have custody of minor child(ren) or incapacitated adults in the United States, without regard to the dependent's citizenship or immigration status; and/or 2) those who have a direct interest in family or probate court, guardianship, or child welfare proceedings involving a minor or incapacitated adult, without regard to the dependent's citizenship or immigration status.
33 See announcement on ICE Detained Parents Directive at https://www.ice.gov/detain/parental-interest#:~:text=ICE%20Directive%2011064.3%2C%20Interests%20of,incapacitated%20adult%20for%20whom%20they
34 *Id.* at Section 5.3(1)
35 *Id.* at Section 5.3(2)
36 *Id.* at Section 5.3(2) and fn. 6 and 7.
37 See ICE Memorandum issued on June 19, 2015, containing Further Guidance Regarding the Care of Transgender Detainees
38 *Id.* at Section 3.b.iii enumerates a non-exhaustive list of these best practices which includes making available medical personnel who have experience providing care and treatment to transgender detainees (including the delivery of hormone therapy) and detention facility staff who have received LGBTI Sensitivity and Awareness training.
39 *Id.* at Section 3.a.

people.[40] If it is impracticable to place the transgender person in these aforementioned facilities, then ICE is mandated to look for facilities that are able to appropriately care for them, including alternative facility options.[41] In order to assess whether the facility is adhering to the Transgender Policy, it is important to check if the facility:

- Takes transgender person's preferences and requests into consideration and refers to them by their preferred pronouns;
- Addresses concerns pertaining to documented and self-reported history of sexual assault, victimization, or predatory behavior;
- Facilitates maintenance of acceptable hygiene practices consistent with gender identity;
- Enables the transgender person to shower in a setting that ensures safety and privacy;
- Documents strip searches and considers the preference of the transgender person when assigning the gender of the officer that will perform any necessary pat-down and strip search;
- Conducts searches in a professional, respectful, and least restrictive manner and ensures that searches are not being done solely for determining the person's biological sex; and
- Provides access to continued mental health care and other transgender-related health care based on medical need.

Transfer of Orantes Class Members for Certain Salvadoran Nationals

The National Immigration Law Center (NILC) is documenting violations of the injunction to advocate for better conditions in immigration detention and to instruct the government to correct any violations. If you have a case with a violation of the Orantes injunction, please contact the Orantes Injunction Legal Team at orantes@nilc.org or 213-639-3900.

The *Orantes* injunction is a nationwide, permanent injunction that requires the Department of Homeland Security (DHS) to uphold certain rights of Salvadoran nationals in asylum proceedings.[42] The *Orantes* injunction applies to citizens and nationals of El Salvador who are eligible to apply for asylum, and who have been, are, or will be taken into custody by agents of DHS.[43] ICE is prohibited from transferring unrepresented *Orantes* class members out of the district where they were first arrested or apprehended for at least seven days to allow them the opportunity to secure counsel.[44] While detained but represented *Orantes* class members can be transferred to other locations, ICE is obligated to keep the venue of their removal proceedings in the district where their counsel is located.[45] Furthermore, these represented class members must be returned within a reasonable time to the district in which their removal proceedings are venued so that they can consult with their counsel.[46]

The National Immigration Law Center (NILC) is documenting violations of the injunction to advocate for better conditions in immigration detention and to instruct the government to correct any violations.[47]

40 *Id.* at Section 3.b.ii.
41 *Id.* at Section 3.c; see also requirements related to transgender detainees DHS Prison Rape Elimination Act (PREA) Standards and Performance Based National Detention Standards 2008 and 2011 (PBNDS).
42 https://www.nilc.org/issues/immigration-enforcement/orantesinjunction/
43 *Orantes-Hernandez v. Meese*, 685 F. Supp. at 1491, aff'd., 919 F.2d 549 (9th Cir. 1990).
44 According to Section 5.2(4) of Policy 11022.1 on Detainee Transfers, the only exception to this rule applies to Orantes class members who are subject to expedited removal final orders; *see also Orantes-Hernandez v. Gonzales*, No. 82-01107, Modified Consolidated Injunction at paragraph 11(a).
45 *Orantes-Hernandez v. Gonzales*, No. 82-01107 at paragraph 11(b).
46 *Id.* Restrictions pertaining to Orantes Class Members do not apply to the detention, transfer, or other transportation of individuals who are subject to final orders of removal entered as a result of expedited removal proceedings.
47 *Supra* at 37.

If you have a case with a violation of the *Orantes* injunction, please contact the Orantes Injunction Legal Team at orantes@nilc.org or 213-639-3900.

Choice of Law

The location of immigration proceedings and immigration detention has a huge impact on the outcome of proceedings.[48] With the increased use of remote adjudication centers and hearings conducted by videoconferencing, one massive challenge to the representation of detained clients is the question of which law even applies. Often the respondent is detained in one location, counsel appears from a second location, the DHS trial attorney appears from yet another location, the immigration judge appears from a separate location, and the court with administrative control[49] is in yet another locale. This ability to appear from different locations enabled by internet-based hearings has engendered much litigation over choice of law.[50]

The Board of Immigration Appeals (BIA) attempted to create a clear and uniform rule that provides predictability on choice of law through its decision in *Matter of Garcia*.[51] In *Matter of Garcia*, the BIA held that choice of law should be determined by the location of the immigration court in which a charging document is filed, except where a charging document is filed at an administrative control court or when the immigration judge grants a change of venue.[52]

But *Matter of Garcia* has not brought the predictability it was supposedly intended to bring and has left many questions unresolved. First, *Matter of Garcia* gives immigration judges discretion to decide choice of law in situations where a charging document is filed at an administrative control court that services another court or detention location.[53] Plus, the agency can reassign an administrative control court during the course of proceedings, which means that the choice of law rule articulated by *Matter of Garcia* does not guarantee predictability.[54]

Second, in the detained context, *Matter of Garcia* gives the government an unfair advantage in choosing the applicable law. Tying the applicable case law to the filing location of the charging document effectively allows the government to choose the applicable law because the government unilaterally decides where to detain noncitizens.[55] The inequity is even more pronounced because ICE may move a person to another detention facility located anywhere in the country at any time.[56] Differing legal interpretations among the circuit courts can often mean the difference between a grant of relief and a removal order. Moreover, because noncitizens have no control over where they will be detained and therefore over what circuit's law will apply in their removal proceedings, it is extremely difficult for criminal defense attorneys to give accurate advice regarding the potential immigration consequences of a criminal conviction,[57] Thus, ICE's ability to control where it will detain a person gives it the nearly unfettered ability to choose the venue and the applicable law.

While the applicable law may change if the immigration judge grants a motion to change venue, this option is frequently illusory now that internet-based hearings are possible. Most of the factors

48 TRAC Immigration, "Judge-by Judge Asylum Decisions in Immigration Courts FY 2017-2022," *available at* https://trac.syr.edu/immigration/reports/judge2022/ .
49 8 C.F.R. 1003.11 (defining administrative control court).
50 *See, e.g., Sarr v. Garland*, 50 F.4th 326, 332 (2d Cir. 2022); *Herrera-Alcala v. Garland,* 39 F.4th 233,241 (4th Cir. 2022); *Yang You Lee v. Lynch,* 791 F.3d 1261 (10th Cir. 2015); *Sorcia v. Holder*, 643 F.3d 117, 123-24 (4th Cir. 2011) (declining to transfer the petition for review to the Eleventh Circuit due, in part, to the same legal proposition being applicable in both the Fourth and Eleventh Circuits).
51 *Matter of Garcia*, 28 I&N Dec. 693 (BIA 2023).
52 *Id.* at 703.
53 *Id.* at 704.
54 Monica Mananzan, Law360, *Immigration Board Must Mend Choice of Law Post-Garcia* (June 7, 2023).
55 *Id.*
56 The Immigration & Nationality Act does not contain any provisions limiting ICE transfers.
57 Criminal defense attorneys are constitutionally required to advise their clients on potential immigration consequences of a conviction. *See Padilla v. Kentucky*, 559 U.S. 356 (2010).

Moreover, because circuit courts have conflicting interpretations of how the venue provisions at Section 242 of the Immigration and Nationality Act (INA) apply in the context of internet-based hearings, a petition for review can potentially be filed in multiple circuits.

previously considered to be good causes for a change of venue — such as witness location, the cost of transporting evidence or witnesses, and issues related to a respondent's place of residence — are simply less relevant now.[58]

Third, the BIA failed to explain how *Matter of Garcia* should be applied to cases that were already pending before its issuance. The BIA's failure to specify whether the rule on choice of law applies retroactively creates uncertainty on the applicable law in pending immigration cases filed prior to the *Garcia* decision.

Thus, advocates must continue to grapple with questions about which circuit's law will apply throughout removal proceedings. Sometimes, briefing and argument will have to address the law in two or even three different circuits. Where the law in the different circuits is very similar, attorneys might simply be able to use string citations. But where the law significantly differs, attorneys will need to separately address how their client can win under each circuit's law and make an argument for application of the more favorable circuit's standards. Moreover, because circuit courts have conflicting interpretations of how the venue provisions at Section 242 of the Immigration and Nationality Act (INA) apply in the context of internet-based hearings, a petition for review can potentially be filed in multiple circuits.[59] It is not yet clear how the circuit courts will determine choice of law at the petition for review stage in the aftermath of *Matter of Garcia*.

Vulnerable Populations

Language Access for Speakers of Indigenous and Rare Languages

For too long, indigenous people from Guatemala, Mexico, and other countries have been pressured to undergo removal proceedings in Spanish and not their preferred language. In many cases, these individuals have suffered, and continue to fear harm in their home countries precisely because of their racial or ethnic identities and backgrounds. Indeed, many such individuals have experienced discrimination because they continue to speak their preferred language.[60]

In *Matter of Tomas*, the BIA held that respondents have a right to present their case in their best language.[61] In this case — involving Kanjobal Mayan asylum seekers from Guatemala — the BIA concluded that a court's "desire to avoid excessive continuances is not sufficient reason to allow a hearing to proceed where the right of a respondent to present testimony may be abridged."[62]

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58 In unpublished decisions, the Board has agreed that it may be appropriate to change venue even where a detained respondent would appear via televideo. See C-M-L-, AXXX XXX 428 (BIA June 23, 2023). This and other unpublished decisions are accessible through the Immigrant and Refugee Appellate Center's Index of Unpublished Decisions of the Board of Immigration Appeals, available at https://www.irac.net/unpublished/index-2/.

59 A noncitizen can file a petition for review in the circuit court where the notice to appear was filed, where the administrative control court is located, where the immigration judge sits, or at the immigration court to which venue has been changed. *Sarr v. Garland,* 50 F.4th 326, 332 (2d Cir. 2022) *with Ramos v. Ashcroft*, 371 F.3d 948, 949 (7th Cir. 2004) *with Herrera-Alcala v. Garland,* 39 F.4th 233,241 (4th Cir. 2022) *with Plancarte Sauceda v. Garland,* 23 F.4th 824, 831-32 (9th Cir. 2022).

60 The guidance this Practice Advisory is equally applicable to individuals who are speakers of other less common languages.

61 *Matter of Tomas*, 19 I&N Dec. 464 (BIA 1987).

62 *Id.* at 466.

Despite consistent affirmance of the right to an interpreter in an individual's language of choice, immigration courts have consistently failed to follow BIA precedent.[63]

While reiterating general requirements of due process for all immigrants whose best language is not English, this guidance is particularly helpful for individuals who "have limited proficiency in the dominant language spoken in their country of origin (for example, Spanish in Mexico and most Central and South American countries) and are fluent only in an Indigenous language." Furthermore, this guidance notes that in such cases, "[t]here will sometimes be reason to extend a filing deadline where a noncitizen has made diligent efforts to prepare documents for filing but where they have been unable to access translation services or the translation process has taken longer than forecast."

Against this background, EOIR issued a new guidance on language access in immigration court.[64] It aims to "provide guidance to immigration judges on language access issues pertaining to immigration court proceedings." While reiterating general requirements of due process for all immigrants whose best language is not English, this guidance is particularly helpful for individuals who "have limited proficiency in the dominant language spoken in their country of origin (for example, Spanish in Mexico and most Central and South American countries) and are fluent only in an Indigenous language."[65] Furthermore, this guidance notes that in such cases, "[t]here will sometimes be reason to extend a filing deadline where a noncitizen has made diligent efforts to prepare documents for filing but where they have been unable to access translation services or the translation process has taken longer than forecast." [66]

This guidance also emphasizes that immigration judges have additional responsibilities regarding detained respondents, stating that "[i]mmigration judges presiding over dockets of detained noncitizens must familiarize themselves with resources available to noncitizens at the detention facility…including what translation services, including pertaining to Indigenous or rare languages, are available to detainees through the library."[67]

Attorneys should, at the earliest possible time, make the immigration court aware of the interpretation needs of indigenous clients. As part of this process, attorneys should ascertain which precise regional variation of an indigenous language may be necessary. For example, there are several regional variations of both Mam and Quiche, two common Mayan languages in Guatemala. One of the easiest ways to ascertain this is to identify the precise birthplace or home community of the individual and to request an interpreter based on this information. A sample *Motion to Request Interpreter* is included in Appendix B.

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63 *See, e.g., Perez-Lastor v. I.N.S.*, 208 F.3d 733, 778 (9th Cir. 2000) (remanding where immigration judge required indigenous Quiche man to proceed with interpreter of different regional dialect of Quiche language); J-R-P, AXX XXX 985 (BIA March 31, 2017) (remand required because translator used different dialect of Mam); E-M-C-V-, AXXX XXX 954 (BIA June 21, 2016) (remand required where respondent, who spoke particular dialect of Mam, submitted evidence demonstrating 50 specific instances of interpreter error).

64 Dep't of Justice, Executive Office for Immigration Review, DM23-02, Director David Neal, "Language Access in Immigration Court," (June 6, 2023), https://www.justice.gov/eoir/book/file/1586686/download.

65 *Id.* at 2.

66 *Id.* at 4.

67 *Id.* at 3.

Competency Issues and Reasonable Accommodations under the Rehabilitation Act of 1973

In criminal proceedings, proceedings are paused or dismissed if an individual is found incompetent to stand trial[68] and an individual cannot be indefinitely detained on this basis.[69] Unfortunately, this common-sense rule does not apply to immigration proceedings. Thus, individuals with schizophrenia, developmental disabilities, traumatic brain injuries,[70] dementia, and other serious mental health and cognitive disabilities regularly undergo removal proceedings while detained, whether or not they understand the proceedings against them.

Nevertheless, attorneys can take steps to protect the due process rights of their detained clients with mental health, cognitive, and other disabilities. Through creatively requesting safeguards and reasonable accommodations, attorneys can zealously represent these clients. Attorneys should familiarize themselves with several BIA decisions beginning with *Matter of M-A-M-;* certain DOJ and DHS policies; and protections available under the Rehabilitation Act of 1973 (the federal analogue to the Americans with Disabilities Act).[71] There are several excellent practice advisories on these issues.[72] Finally, attorneys should consult their state bar's rules of professional conduct on clients with diminished capacity, typically modeled on ABA Model Rule 1.14, which requires that "the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."[73]

1. Board of Immigration Appeals Decisions

Matter of M-A-M- establishes the framework for considering competency issues in immigration proceedings, establishing that "[t]he test for determining whether [a noncitizen] is competent to participate in immigration proceedings is (1) whether he or she has a rational and factual understanding of the nature and object of the proceedings, (2) can consult with the attorney or representative if there is one, and (3) has a reasonable opportunity to examine and present evidence and cross-examine witnesses."[74]

Prong 3 is of particular importance in the immigration context and for detained clients because the respondent typically has the burden of proof to show that they are entitled to relief and detained clients already inherently have increased difficulties in securing evidence. However, if their disability prevents them from collecting evidence, providing testimony, or understanding the evidence against them, they may be unable to meet their burden. For example, an individual in detention with dementia who cannot remember the names and phone numbers of their family members may not be able to provide affidavits in support of their claim, and an individual with schizophrenia who is consistently distracted by auditory hallucinations may be unable to respond to questions on either direct or cross-examination.

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68 *Dusky v United States*, 362 U.S. 402 (1960).
69 *Jackson v. Indiana* (406 U.S. 715 (1972).
70 Attorneys may want to screen victims of intrafamilial and gender-based violence for traumatic brain injury (TBI) because of the high percentage of TBI in these population groups. *See, e.g.,* Cristina Hillstrom, New York Times, *The Hidden Epidemic of Brain Injuries from Domestic Violence* (March 1, 2022), https://www.nytimes.com/2022/03/01/magazine/brain-trauma-domestic-violence.html.
71 25 I&N 474 (BIA 2011); 29 U.S.C. § 794.
72 *See, e.g.,* Laura Lunn, Molly Lauterback, and Sara Gilman, Acacia Center for Justice, *NQRP Practice Advisory: Procedural Safeguards and Section 504 of the Rehabilitation Act* (May 2023), https://static1.squarespace.com/static/57f6bd842e69cf55d8158641/t/64b0622e-9299b230afc46ff7/1689281075577/NQRP+Practice+Advisory+-+Safeguards+and+Section+504+of+the+Rehabilitation+Act+-+2023-05-03+%5BFINAL%5D+%281%29.pdf; Priscilla Olivarez, Immigrant Legal Resource Center, *Advocating for and Representing Clients with Mental Illness in Detained Immigration Removal Proceedings*; (June 2022), https://www.ilrc.org/sites/default/files/resources/removal_proceedings_clients_mental_ilness_advisory_june_2022.pdf; Aimee Mayer-Salins and Ann Garcia, Catholic Legal Immigration Network, *Representing Noncitizens with Mental Illness* (May 2020), https://www.cliniclegal.org/file-download/download/public/3756.
73 ABA Model Rule 1.14.
74 25 I&N at 474.

At any point in the proceedings, and particularly in advance of the individual hearing, the attorney should also file a Motion for Procedural Safeguards and Reasonable Accommodations. An attorney can still file such a motion even if the immigration judge has found the individual to be competent. For comprehensive sample materials, as well as additional legal background, please see Acacia Center for Justice's NQRP Practice Advisory. The proposed safeguards should be directly tied to the respondent's specific disabilities.

If an attorney becomes concerned about a client's ability to meet the competency requirements of *Matter of M-A-M-*, they should consider moving the immigration court to conduct a Judicial Competency Inquiry, often called an *M-A-M-* hearing.[75] An attorney can raise competency concerns at any point during proceedings. With this motion, the attorney should attach evidence of mental incompetency, such as psychiatric medical records, declarations or affidavits from the client, family members, and friends, information on prescriptions, and detention medical records. In this motion, the attorney should address how the client meets any of the three prongs addressed in *Matter of M-A-M-* and remind the court that meeting just one of these prongs is sufficient to reach a judicial incompetency finding. A sample *Motion for Judicial Competency Inquiry and Implementation of Safeguards Pursuant to Matter of M-A-M- and Reasonable Accommodations* is included as Appendix A.

At any point in the proceedings, and particularly in advance of the individual hearing, the attorney should also file a Motion for Procedural Safeguards and Reasonable Accommodations. An attorney can still file such a motion even if the immigration judge has found the individual to be competent. For comprehensive sample materials, as well as additional legal background, please see Acacia Center for Justice's NQRP Practice Advisory.[76] The proposed safeguards should be directly tied to the respondent's specific disabilities.

Matter of J-R-R-A- holds that "[i]f an applicant for asylum has competency issues that affect the reliability of [their] testimony, the Immigration Judge should, as a safeguard, generally accept [their] fear of harm as subjectively genuine based on the applicant's perception of events."[77] Highlighting *Matter of J-R-R-A-* may be helpful in avoiding erroneous adverse credibility determinations.

2. DOJ and DHS Policies

Attorneys should be familiar with mechanisms for immigration judges to appoint legal representatives for detained individuals deemed mentally incompetent. This process typically will occur before an attorney enters their full appearance. Individuals detained in California, Arizona, and Washington may be appointed counsel at government expense under the permanent injunction in *Franco-Gonzalez v. Holder*.[78] Individuals detained in other states may be appointed counsel through the National Qualified Representative Program."[79] If an attorney becomes aware of a detained individual who should be considered for representation through these mechanisms, the attorney should reach out to nqrp@acaciajustice.org for more information (but should not include in the email any personally identifiable information of the client).

75 For cases in the online EOIR Courts and Appeals System (ECAS), attorneys should upload motions for judicial competency inquiries, procedural safeguards, and reasonable accommodations under the "Motion for Competency Safeguards" subcategory for motions.
76 NQRP Practice Advisory, *supra* note 72.
77 26 I&N Dec. 609 (BIA 2015).
78 *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG DTBX, 2013 WL 3674492, at *2 (C.D. Cal. Apr. 23, 2013).
79 Dep't of Justice, Executive Office for Immigration Review Policy Memorandum, Chief Immigration Judge Brian O'Leary, "Nationwide Policy to Provide Enhanced Procedural Protections to Unrepresented Detained [Noncitizens] with Serious Mental Disorders or Conditions," (Apr. 22, 2013) *available at:* https://www.hoppocklawfirm.com/wp-content/uploads/2021/09/2013-OLeary-Memo.pdf.

Attorneys should also familiarize themselves with ICE Directive 11063.2, which requires that ICE take several affirmative steps in regard to the detention, custody, and release of individuals with mental health conditions, irrespective of whether they have been found to be incompetent.[80] This includes providing attorneys 72 hours advance notice, whenever possible, of transfer, release, or removal.[81]

3. Section 504 of the Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973 is a powerful tool that immigration attorneys should use to fight for detained clients with disabilities. Section 504 prohibits discrimination on the basis of a disability in programs, services, or activities conducted by U.S. federal agencies, including DHS and EOIR.[82] The Rehabilitation Act defines "disability" as "a physical or mental impairment that substantially limits one or more major life activities of [the] individual."[83] Government agencies must grant reasonable modifications to "otherwise qualified" persons with disabilities (*i.e.*, the person's disability creates an impediment to fully benefiting from a program for which they qualify) to ensure they are "provided with meaningful access" to the program at issue. That is, under Section 504, covered entities must afford persons with disabilities "'equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement."[84]

Attorneys should push for the application of Section 504 in immigration proceedings because it affords greater protection for noncitizens with disabilities than the *Matter of M-A-M-* framework. Through the use of Section 504, attorneys have access to decades of robust disability rights law which are focused on ensuring equal access to all individuals, regardless of their disabilities. This may be particularly useful for individuals with vision and hearing impairments, due to the more developed state of the law. As a practical matter, attorneys should always consider incorporating requests for reasonable accommodations under Section 504 within their pre-trial motions for competency safeguards. For more information, please see this NQRP Practice Advisory.[85]

Filing Administrative Complaints and Requesting Investigations on Behalf of Detained and Formerly Detained People

ICE has set up internal and external complaint and investigation mechanisms for people in its custody.[86] That information is briefly provided in the table below (Complaint Forms & Additional Information). This section provides additional information for filing administrative complaints with two entities outside of ICE and escalating access to counsel problems to ICE. A word of caution: retaliation by ICE facility staff and personnel is a real concern whenever an individual takes the step of speaking about abusive practices. As such, counsel and their clients should be on guard and demand safeguards wherever possible.

80 Dep't of Homeland Security, ICE Policy Number: 11062.2, Director Tae Johnson, "Identification, Communication, Recordkeeping, and Safe Release Planning for Detained Individuals with Serious Mental Disorders or Conditions/and/or Who Are Detained To Be Incompetent By an Immigration Judge," (April 5, 2022), https://www.ice.gov/doclib/news/releases/2022/11063-2.pdf.
81 *Id.* at § 5.4.
82 6 C.F.R. § 15.30(a) (applying to DHS); *accord* 28 C.F.R. § 39.130 (same); *see also* 29 U.S.C. § 794 (applying to EOIR).
83 *Edmonds-Radford v. Sw. Airlines Co.*, 17 F.4th 975, 986 (10th Cir. 2021).
84 *Id.* at 305 (citing 45 C.F.R. § 84.4(b)(2)).
85 *See NQRP Practice Advisory,* note 72, *supra.*
86 For additional information, *see* American Immigration Council, "Factsheet: Oversight of Immigration Detention: An Overview," May 16, 2022, https://www.americanimmigrationcouncil.org/research/oversight-immigration-detention-overview

Office for Civil Rights and Civil Liberties (CRCL)

CRCL is empowered to investigate allegations civil rights and civil liberties violations committed by DHS personnel or that occur because of DHS policies.[87] Its chief role is to investigate complaints, but it also provides policy advice to DHS leadership on issues related to detention. It does not provide individual remedial relief *except* with respect to Section 504 of the Rehabilitation Act of 1973 claims (e.g., disability accommodations, see discussion above).[88] Some examples of issues CRCL has investigated include:

- Failing to arrange for a phone interpreter for a detained individual who speaks an indigenous language;
- Denying certain types of meals for Jewish or Muslim detained individuals based on religious practice; and
- Using excessive force during apprehension or enforcement operations.

Importantly, not every CRCL complaint will lead to an investigation. CRCL triages allegations and must provide the DHS Office of the Inspector General (OIG) the right of first refusal on incoming allegations.[89] Only if OIG does not open an investigation may CRCL proceed with its own. At the conclusion of an investigation, CRCL may make formal recommendations in addition to communicating directly with the individual who is the subject of a complaint (or their counsel). CRCL has begun to make its formal recommendations available to the public as part of recent transparency initiatives.[90]

Section 504 disability discrimination complaints have different procedures, and a key difference is that CRCL investigates all complete complaints. For these types of complaints, CRCL is also required to issue a determination letter within 180 days.[91]

The Office of the Immigration Detention Ombudsman (OIDO)

The OIDO has the authority to inspect detention and border facilities, review detention contract terms, and provide remedial relief to people in detention.[92] As an ombudsman's office, OIDO is independent of the DHS components (ICE and CBP) over which it conducts oversight. Its Case Management division is responsizble for receiving and processing complaints from detained and formerly detained individuals. Complaints can be filed by a detained individual, someone on their behalf, anonymously, and by formerly detained people. OIDO has case managers assigned to work inside ICE detention facilities nationwide.[93] OIDO has stated that people in detention can ask to speak to a case manager and they will be assisted with filing a complaint with OIDO. While OIDO has a Case Intake Form (DHS Form 405), it will open a complaint without the use of the form. However, if filing on behalf of a detained person, attorneys will need to submit a privacy waiver or a Form G-28 Notice of Entry of Appearance to receive information about any complaint resolution.

After receipt of a complaint, OIDO will review, categorize the complaint, and if it is an issue with which it can help, will proceed to work with the individual to seek a resolution. They cannot help with individual

87 *See* 6 U.S.C. §345 (a)(6); *see also* 29 U.S.C §794 (Section 504 of the Rehabilitation Act of 1973).
88 Procedures are codified at 6 CFR sec. 15.70.
89 The DHS Office of Inspector General (OIG) is one of several oversight detention oversight agencies that are housed within DHS. It conducts oversight through audits, investigations, unannounced inspections, and other reviews culminating in recommendations to ICE. For example, OIG completed an investigation of ICE's management of COVID-19 in its detention facilities and found widespread mismanagement. However, these investigations proceed slowly and are not well suited for addressing urgent needs of a detained individual.
90 For additional information, see DHS's Transparency in Civil Rights Investigations, https://www.dhs.gov/transparency-civil-rights-investigations
91 For additional information, see the Office of the Immigration Detention Ombudsman August 2022, Issue #2 newsletter, https://www.dhs.gov/sites/default/files/2022-08/OIDO%20August%202022%20Newsletter_508.pdf
92 Congress authorized the creation of an Ombudsman for Immigration Detention in Pub. L. No. 116-93. The new office will be independent of DHS agencies and officers and will report directly to the DHS Secretary, see https://www.aila.org/infonet/congress-authorizes-ombudsman
93 See DHS's Office of the Immigration Detention Ombudsman Locations, https://www.dhs.gov/oido-locations

release requests. OIDO aims to resolve most complaints within 14 days.[94] OIDO's case managers triage medical care issues as a priority. Some examples of complaints they have resolved:

- Facilitating a medical appointment for an individual with vision problems that had been left untreated by facility staff;
- Responding to an individual's complaint that food items were expired and working with the facility staff to update food items; and
- Escalating a group complaint to facility management about the lack of a grievance process in the facility as required by ICE detention standards.

ERO Legal Access Team

ICE ERO's Custody and Programs Division maintains a Special Populations and Program Unit, which includes a legal access team. The ERO legal access team curates an attorney information and resource page on the ICE website.[95] The website includes links to the Virtual Attorney Visitation Program, information about how to communicate with clients at different facilities, and specific information about legal access-related ICE detention standards. If an attorney is unable to contact a detained client, the attorney should first attempt to resolve those concerns by sending a request at the field office level. If these initial attempts are unsuccessful, attorneys may seek further assistance by contacting the ERO legal access team. The Legal access team coordinates with all ERO field offices on inquiries and assists on issues related to legal access in detention to facilitate attorney to client communication.

94 For additional information, see the Office of the Immigration Detention Ombudsman August 2022, Issue #2 newsletter, https://www.dhs.gov/sites/default/files/2022-08/OIDO%20August%202022%20Newsletter_508.pdf

95 See ICE's Attorney Resources and Information webpage at https://www.ice.gov/detain/attorney-information-resources

Complaint Forms and Additional Information

Name	How to Submit a Complaint	Additional Information
Office of Inspector General	Telephone: 1 (800) 323-8603 TTY: 1-844-889-4357 toll free Online: https://hotline.oig.dhs.gov/#step-1) Postal Mail: DHS Office of Inspector General/ MAIL STOP 0305 Attn: Office of Investigations - Hotline 245 Murray Lane SW Washington, DC 20528-0305	Website: https://www.oig.dhs.gov/ Contact Email: DHS-OIG.OfficePublicAffairs@oig.dhs.gov.
DHS Office for Civil Rights and Civil Liberties	Telephone: (202) 401-1474 or 1-866-644-8360 (toll free) Online: https://www.dhs.gov/file-civil-rights-complaint. Email: Download complaint form and send to: CRCLcompliance@hq.dhs.gov Postal Mail: U.S. Department of Homeland Security Office for Civil Rights and Civil Liberties Compliance Branch, Mail Stop #0190 2707 Martin Luther King Jr Ave SE Washington DC 20528-0190	General Contact Email: ICE.Civil.Liberties@ice.dhs.gov.
Office of the Immigration Detention Ombudsman	**In-Person** via an OIDO case manager located in a facility**.** **E-Mail** the OIDO Case Intake Form (DHS Form 405) as an attachment to: DetentionOmbudsman@hq.dhs.gov U.S. mail and/or expedited delivery services: Office of the Immigration Detention Ombudsman (OIDO) Mail Stop 0134 Department of Homeland Security Washington, DC 20528-0134 ATTN: OIDO Case Intake Form (DHS Form 405)	General Contact Email: OIDO_Outreach@hq.dhs.gov
ICE ERO Legal Access Team	Email ERO (ERO.Info@ice.dhs.gov) or the ERO Legal Access team (Detention.LegalAccess@ice.dhs.gov).	Note that these emails are for *detention related legal-access inquiries only and are meant to escalate issues unresolved at the local field office level.* Attorney Information and Resources Page: https://www.ice.gov/detain/attorney-information-resources

ICE Office of Professional Responsibility: Joint Intake Center	Phone: 1-877-246-8253 (Joint Intake Center (JIC) and open 24 hours a day) Email: Joint.Intake@dhs.gov, or iceoprintake@ice.dhs.gov Mail: U.S. Immigration and Customs Enforcement Office of Professional Responsibility P.O. Box 14475 Pennsylvania Ave, NW Washington, DC 20044 U.S. Department of Homeland Security Joint Intake Center P.O. Box 14457 1200 Pennsylvania Avenue, NW Washington, DC 20044	This office investigates allegations of serious ICE employee and contractor misconduct. Facilities covered by the Performance Based National Detention Standards (PBNDS) 2011 or National Detention Standards (NDS) 2019 are required to provide detained individuals with free calls to the JIC.
ICE Enforcement and Removal Operations Contact Center of Operations (ECCO) and the Detention Reporting and Information Line (DRIL)	Phone: ERO Contact Center of Operations (ECCO): (844) 319-6691 for members of the public. Phone: 1-888-351-4024 (**Detention Reporting and Information Line (DRIL)** for people in detention. Email: ERO.INFO@ice.dhs.gov Contact Form: https://www.ice.gov/webform/ero-contact-form	The DRIL Line has live operators available Monday through Friday (excluding holidays) from 8 a.m. to 8 p.m. (Eastern Time) to respond to inquiries from those in ICE detention and from community members. Language assistance, including Spanish operators, is also available. Facilities covered by ICE's NDS 2019 are required to provide detained individuals with free calls to DRIL. The DRIL line was created to provides victims the ability to report incidents of sexual or physical assault, abuse, mistreatment or human trafficking in ICE detention.

[redacted]

NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
NEW YORK, NEW YORK

In the Matter(s) of:	
[redacted]	**File No.: A** [redacted]
In Removal Proceedings.	

Immigration Judge:
Hon. [redacted]

Next Hearing:
[redacted]

RESPONDENT'S REQUEST FOR IN-PERSON HEARING

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
NEW YORK, NEW YORK

In the Matter(s) of: [redacted]	**File No.: A** [redacted]
In Removal Proceedings.	

RESPONDENT'S REQUEST FOR IN PERSON HEARING

Respondent, through counsel, respectfully requests the Court permit Respondent, his witnesses, and his counsel to appear in person for his Individual Merits Hearing scheduled for [redacted] at 9:00 a.m. This request is submitted in accordance with the instructions received from the Court.

Respectfully submitted on [redacted],

[redacted].

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
NEW YORK, NEW YORK

In the Matter(s) of:	)	**File No.: A** [redacted]
[redacted]	)	
In Removal Proceedings.	)	

ORDER OF THE IMMIGRATION JUDGE

Upon consideration of the Respondent's Request for In-Person Hearing, it is HEREBY ORDERED that the Motion be ___**GRANTED** _____ **DENIED** because:

_____DHS does not oppose the motion.
_____The respondent does not oppose the motion.
_____A response to the motion has not been filed with the court.
_____Good cause has been established for the motion.
_____The court agrees with the reasons stated in the opposition to the motion.
_____The motion is untimely per _____.
____ Other:

Deadlines:

_____The application(s) for relief must be filed by _____.
_____The respondent must comply with DHS biometrics instructions by _____.

_____ _____
Date Immigration Judge

Certificate of Service

This document was served by: [ ] Mail [ ] Personal Service

To: [ ] Alien [ ] Alien c/o Custodial Officer [ ] Alien's Atty/Rep [ ] DHS

Date: _____ By: Court Staff

[redacted]
A [redacted]

PROOF OF SERVICE

On [redacted], I, [redacted], served a copy of the within Respondent's Request for In-Person Hearing to the Office of the Chief Counsel, Department of Homeland Security, Immigration and Customs Enforcement, at 26 Federal Plaza, New York, NY 10978 by eService.

[redacted]

Dated: [redacted]

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
ANNANDALE, VIRGINIA

In the Matter of	
LAST NAME, First Name	**File No.: A 123 456 789**
In removal proceedings	

Immigration Judge Xxx — Next Hearing: [DATE]

MOTION TO REQUEST SOUTHERN MAM INTERPREPTER

Respondent, through undersigned counsel, requests that this Court schedule a Southern Mam interpreter for his individual hearing. In support of this motion, Respondent states as follows:

1. Respondent is scheduled for an individual merits hearing on DATE at TIME.

2. Respondent is from Quetzaltenango, Guatemala, and speaks the Southern variant of Mam spoken in this region.

3. Respondent will testify in Southern Mam.

4. Respondent does not understand other regional variants of Mam, including the Northern and Central variants of Mam spoken in Huehuetenango and San Marcos.

5. In order to allow Respondent a meaningful opportunity to present evidence on his own behalf, an interpreter from Southern Mam is requested. *See* INA § 240(b)(4)(B); *Matter of Tomas*, 19 I&N Dec. 464 (BIA 1987); *Reno v. Flores*, 507 U.S. 292, 306 (1993).

Wherefore, Respondent respectfully requests that the Court schedule a Southern Mam interpreter for his individual hearing.

Respectfully submitted,

Xxxx Xxxx
Counsel for Respondent

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
ANNANDALE, VIRGINIA

In the Matter of	)	
SMITH, John	)	**File No.: A 123 456 789**
In removal proceedings	)	

Immigration Judge Xxx

Next Hearing: June 28, 2023 at 8:30 a.m.

RESPONDENT'S MOTION FOR JUDICIAL COMPETENCY INQUIRY AND IMPLEMENTATION OF SAFEGUARDS PURSUANT TO *MATTER OF M-A-M-* AND REASONABLE ACCOMMODATIONS

Undersigned counsel hereby moves this Court to conduct a hearing or other such inquiry to assess whether Respondent John Smith (hereinafter "Mr. Smith" or "Respondent") lacks sufficient competency in these proceedings pursuant to the standards articulated by the Board of Immigration Appeals in *Matter of M-A-M-*. 25 I&N Dec. 474 (BIA 2011). Undersigned counsel further moves this court to implement appropriate safeguards to protect Mr. Smith's due process rights and privileges in these proceedings as required by *Matter of M-A-M-*. and Section 504 of the Rehabilitation Act of 1973.

I. Procedural History

Mr. Smith is a Lawful Permanent Resident of the United States, and is a national of Canada. Mr. Smith entered the custody of Immigration and Customs Enforcement ("ICE") on May 1, 2023. On May 18, 2023, Mr. Smith appeared *pro se* for his initial Master Calendar

Hearing. Mr. Smith requested additional time to find an attorney, and his case was reset to June 3, 2023. On June 1, 2023, undersigned counsel entered her appearance, and, on June 3, 2023, requested attorney preparation time. His case was reset to June 28, 2023.

On June 10, 2023, Mr. Smith informed undersigned counsel that he has bipolar disorder and that for several years he been had meeting monthly with his psychiatrist and health care team for medication management. However, upon detention, he has not been receiving his medication, and he has stated that he is hearing voice and experiencing visual hallucinations. He has expressed that he is unable to concentrate and that he is afraid that he will continue to have worsening symptoms and experience mania or depression unless his medication is resumed.

Mr. Smith's wife has provided the following documentation, which is attached to this motion:

1) Letter from Dr. XXX stating that he has treated Mr. Smith for 5 years for bipolar disorder.
2) Print-out of last prescriptions from Dr. XXX.
3) Letter from Mr. Smith's mother describing Mr. Smith's history of severe manic and depressive episodes.
4) Records from ICE detention center showing that Mr. Smith is not receiving any psychotropic medication and that he has made several requests to see a psychiatrist since his arrival.

II. Legal Argument

Because of the clear indicia of incompetency presented in this case, a Judicial Competency Inquiry should be conducted, a finding of competency or incompetency should be entered, and safeguards should be implemented as appropriate.

An Immigration Judge must inquire into a respondent's competency for purposes of immigration proceedings when indicia of incompetency are present. Indicia of incompetency

include a "wide variety of observations" including the respondent's behavior, evidence of mental illness, or other relevant circumstances. *Matter of M-A-M-*, 25 I&N at 479-80. Once indicia of incompetency are present, the Immigration Judge should evaluate the evidence bearing on the respondent's mental functioning against the competency standard. The Board articulated this standard as "whether [the respondent] has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses." *Id.*

If the Immigration Judge determines that a respondent lacks sufficient competency, the Judge must then evaluate which available measures would result in a fair hearing and shall prescribe safeguards to protect the rights and privileges of that respondent. *Id.* at 478. There is no exhaustive list of safeguards, as "Immigration Judges have discretion to determine which safeguards are appropriate, given the particular circumstances in a case before them." *Id.* at 481-82.

Should an Immigration Judge find a respondent competent, nevertheless it is appropriate to consider the implementation of appropriate safeguards. Implementation of safeguards in this case is also consistent with the standards articulated in *Matter of M-A-M-* ("Even if an alien has been deemed to be medically competent, there may be cases in which an Immigration Judge has good cause for concern about the ability to proceed, such as where the respondent has a long history of mental illness, has an acute mental illness, or was restored to competency…In such cases, Immigration Judges should apply appropriate safeguards.") *Id.* at 480. This is also consistent with *Matter of J-R-R-A-* ("[W]e find it appropriate to provide guidance regarding credibility assessments involving aliens who are incompetent or who have serious mental health or cognitive issues that may affect their testimony…Alternatively, the individual could be deemed competent for purposes of his hearing, although he has been diagnosed with a mental

illness or serious cognitive disability and may exhibit symptoms that affect his ability to provide testimony in a coherent, linear manner. 26 I&N Dec. 609, 610-12 (BIA 2015).

III. Conclusion

Based on the foregoing information, undersigned counsel respectfully requests that this Honorable Court conduct a judicial competency inquiry pursuant to *Matter of M-A-M-* in order to protect Mr. Smith's due process rights. This Motion for Implementation of Safeguards shall not preclude other safeguard requests.

Respectfully submitted this 12th day of June, 2023.

_____
Xxxx Xxxx
Counsel for Respondent

DETAINED

[redacted]
Pro Bono Counsel for Respondent

[redacted]
Pro Bono Counsel for Respondent

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
AURORA, COLORADO

In the Matter(s) of:	)	
[redacted]	)	File No.: **A** [redacted]
In Removal Proceedings.	)	

Immigration Judge:
Hon. [redacted]

Hearing Date:
[redacted], 2023 at 1:00 .p.m.

RESPONDENT'S MOTION FOR WEBEX APPEARANCE OF COUNSEL & WITNESS

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
AURORA, COLORADO

In the Matter(s) of:	
[redacted]	File No.: **A** [redacted]
In Removal Proceedings.	

RESPONDENT'S MOTION FOR WEBEX APPEARANCE OF COUNSEL & WITNESS

Respondent, Mr. [redacted], through undersigned pro bono counsel and pursuant to Chapter 4.7 of the Immigration Court Practice Manual, respectfully requests the Court permit his counsel and witness to appear remotely by Webex from their respective locations. As grounds he offers the following:

1. INA § 240(b)(2) and 8 C.F.R. § 1003.25(c) authorize EOIR to conduct hearings by video conference. When hearings are conducted by video, the immigration judge, the respondent, the DHS attorney, and the witnesses need not necessarily be present together in the same location. ICPM 4.7(b).
2. Respondent's counsels, [redacted] and [redacted], are based on the east coast and providing *pro bono* representation in collaboration with the non-profit Capital Area Immigrants' Rights (CAIR) Coalition. Counsel do not have funding available to facilitate in-person appearance at the Aurora Immigration Court.
3. Respondent's witness [redacted] resides in [redacted], Maryland. She is employed on a full-time basis and is a single parent to a [redacted]-year-old daughter, [redacted], who is living with [redacted]. Mr. [redacted] does not have the financial or logistical ability to travel to the Aurora Immigration Court to give testimony. Ms. [redacted] has access to an internet-connected personal device to connect to Webex, and she understands the importance of testifying from a private and quiet location.
4. The Court has graciously permitted counsel to appear via Open Voice at previous master calendar proceedings, but counsel requests that the individual merits hearing be conducted via Webex because counsel's inability to visually see Respondent, the

Immigration Judge, and the Assistant Chief Counsel limits counsel's ability to provide adequate representation and deprives Mr. [redacted] of his regulatory right to counsel in removal proceedings, as well as his constitutional right to due process. 8 USC 1229a(b)(4)(A); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (observing the fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful matter."). For example, if counsel can't see Respondent, counsel can't ensure certain facts are preserved in the record, such as any emotional reactions, gestures, or references to the body that Respondent might make on camera. Use of Webex allows counsel to have the same visibility of Respondent as the Court and the ACC, preserving the fundamental fairness of the proceedings.

5. Similarly, witness testimony via Open Voice limits the Court's ability to assess the witness' demeanor and make an adequate credibility determination pursuant to 8 USC §1158(b)(1)(B)(iii). Use of Webex ameliorates this concern, because Ms. [redacted] will be visible to the Court and the parties while testifying.
6. Pursuant to ICPM 5.2(i), on June 20, 2023, counsel contacted OPLA regarding a position on this motion and is currently awaiting a response.

Wherefore, Mr. [redacted] respectfully requests that his counsel and witness be permitted to appear by Webex from their respective locations.

Respectfully submitted this 21th day of June, 2023.

[redacted]

_____

[redacted]
Capital Area Immigrants' Rights Coalition
Pro Bono Attorney for Respondent

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
AURORA, COLORADO

In the Matter(s) of:	)	
[redacted]	)	File No.: **A** [redacted]
In Removal Proceedings.	)	

ORDER OF THE IMMIGRATION JUDGE

Upon consideration of the Respondent's Motion for Webex Appearance of Counsel & Witness, it is HEREBY ORDERED that the motion be **[ ] GRANTED [ ] DENIED** because:

[ ] DHS does not oppose the motion.
[ ] The respondent does not oppose the motion.
[ ] A response to the motion has not been filed with the court.
[ ] Good cause has been established for the motion.
[ ] The court agrees with the reasons stated in the opposition to the motion.
[ ] The motion is untimely per _____.
[ ] Other:_____.

Deadlines:
[ ] The application(s) for relief must be filed by _____.
[ ] The respondent must comply with DHS biometrics instructions by _____.

_____ _____
Date Immigration Judge

Certificate of Service

This document was served by: [ ] Mail [ ] Personal Service
To: [ ] Alien [ ] Alien c/o Custodial Officer [ ] Alien's Atty/Rep [ ] DHS
Date: _____ By: Court Staff_____

[redacted]
A [redacted]

DETAINED

CERTIFICATE OF SERVICE

On [redacted], 2023, I, [redacted], certify that the foregoing **Respondent's Motion for Webex Appearance** was served to the Department of Homeland Security, Office of Chief Counsel at the following address:

Office of the Chief Counsel
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security
12445 East Caley Avenue
Centennial, CO 80111-6432

By electronic service via ECAS.

[redacted]

Signature

06/21/2023
Date