CAIR
Capital Area Immigrants' Rights
COALITION

PRACTICE MANUAL FOR *PRO BONO* ATTORNEYS

Representing Detainees with Mental Disabilities in the Immigration Detention and Removal System*

Second Edition

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CAIR Coalition welcomes questions and comments about this manual and is available to consult with attorneys on cases involving clients with mental disabilities. Inquiries may be directed to the editors at the contact information listed above or to Supervising Attorney Claudia Cubas at claudia.cubas@caircoalition.org or (202) 331-3320 ext. 22.

NOTE

This manual is intended to provide practical and useful information for attorneys acting as *pro bono* counsel for detained non-citizens in the immigration detention and removal system. It is provided with the understanding that neither the Capital Area Immigrants' Rights Coalition, Cooley LLP, Covington and Burling LLP, McDermott Will & Emery, nor Akin Gump Strauss Hauer & Feld LLP is rendering legal or other professional advice to any person or entity.

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Practitioners using these materials are advised that the authors have no obligation to update or amend these materials to account for developments in this area of law.

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ACKNOWLEDGEMENTS

This manual is an updated and revised edition of the "Practice Manual for *Pro bono* Attorneys Representing Detained Clients with Mental Disabilities in Immigration Court," which was produced in 2009 as a collaboration between CAIR Coalition and Cooley LLP.

As with the original manual, we have benefited enormously from the generous contributions of our *pro bono* law firm partners in producing this revised edition. Undertaking a project of this kind would not have been possible without McDermott Will & Emery's sponsorship of Stephen Dekovich's Equal Justice Works fellowship, which is focused on expanding access to high-quality *pro bono* representation for individuals with mental disabilities in the immigration detention and removal system.

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Thank you to each of our partners for your support of our organization and your commitment to the detainees we all serve together.

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INTRODUCTION

In the nearly four years since the first edition of this Practice Manual was published, there have been significant developments in a number of areas, including notably the Board of Immigration Appeals' 2011 precedent decision on mental competency in *Matter of M-A-M-* and Immigration and Customs Enforcement's recent issuance of a new set of detention standards. Those developments are reflected in this new edition.

One thing that has not changed about this manual, however, is its purpose. The overviews of the issues and the suggestions for strategizing about them are designed to serve as an introduction and point of departure for *pro bono* attorneys with little or no background in immigration law who have volunteered to represent a detainee with a mental disability in removal proceedings. Because the manual is designed as a practical guide for these attorneys in familiarizing themselves with and navigating the detention and removal system, it is not exhaustive. With that significant caveat in mind, we urge *pro bono* attorneys in all cases to consult with seasoned immigration practitioners and mentors.

Nevertheless, it is our hope that this manual will serve as a useful resource for *pro bono* attorneys as they encounter the challenging issues that often arise in these cases. We firmly believe that, with the proper resources and support, *pro bono* attorneys can step into this area of great need and protect the rights and dignity of detainees with mental disabilities who would otherwise be left to fend for themselves in a system that is not designed to meet their needs. We believe this because we have seen it happen time and time again.

COMMONLY-USED ACRONYMS

A Number	Alien Registration Number
A File	Alien File
BIA	Board of Immigration Appeals (subdivision of EOIR)
CAT	Convention Against Torture
CBP	Customs and Border Protection (subdivision of DHS)
CDF	Contract Detention Facility
DHS	Department of Homeland Security
DIHS	Division of Immigration Health Services (now IHSC)
DOJ	Department of Justice
DRO	Detention and Removal Operations (now ERO)
EOIR	Executive Office for Immigration Review (subdivision of DOJ)
ERO	Enforcement and Removal Operations (formerly DRO; subdivision of ICE)
FOIA	Freedom of Information Act
HIPAA	Health Insurance Portability and Accountability Act
ICE	Immigration and Customs Enforcement (subdivision of DHS)
IGSA	Intergovernmental Service Agreement detention facility
IHSC	ICE Health Services Corps (formerly DIHS; subdivision of ERO)
IJ	Immigration Judge
INA	Immigration and Nationality Act
INS	Immigration and Naturalization Service (legacy immigration agency whose duties are now split between DHS and DOJ)
NDS	National Detention Standards
NTA	Notice to Appear
OCC	Office of Chief Counsel (subdivision of OPLA)
OIL	Office of Immigration Litigation (subdivision of DOJ)
OPLA	Office of the Principal Legal Advisor (subdivision of ICE)
PBNDS	Performance-Based National Detention Standards
SPC	Service Processing Center
TA	Trial Attorney (referring to DHS counsel in removal proceedings)
USCIS	U.S. Citizenship and Immigration Services (subdivision of DHS)

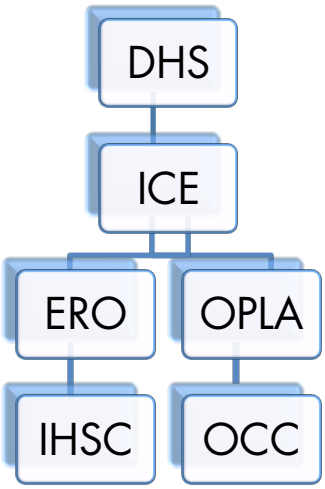
The Immigration and Nationality Act is codified at 8 U.S.C. § 1101 *et seq.*

Department of Justice regulations pertaining to removal proceedings are at 8 C.F.R. Chapter V.

Department of Homeland Security regulations pertaining to removal proceedings are at 8 C.F.R. Chapter I.

I. THE DEPARTMENT OF HOMELAND SECURITY: AN OVERVIEW OF ITS POWERS AND ROLES IN THE DETENTION AND REMOVAL SYSTEM

In representing a detainee with a mental disability in removal proceedings, a *pro bono* attorney will come into contact with several components of the Department of Homeland Security ("DHS"). Immigration and Customs Enforcement ("ICE") is the division of DHS charged with "promot[ing] homeland security and public safety through the criminal and civil enforcement of federal laws governing border patrol, customs, trade, and immigration."[1] There are a number of subdivisions within ICE, including Enforcement and Removal Operations ("ERO") and the Office of the Principal Legal Advisor ("OPLA").



ERO is tasked with apprehending, detaining, and removing non-citizens who are alleged to be present in the United States in violation of the immigration laws. ERO utilizes the ICE Health Services Corps ("IHSC") to oversee the provision of medical services to the non-citizens it detains.

OPLA serves as the legal representative of the U.S. government in removal proceedings before the Immigration Courts and the Board of Immigration Appeals, which are components of the Department of Justice's Executive Office for Immigration Review ("EOIR"). Individual cases are staffed by attorneys in Offices of Chief Counsel ("OCC") located near Immigration Courts across the country.

A. What is the immigration detention system?

DHS/ICE/ERO houses immigration detainees in over 250 jails and detention centers across the country. The Detention Watch Network maintains a map of this system at http://www.detentionwatchnetwork.org/dwnmap.

The facilities that make up the detention system can be roughly divided into three categories:

- Service Processing Centers ("SPCs"), which are federally-owned facilities that are operated by ICE staff and/or contractors;
- Contract Detention Facilities ("CDFs"), which are owned and operated by private companies under contract with ICE; and
- Intergovernmental Service Agreement Facilities ("IGSAs"), which are state and local jails that house federal immigration detainees alongside their criminal inmate populations under Intergovernmental Service Agreements with ICE.

[1] ICE Overview: Mission, http://www.ice.gov/about/overview (last visited October 10, 2012).

PRACTITIONER'S TIP: The type of facility can matter. The type of facility in which a detainee with a severe mental disability is held can have a substantial impact on the way ICE manages the case. A 2011 report by the DHS Office of Inspector General ("OIG") found inconsistencies in ICE oversight between facilities that were and were not staffed by IHSC[2] The OIG concluded that the "oversight exercised by IHSC at non-IHSC staffed facilities does not provide ICE with a means for (1) maintaining statistics on the overall population of detainees with mental health conditions, (2) updating the mental health status of detainees and related treatments, and (3) maintaining an awareness of the level of care that each facility can provide." IHSC staffs only 18 out of the roughly 250 detention centers nationwide.

Some key figures regarding this detention system:

- The total number of non-citizens who are held in ICE detention facilities annually has nearly doubled in the past decade, from 209,000 in 2001 to 392,000 in 2010.[3]
- The average daily population in detention facilities was 34,000 in Fiscal Year 2012, up 20% from 18,000 in 2004.[4]
- As of April 2011, the average length of detention for all non-citizens who enter the detention system was 31 days.[5] However, this number includes the approximately 25% of the detention population that is detained and released within a matter of days. For non-citizens who are detained while they contest removal charges and/or pursue relief from removal in the Immigration Courts, a 2009 study found that the average length of detention was 81 days.[6] Among these detainees, those with no criminal record were detained an average of 65 days, while those with criminal convictions were detained an average of 121 days.
- According to the ICE Public Advocate, 90% of detainees represent themselves in their legal proceedings.[7]
- For Fiscal Year 2013, ICE requested a budget of $2 billion for detention and removal operations (enough for an average daily population of 32,800). The cost to house one detainee for one day is $122.[8]

B. How many non-citizens with mental disabilities are there in the detention system?

ICE does not keep statistics on the number of non-citizens in its custody who have mental disabilities. However, in 2008, IHSC estimated that 2-5% of detainees have a "serious mental illness," while 10-

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[2] Department of Homeland Security Office of Inspector General, OIG-11-62, *Management of Mental Health Cases in Detention* (March 2011), *available at* http://www.oig.dhs.gov/assets/Mgmt/OIG_11-62_Mar11.pdf.

[3] National Immigration Forum, *The Math of Immigration Detention* 3 (Aug. 2011), http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf.

[4] *Id.*

[5] National Immigrant Justice Center, *Snapshot of U.S. Immigration Detention* (April 2011), www.immigrantjustice.org/sites/immigrantjustice.org/files/A Snapshot of Immigration Detention April 2011.pdf.

[6] Kerwin, Donald and Serena Yi-Ying, Migration Policy Institute, *Immigrant Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?* (Sept. 2009), *available at* http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf.

[7] Teleconference Recap: A Conversation with the ICE Public Advocate, http://www.dhs.gov/files/programs/cisomb-telecon-ice-public-advocate.shtm (last visited October 10, 2012).

[8] Math of Immigration Detention, supra note 5, at 2.

16% have "some form of encounter with a mental health professional or the mental health system" while in detention.[9]

As Human Rights Watch and the ACLU pointed out in their joint 2010 report on issues around mental disability in the detention and removal system, it is unclear how IHSC defined its terms or how it reached those figures. Independent estimates put the number of non-citizens in immigration proceedings who have mental disabilities conservatively at 15%,[10] which by current detention figures amounts to nearly 60,000 detainees annually.

Throughout the different facilities that make up the detention system, the ratio of mental health providers to detainees with significant mental illness varies widely, from 1:8 to 1:53. IHSC, for its part, has persistent vacancies in mental healthcare positions. For instance, in August of 2010, vacancy rates in 11 of the 18 detention centers staffed by IHSC were 50% or more.[11]

C. What standards apply to the treatment of detainees with mental disabilities in the detention system?

While DHS has rebuffed calls to issue legally-binding regulations that would govern the treatment of detainees in the immigration detention system, ICE has published three sets of detention standards: the 2000 National Detention Standards ("2000 NDS"), the 2008 Performance-Based National Detention Standards ("2008 PBNDS"), and the 2011 Performance-Based National Detention Standards ("2011 PBNDS"). All three sets of detention standards are available online at http://www.ice.gov/detention-standards/2011.

The detention standards are not legally-binding on the detention facilities, detention staff, or ICE itself. As a result, attorneys are likely to encounter wide variations in adherence to these guidelines across different detention facilities and ICE/ERO Field Offices.[12] A number of audits of detention centers for compliance with the standards are available online through ICE's website at http://www.ice.gov/foia/library. Recurring problems include failures to perform required mental health screenings, to track or transfer detainees' medical records, and to provide medically-necessary medications.

Please see Chapter IV for a detailed discussion of the detention standards that are directly applicable to the care and treatment of detainees with mental disabilities.

D. How do non-citizens enter the detention system?

Non-citizens enter ICE custody in a number of ways:

- From ports of entry: Non-citizens who arrive at a port of entry at the border of the United States without proper documentation (such as a valid visa) and express a fear of returning to their home country will be detained pending further legal proceedings.

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[9] Human Rights Watch and the American Civil Liberties Union, *Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the US Immigration System* 16 (June 2011), http://www.hrw.org/reports/2010/07/26/deportation-default.

[10] *Id.* at 17.

[11] Management of Mental Health Cases in Immigration Detention, supra note 2, at 1.

[12] *See, e.g.*, Physicians for Human Rights, *Dual Loyalties: The Challenges of Providing Professional Health Care to Immigration Detainees*. Physicians for Human Rights (March 2011), http://physiciansforhumanrights.org/library/reports/report-03-21-2011.html .

- Through DHS raids and enforcement actions: Non-citizens may be apprehended during enforcement sweeps conducted by ERO at their homes or workplaces.
- From psychiatric hospitals: Though regulations prohibit ICE from taking custody of a non-citizen who is "confined because of physical or mental disability in an institution or hospital,"[13] instances have been known to arise. In addition, there is no prohibition on ICE taking custody of a patient upon her discharge from the hospital.
- From criminal custody: A large segment of the detainee population enters the detention system directly from state or federal criminal custody.

See below for further discussion of the process by which ICE apprehends and detains non-citizens with criminal histories.

1. What is an ICE detainer?

A detainer is a notice issued by ICE to a federal, state, or local law enforcement agency ("LEA"). The detainer serves three key functions:

- it notifies the LEA that ICE intends to assume custody of a non-citizen in the LEA's custody when the non-citizen is released from the LEA's custody;
- it requests information from the LEA about the non-citizen's upcoming release so that ICE may make plans to assume custody of the non-citizen; and
- it asks that the LEA continue to hold the non-citizen for up to 48 hours (excluding Saturdays, Sundays, and holidays) beyond the time of release so that ICE may assume custody.[14]

PRACTITIONER'S TIP: ICE Form I-247. In December of 2011, ICE began issuing detainers on Form I-247, also called the "Notice of Action." A sample is available online at http://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf. This form provides information to the LEA about the nature of ICE's interest in the non-citizen (i.e., that it has begun an investigation to determine whether it should initiate removal proceedings, or that removal proceedings have already been initiated through service of a Notice to Appear), asks the LEA to continue to hold the non-citizen for up to 48 hours (excluding weekends and holidays) after the time she otherwise would have been released, and requests that the LEA provide the non-citizen with a copy of the form. The attorney should note that the LEA cannot lawfully hold a non-citizen beyond the 48 hours provided for by 8 C.F.R. § 287.7. If ICE fails to assume custody within that window, the LEA must release the non-citizen.

2. How does ICE identify non-citizens for detainers?

ICE's Criminal Alien Program ("CAP") is the mechanism through which ICE screens the U.S. jail and prison population for non-citizens.[15] Once ICE has identified a potentially removable non-citizen in criminal custody, it issues a detainer and begins the process of initiating removal proceedings when the non-citizen is transferred into immigration detention.

In some cases where the non-citizen is serving a lengthy criminal sentence, ICE may initiate removal proceedings long before the scheduled release date through what is known as the Institutional Hearing

[13] 8 C.F.R. § 236.2(b).
[14] ICE Detainers: Frequently Asked Questions, http://www.ice.gov/news/library/factsheets/detainer-faqs.htm (last visited October 10, 2012).
[15] ICE Criminal Alien Program, http://www.ice.gov/criminal-alien-program (last visited October 10, 2012).

Program. The intention in these cases is to secure an administratively final order of removal that can be executed immediately upon the completion of the criminal sentence, thus reducing immigration detention costs.

Either way, CAP is designed to prevent the release of non-citizens with criminal histories into the community following the completion of their criminal proceedings.

3. What consideration does ICE give to a non-citizen's mental health when making the decision of whether or not to detain?

In a 2006 memo to ICE/ERO Field Offices entitled "Discretion in Cases of Extreme or Severe Medical Concern," then-ICE Director John Torres addressed the exercise of discretion by ERO (then known as "DRO") officers when following up on a detainer or a "pickup request" for non-citizens with "severe psychiatric conditions," including "extreme mental retardation/mental illness/mental incompetence."[16]

The memo directs that a favorable exercise of discretion (i.e., a decision not to detain) should be considered on a case-by-case basis "whenever a medical or psychiatric evaluation, diagnosis, treatment plan, or other documentation provided by the referring agency indicates the existence of extreme disease or impairment that makes detention problematic and/or removal highly unlikely." These acts of discretion are designed to allow ICE to "[s]how compassion and humanitarian concern," direct detention resources to non-citizens who are more likely to be removed, and avoid incurring potentially large health care costs.

Please see Chapter VII for a further discussion of other facets of ICE's prosecutorial discretion in removal proceedings.

4. If ICE does decide to detain a non-citizen, what consideration is given to mental health factors in choosing where to detain her?

ICE's detention standards call for the use of a formal classification process for "managing and separating detainees by threat risk and special vulnerabilities or special management concerns that is based on verifiable and documented data."[17] The classification system is intended to ensure the safety of detainees and staff by housing non-citizens with similar profiles and criminal histories together. This classification system may be used within a facility (for example, by separating detainees into low-, medium-, and high-custody housing units) or across facilities (for example, by sending all low-custody detainees to one facility and all medium- and high-custody detainees to another facility within the Field Office's area of responsibility).[18]

In making this classification determination, the detention standards require that detention staff give "special consideration" to any factor that "would raise the risk of vulnerability, victimization, or assault," including a detainee's disability or serious medical or mental illness.[19]

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[16] Torres, John, *Discretion in Cases of Extreme or Severe Medical Concern*, *available at* http://www.ice.gov/doclib/foia/dro_policy_memos/discretionincasesofextremeorseveremedicalconcerndec112006.pdf.
[17] 2011 ICE Performance-Based National Detention Standards § 2.2(II)(1) (hereinafter, "2011 PBNDS"), *available at* http://www.ice.gov/detention-standards/2011/ .
[18] *Id.* at § 2.2(V)(F).
[19] *Id.* at § 2.2(V)(C).

PRACTITIONER'S TIP: Transfers between detention facilities. In January of 2012, ICE adopted Policy 11022.1, a series of guidelines and requirements for the transfer of detainees outside an "area of responsibility" ("AOR") – that is, from the geographic region under the authority of one ICE/ERO Field Office to another.[20] *(The policy does not address transfers between facilities within an AOR, which may be commonplace for detainees with mental health needs.) The policy directs that detainees generally will not be transferred out of an AOR in which they have immediate family members, an attorney of record, or pending removal proceedings or bond hearings. However, an exception to that rule may be made in certain circumstances, including where a transfer is deemed necessary to provide necessary medical or mental health care to a detainee or where it is requested by a detainee. If a transfer is to be made, the sending facility is required to provide the receiving facility with information regarding the detainee's medical or mental health concerns and medications in writing, as well as a copy of the detainee's full medical record. The sending facility must also send the detainee with at least seven days worth of prescription medication to ensure continuity of care, and arrange for the provision of any medications that must be administered en route and any specialized care that may be required during the transfer. In addition, the policy requires ERO to notify the detainee's attorney of record within 24 hours of the detainee's transfer and inform her of the reason for the transfer and the contact information for the new facility. ICE must also notify the Immigration Court of the transfer if the detainee has pending proceedings.*

E. How does a *pro bono* attorney enter her appearance as a detainee's representative for detention purposes?

An attorney representing a detainee must enter her appearance with ERO in order to be recognized by ERO as the attorney of record. This can be accomplished by filing Form G-28 with the ERO Field Office that has responsibility for the facility in which the detainee is held.

The attorney should note that the process for entering an appearance with ICE/ERO is distinct from the process for entering an appearance in Immigration Court, which involves serving a copy of the Form EOIR-28 on ICE's Office of Chief Counsel. (See Chapter II for more information on entering an appearance in Immigration Court.)

The Form G-28 is available online at http://www.uscis.gov/files/form/g-28.pdf.

F. Once ICE makes the decision to detain, how can the detainee get out of the detention system?

There are several ways that a detainee can gain release from detention prior to the resolution of the removal proceedings. Three of them – bond, parole, and alternatives to detention – are discussed briefly below.

1. How can a *pro bono* attorney get a detainee out on bond?

Under immigration detention procedures, ICE makes an initial determination regarding whether and in what amount to set a bond for a detainee.[21] This determination is typically provided to the detainee in writing in conjunction with or shortly after service of the Notice to Appear.

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[20] ICE Policy 11022.1: Detainee Transfers (Jan. 4, 2012), http://www.ice.gov/doclib/detention-reform/pdf/hd-detainee-transfers.pdf.
[21] 8 C.F.R. § 236.1.

If the detainee is dissatisfied with ICE's decision or the amount of the bond, she may seek a redetermination by the Immigration Judge, who is then free to either lower or raise the bond. However, the Immigration Judge does not have jurisdiction to make a bond redetermination in certain types of cases, including where the detainee is considered to be an "arriving alien" as defined at 8 C.F.R. § 1.1(q) or is subject to mandatory detention under INA § 236(c). (That said, the Immigration Judge does have jurisdiction to review whether the respondent properly falls within a "no-bond" category.[22])

If the Immigration Judge does have jurisdiction to consider a request for a bond redetermination, the detainee's attorney may make a motion for a bond hearing at any time during removal proceedings. Bond hearings are typically held during the Master Calendar Hearing docket (please see Chapter II for more information on the different types of hearings in Immigration Court), though they are distinct from and form no part of the record of the removal proceedings.[23]

At a bond hearing, the Immigration Judge will consider whether the detainee:

(1) is eligible for relief from removal;
(2) would pose a danger to the community upon release; and
(3) would pose a flight risk upon release.

For an overview of jurisdictional issues, important factors, and appeal rights regarding bond redeterminations, the attorney may consult the Immigration Judge Benchbook section on bond, which is available online at http://www.justice.gov/eoir/vll/benchbook/tools/Bond%20Guide.htm.

PRACTITIONER'S TIP: Mental health as a factor in bond hearings. In making a motion for a bond redetermination on behalf of a detainee with a mental disability, the attorney should be prepared to present to the court a plan for the detainee's transition to the community that has been developed with the detainee in light of her goals for the representation. A well-designed plan that includes coordination with local social services and mental health agencies for appropriate housing, case management services, and access to community-based mental health care, as well as the involvement of supportive and dependable family members and friends, can be persuasive for an Immigration Judge who may otherwise be skeptical of the detainee's ability to maintain himself or herself safely in the community during the course of the removal proceedings. Please see the Appendix for information on community-based resources in the Washington, D.C./Virginia/Maryland region.

2. How can a *pro bono* attorney get a detainee out on parole?

Parole is a special form of release for "arriving aliens" (i.e., those who are detained while attempting to enter the United States because they do not have a valid entry visa or are otherwise inadmissible) who are pursuing asylum applications based on their fear of persecution or torture in their home countries. "Arriving aliens" are not eligible for bond (or bond redetermination hearings in Immigration Court),[24] but DHS may grant them release on parole in cases where it is justified by "urgent humanitarian reasons" or a "significant public benefit."[25] The regulations state that those cases include ones in which "continued detention would not be appropriate" because the detainee has a "serious medical condition."

[22] *Matter of Joseph*, 22 I&N 799 (BIA 1999).
[23] 8 C.F.R. § 1003.19(d).
[24] INA §235(b)(2)(A).
[25] 8 C.F.R. § 212.5(b).

To qualify for parole, the "arriving alien" must establish her identity, provide evidence that she will appear when required, and demonstrate that she does not pose a threat to the community.[26]

As with bond redetermination hearings, the attorney should also consider submitting evidence and supporting documentation to establish the harm that continued detention would bring to the detainee, as well as offer a plan for the detainee's transition to the community.

3. What are "alternatives to detention"?

By ICE's definition of the term, alternatives to detention ("ATDs") are programs that provide for close monitoring of non-citizens in the community during the course of their removal proceedings, thus making detention unnecessary. The goal of these programs, as with the detention system generally, is to ensure that non-citizens appear for their Immigration Court proceedings and comply with any orders issued therein, including orders of removal.

ICE utilizes several different ATD programs, which are intended to provide different levels of supervision based on an individualized consideration of the non-citizen's profile and risk factors. However, not all ATD programs are available nationwide, and assignment to a program can therefore be determined in part by the non-citizen's residency and the availability of funds for the program. Furthermore, ICE utilizes enrollment in an ATD program as a specific condition of release. As a result, if a participant fails to comply with the requirements of the program, they may be subject to increased supervision and restrictions and/or re-detention.

ICE's ATD programs include:

- Intensive Supervision Appearance Program ("ISAP"), the most restrictive ATD program. ISAP includes community-based supervision and intensive case-management with structured reporting requirements, global positioning and radio frequency tracking, telephonic reporting, and unscheduled home visits.
- Enhanced Supervision/Reporting ("ESR"), which is less restrictive than ISAP. ESR includes telephonic reporting, radio frequency and global positioning tracking, and unannounced home visits by contract staff.
- Electronic Monitoring ("EM"), which is operated by ICE itself and is available to non-citizens who reside in areas that are not covered by either ISAP or ESR.

PRACTITIONER'S TIP: Jurisdiction of Immigration Judges over ATDs. In a pair of recent cases, the Board of Immigration Appeals concluded that enrollment of a non-citizen in an ATD program is a "condition of release from custody" and not a form of "continuing custody." As a result, Immigration Judges have jurisdiction to review a non-citizen's placement in an ATD program under the authority granted to them by 8 C.F.R. § 1236.1(d)(1) to "review and modify the terms imposed by the DHS on an alien's release from custody."[27]

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[26] ICE Directive 11002.1: Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Jan. 4, 2010), *available at* http://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf.

[27] *Matter of Aguilar-Aquino*, 24 I&N Dec. 747 (BIA 2009); *Matter of Garcia-Garcia*, 25 I&N Dec. 93 (BIA 2009). *See also* Immigration Law Advisor, "Alternatives to Detention and Immigration Judge's Bond Jurisdiction" (April 2010), *available at* http://www.justice.gov/eoir/vll/ILA-Newsleter/ILA%202010/vol4no4.pdf.

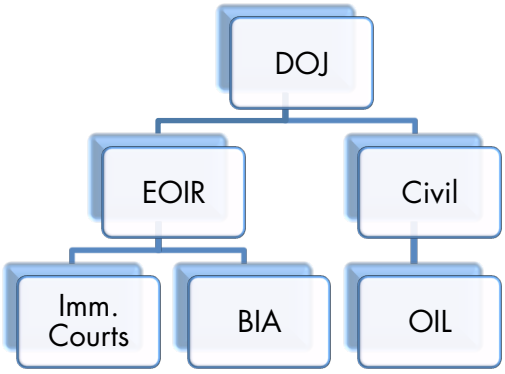
G. What is DHS's role in removal proceedings in Immigration Court?

Aside from ERO's responsibilities for apprehending and detaining non-citizens, ICE has a separate subdivision – the Office of the Principal Legal Advisor ("OPLA") – that is responsible for prosecuting removal proceedings in Immigration Court, among other legal duties. Individual removal cases are staffed by DHS attorneys located in Offices of Chief Counsel nationwide.

Please see Chapter VII for a discussion of ICE's authority to exercise prosecutorial discretion in removal proceedings through its Offices of Chief Counsel.

II. THE DEPARTMENT OF JUSTICE: AN OVERVIEW OF ITS POWERS AND ROLES IN THE DETENTION AND REMOVAL SYSTEM

In representing a detainee with a mental disability in removal proceedings, a *pro bono* attorney may come into contact with the Department of Justice in several ways.



First, the attorney will appear before the Immigration Court, a component of the Department of Justice's Executive Office for Immigration Review ("EOIR") responsible for adjudicating removal cases.

Second, after the Immigration Judge has issued a decision, an administrative appeal may be taken by either the respondent or DHS to the Board of Immigration Appeals ("BIA"), which is also housed within DOJ's EOIR.

Third, should the BIA issue a ruling adverse to the respondent, the respondent may then appeal that administratively final decision to the federal Circuit Court of Appeals, where the government's position will be represented by an attorney from DOJ's Office of Immigration Litigation ("OIL").

Each of these steps is discussed below.

A. What is an Immigration Court and how does it conduct removal proceedings?

Immigration Courts are a component of the Department of Justice's Executive Office for Immigration Review ("EOIR"), and they are neither Article III courts nor administrative courts. As of 2012, there were more than 230 Immigration Judges sitting in 55 Immigration Courts nationwide.[28] These Immigration Judges received more than 430,000 matters in Fiscal Year 2011.[29]

The scope of their authority includes:

- determining whether a non-citizen is subject to removal[30] from the United States for violating an immigration law;
- determining whether to grant an otherwise removable non-citizen relief from removal (including the forms of select forms of relief discussed below in Chapters VIII and IX);
- reviewing matters concerning custody status and making bond re-determinations; and
- reviewing reasonable fear denials by DHS officers for certain non-citizens seeking fear-based protection from removal.

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[28] Department of Justice Executive Office for Immigration Review, Office of the Chief Immigration Judge, http://www.justice.gov/eoir/ocijinfo (last visited October 10, 2012).

[29] Department of Justice Executive Office for Immigration Review, *2011 Statistical Yearbook*, *available at* http://www.justice.gov/eoir/statspub/fy11syb.pdf.

[30] The term "removal," which was introduced by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, is functionally synonymous with the terms "deportation" or "exclusion," which were used before 1996. Though "removal" is thus the technically accurate term today, immigration practitioners often use the terms interchangeably.

PRACTITIONER'S TIP: Know the Immigration Court Practice Manual. Attorneys representing respondents in removal proceedings should familiarize themselves with and abide by the Immigration Court Practice Manual, available online through the DOJ website at http://www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm. The statutory provisions governing removal proceedings are found at Immigration and Nationality Act ("INA") § 240, and the corresponding regulations are at 8 C.F.R. Part 1240.

1. How are Immigration Court proceedings initiated against a non-citizen?

Removal proceedings begin when DHS serves a charging document – Form I-862, the Notice to Appear ("NTA") – on a non-citizen and files it with the Immigration Court. In this respect, the NTA is functionally equivalent to a civil complaint or a criminal indictment.

PRACTITIONER'S TIP: Terminology. In Immigration Court, the non-citizen who is the subject of the removal proceedings is referred to as the "respondent." The Immigration Judge should be addressed as "Your Honor" or "Judge (Last Name)." The attorney representing the Department of Homeland Security is "DHS counsel," though it is common to hear Immigration Judges and respondents' attorneys refer to DHS simply as "the government."

The NTA contains two distinct sections: the factual allegations, and the charge(s) of removability. Typically, the factual section briefly alleges key aspects of the respondent's immigration history (her citizenship, date of entry into the United States and status at entry, current immigration status, etc.). Where relevant, the factual section may also allege the existence and nature of one or more criminal convictions. Then, based on the facts alleged, the removability section charges the respondent with removability from the United States under one or more applicable provisions of the Immigration and Nationality Act ("INA").

The NTA may also contain the date, time, and location of the initial Immigration Court hearing at which the respondent must appear to answer the allegations and charges. If the NTA does not contain this information, the respondent will be mailed a separate "Notice of Hearing in Removal Proceedings" once the initial Immigration Court date has been docketed.

2. How does a *pro bono* attorney enter her appearance as a respondent's representative in Immigration Court?

An attorney representing a respondent must enter her appearance by filing Form EOIR-28 with the Immigration Court and serving a copy on DHS counsel. This form must be served and filed at or before the attorney's first appearance in Immigration Court on behalf of the respondent. If, however, the attorney intends to file a motion and has not yet entered an appearance in the matter, the EOIR-28 should accompany the motion according to the procedures outlined in the Immigration Court Practice Manual.

Pro bono attorneys should note that there is a box on the second page of the Form EOIR-28 that should be marked to indicate to the court that the representation is being provided *pro bono*.

The form can be accessed online at http://www.justice.gov/eoir/eoirforms/instru28.htm.

3. What are the hearings like in Immigration Court?

Very generally speaking, a respondent in removal proceedings who contests DHS's removability charge(s) or pursues relief from removal (or both) will have a handful of court hearings.

In Immigration Court, there are generally two types of hearings: the "Master Calendar Hearing" and the "Individual" or "Merits Hearing."

a. What is a Master Calendar Hearing?

The Master Calendar Hearing is an initial or preliminary hearing before an Immigration Judge. These hearings are typically quite short in duration. Their purpose is to identify points of contention between the respondent and DHS, confirm undisputed or undisputable issues, set deadlines for the submission of briefs and evidence, schedule future court dates, and generally set the course for the rest of the proceedings.

Respondents are required to attend these hearings. If the respondent is detained, ICE will either arrange for the detainee's transportation to the Immigration Court for an in-person appearance, or the respondent will appear via video-teleconferencing ("VTC") from the detention center. Immigration Courts and DHS are increasingly utilizing VTC technology in certain jurisdictions, particularly those where detention centers are located far from the Immigration Court.

PRACTITIONER'S TIP: Asking for a continuance. If the attorney is making her first appearance and has not yet had the opportunity to review the Notice to Appear with the respondent, a request for a continuance is appropriate and most Immigration Judges and DHS counsel will readily agree to it. That said, an attorney representing a detainee with a mental disability should be especially sensitive to the effects of detention on the client's well-being and be diligent to avoid any unnecessary delays in moving the case forward towards a resolution.

Whether at the first Master Calendar Hearing or after a continuance has been granted, the respondent's attorney should be prepared to plead to the factual allegations and removability charges contained in the Notice to Appear. (The Immigration Court Practice Manual provides templates for both oral and written pleadings in its appendix.)

Below is a list of pleading options at the Master Calendar Hearing.

Issue	Options
Is the respondent competent to participate in removal proceedings under the standard articulated in *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011)?	If an attorney has reason to believe the respondent is not mentally competent, the attorney should consider raising this issue as early as possible and proposing a schedule and method for conducting the competency inquiry. See Chapter VI for a detailed discussion of litigation strategies and approaches for representing clients who may be incompetent.
Did DHS properly serve the respondent with the Notice to Appear?	Concede or deny proper service. For incompetent respondents or respondents whose competency is in doubt, the attorney should consider whether DHS has complied with the enhanced service requirements specifically for incompetent respondents found in the regulations at 8 C.F.R. § 103.5a(c)(2) before pleading on this issue.
Should the Notice to Appear be formally read in court?	Request or waive a formal reading of the NTA.
Has the Immigration Judge explained the respondent's rights in the removal proceedings?	Request or waive explanation of rights. The attorney should advise the respondent of her rights in removal proceedings before the initial hearing.
How does the respondent answer the factual allegations in the NTA?	Admit or deny the factual allegations DHS has made in the Notice to Appear.
How does the respondent answer the removability charge(s) in the NTA?	Concede or deny the removability charge(s) DHS has made in the Notice to Appear. If the attorney denies the removability charge(s), she should be prepared to defend that position and, if necessary, to propose a schedule for briefing the argument.
Does the respondent wish to designate the country of removal?	Designate or decline to designate a country of removal. If the respondent is contesting removal, it is common practice to decline to designate a country of removal.
What relief from removal does the respondent intend to pursue?	State which application(s) for relief from removal, if any, the respondent intends to file. The attorney should be prepared to make a *prima facie* showing that the respondent is eligible for the relief that is stated.
When will the application(s) for relief be due?	Request a date on which to file the application(s) for relief with the Immigration Court and serve DHS with a copy. If the respondent is pursuing asylum, withholding of removal, and/or protection under the Convention

Issue	Options
	Against Torture, the I-589 application will need to be filed in open court at a Master Calendar Hearing.
How much of the court's time will the respondent need for the Individual Hearing on the merits of the application(s) for relief?	Estimate the amount of time needed to present the case at the Individual Hearing, which typically last two to four hours.
When will the pre-hearing brief and evidence filing be due?	Clarify with the court when the respondent's pre-hearing brief and evidence filing will be due. For detained cases, the Immigration Court Practice Manual does not provide a default filing deadline, though it is common practice for the brief and evidence packet to be submitted 15 days before the Individual Hearing. Note that, unless ordered by the Immigration Judge, a pre-hearing brief is not required. However, it is highly recommended that the attorney submit a brief that thoroughly explains the facts and law that support the respondent's application(s).

In addition to these pleadings, a number of other motions may be made or addressed at a Master Calendar Hearing. Some common motions are listed below.

- Motion for a competency determination (Please see Chapter VI for a detailed discussion of litigation strategies and approaches for representing clients who may be incompetent.)
- Motion to continue
- Motion to advance
- Motion to change venue
- Motion for substitution or withdrawal of counsel
- Motion for extension of a filing deadline
- Motion to accept an untimely filing
- Motion to amend
- Motion for closed hearing
- Motion for telephonic appearance
- Motion for video or telephonic testimony
- Motion to request an interpreter
- Motion for subpoena
- Motion for consolidation or severance
- Motion to stay removal

Attorneys should consult the Immigration Court Practice Manual for a full discussion of each of these motions and information on motions practice in removal proceedings.

b. What is an Individual or Merits Hearing?

The Individual, also known as the Merits Hearing, is an evidentiary hearing to resolve the disputed issues that were identified at the Master Calendar Hearing. The individual hearing is the respondent's opportunity to present evidence and argumentation in support of the application(s) for relief.

The respondent's attorney should consult the Immigration Court Practice Manual and ensure that all motions, applications for relief, proposed exhibits, and witness lists are filed according to the deadlines set by the Immigration Judge. Attorneys should take special note that respondents with a criminal history should file a chart that includes the criminal records.

At the Individual Hearing, the respondent's attorney should be prepared to:

- make an opening statement;
- raise any objections to the government's evidence[31];
- present witnesses and evidence on all issues;
- cross-examine opposing witnesses and object to testimony, when appropriate; and
- make a closing statement.

Immigration Judges often make their decisions on the application(s) for relief orally at the conclusion of the individual hearing. In some cases, however, the Immigration Judge may take more time to review the record and issue a written decision.

B. What happens after the Immigration Judge issues a decision in the removal proceedings?

If the Immigration Judge decides against the respondent and orders removal, the attorney and the respondent may consider pursuing certain post-decision options. The first two of these options involve motions with the Immigration Court, while the third involves an appeal to a separate appellate body.

The attorney should consult the Immigration Court Practice Manual and the Board of Immigration Appeals Practice Manual for further information on these options, and take note that all three come with strict deadlines.

1. What post-decision motions may be filed with the Immigration Court?

One option for a respondent after receiving an adverse decision from the Immigration Judge is to file a motion to reconsider. This is a motion that asks the Immigration Judge to re-examine her decision. The motion must identify an error in law or fact in the Immigration Judge's decision or identify a relevant change in law that occurred after the decision was made.

A motion to reconsider is based only on the existing record and does not seek to introduce new facts or evidence. In addition, it must be filed within 30 days of the Immigration Judge's decision, and as a general rule, a respondent may file only one such motion.

A respondent may also consider filing a motion to reopen proceedings. In contrast to the motion to reconsider, the motion to reopen asks the Immigration Judge to reopen the removal proceedings so that the respondent may present new facts or evidence in the case.

[31] Note that the Federal Rules of Evidence do not apply in removal proceedings. Nevertheless, the rules can be used as rough guidelines.

A respondent is permitted to file only one motion to reopen, and it must be filed within 90 days of an Immigration Judge's decision (with limited exceptions).

It should be noted that neither a motion to reconsider nor a motion to reopen that is filed with the Immigration Court prior to the deadline for filing an appeal with the Board of Immigration Appeals (see below) will stay or extend the deadline for filing the appeal. They also do not automatically stay an administratively final order of removal.

2. How can an appeal be taken to the Board of Immigration Appeals?

Either the respondent or DHS (or, in some cases, both) may appeal a decision of the Immigration Judge. The Board of Immigration Appeals ("BIA") is the component of DOJ's Executive Office for Immigration Review that has jurisdiction to review decisions of Immigration Judges. The BIA is an administrative body with up to 15 Board Members and a staff of roughly 150 attorney advisors.[32] The BIA received more than 17,000 case appeals in Fiscal Year 2011.[33]

PRACTITIONER'S TIP: Reserving the respondent's appeal rights. A respondent has up to 30 days after the Immigration Judge's decision to exercise her appeal rights by filing an appeal to the BIA. However, the respondent may be asked to waive her appeal rights during or at the conclusion of removal proceedings in Immigration Court. If the right to appeal is knowingly and voluntarily waived, the decision of the Immigration Judge becomes administratively final and DHS may begin its efforts to execute the order of removal immediately.

To appeal an Immigration Judge's decision, a respondent must file with the BIA and serve on the ICE Office of Chief Counsel a properly completed Form EOIR-26, Notice of Appeal, which is available online at http://www.justice.gov/eoir/eoirforms/eoir26.pdf. The Notice of Appeal must be received at the BIA clerk's office (note that the BIA does not follow the mailbox rule) no later than 30 calendar days after the Immigration Judge rendered the oral decision or mailed a written decision.[34] A properly submitted Notice of Appeal automatically stays the execution of the removal order that is being appealed.

Along with the Notice of Appeal, the respondent's attorney must also enter an appearance before the BIA using Form EOIR-27, which is available at http://www.justice.gov/eoir/eoirforms/eoir27.pdf. Note that this entry of appearance for the appeal is distinct from and in addition to the appearance the attorney may have already entered in the Immigration Court using Form EOIR-28 and/or the appearance the attorney may have already entered with ICE/ERO using Form G-28.

Within, on average, one to two months of the submission of the Notice of Appeal and EOIR-27, the respondent's attorney will receive a transcript of the Immigration Court proceedings and a briefing schedule.

PRACTITIONER'S TIP: Know the BIA Practice Manual. An attorney pursuing an appeal of an Immigration Judge's decision should consult the BIA Practice Manual, available online at http://www.justice.gov/eoir/vll/qapracmanual/apptmtn4.htm.

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[32] Department of Justice Executive Office for Immigration Review, Board of Immigration Appeals, http://www.justice.gov/eoir/fs/biabios.htm (last visited October 10, 2012).
[33] 2011 Statistical Yearbook, supra note 29.
[34] 8 C.F.R. § 1003.

3. How can an appeal be taken to the federal Circuit Court of Appeals?

Should the BIA render an adverse decision, the Respondent may appeal that BIA decision to the federal Circuit Court of Appeals with jurisdiction over the Immigration Court that conducted the removal proceedings. To appeal, a party must file a Petition for Review within 30 days of the BIA's final order of removal.[35]

Unlike appeals to the BIA, once a respondent makes an appeal to the Circuit Court of Appeals, there is no automatic stay of removal.[36] Therefore, the attorney must file a Motion for Stay of Removal when making a federal appellate claim.

[35] *See* INA § 242.
[36] INA § 242(b)(3)(B).

III. CONSIDERATIONS IN FORMING AND MAINTAINING AN ATTORNEY-CLIENT RELATIONSHIP WITH A DETAINEE WITH SEVERE MENTAL IMPAIRMENTS

In the typical course, an attorney extends an offer of *pro bono* representation to a detainee with a mental disability in the same manner as she would approach any potential client: that is, with the presumption that the potential client has the capacity to consult with the attorney, weigh the options presented, and either accept or decline the offer.[37]

On occasion, however, this presumption of decision-making capacity may be called into question by information the attorney has obtained either before meeting the potential client (from a referring organization, for example, or perhaps from the Immigration Court) or during the attorney's initial interactions with the detainee.

In these situations, the attorney must consider the threshold question of whether the detainee has the requisite capacity to consent to the arrangement and enter meaningfully into an attorney-client relationship. The attorney should approach this question with the understanding that an individual may have decision-making capacity in some areas and not others; that capacity may change over time; and that a "bad" or "wrong" decision does not necessarily indicate a lack of capacity.

Considerations and guidance for an attorney in these circumstances, and some possible courses of action, are discussed below.

A. What is the requisite decision-making capacity for a detainee to engage a *pro bono* attorney's services?

As a fundamental proposition, an attorney approaching a detainee whose decision-making capacity is in doubt must take steps to determine whether she has the ability to engage the attorney's services by articulating the goals of the proposed representation. The potential client must have the capacity to exert and maintain control over the objectives and course of the attorney-client relationship.

PRACTITIONER'S TIP: Distinguishing capacity from competency. While closely related, a potential client's decision-making capacity is distinct – at least conceptually – from any concerns that may exist regarding her ability to assist the attorney in accomplishing the stated objectives of the representation through the legal process of removal proceedings. For the purposes of this manual (and adopting the terminology predominant in the statutes, regulations, and case law on mental health in the immigration context), these latter concerns are issues of competency. The Board of Immigration Appeals, in its 2011 decision in Matter of M-A-M-, articulated the standard for an Immigration Judge to employ when evaluating a respondent's competency as "whether she has the 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." While an inquiry into the factors listed in the BIA's competency standard may be a useful point of departure for an attorney who is evaluating a potential client's capacity to consent to representation, the attorney should note that an incompetent respondent may nonetheless have the capacity to accept an offer of pro bono representation and enter into an attorney-client relationship. In fact, one of the

[37] *See generally* Helen Y. Kim, Note: Do I Really Understand? Cultural Concerns in Determining Diminished Competency, 15 Elder L.J. 265, 267; James R. Walker, Diminished Client Capacity: Ethical Considerations for Attorneys, Colo. Law., Aug. 2004, at 125.

safeguards that may be implemented to protect an incompetent respondent's due process rights is the presence of counsel. Please see Chapter VI for a detailed discussion of Matter of M-A-M- and competency in the context of removal proceedings.

While there is limited authority and sometimes-conflicting guidance regarding the formation of an attorney-client relationship with an individual whom the attorney suspects of having diminished decision-making capacity, the principle that the potential client must be able, at a minimum, to set the goals of the representation can be distilled from several sources.

For instance, in its Model Rule of Professional Conduct 1.14 on the representation of clients with diminished capacity, the American Bar Association (the ABA) directs that an attorney must, "as far as reasonably possible, maintain a normal client-lawyer relationship." One of the foundations of a "normal client-lawyer relationship" is the attorney's obligation to act in accordance with the client's choices regarding the objectives of the representation and not to substitute her own judgment or preferences for those of the client.[38]

Further guidance may be found in principal-agent theories. Courts have asserted that, in order to engage an attorney to pursue a civil action, a potential client must have the minimal level of capacity necessary to enter into a contract.[39] From this premise, it has been found that a principal must have the mental capacity to "appreciate the significance and consequences of the . . . agency relationship" and be able to "render a degree of control over" it in order to execute a power of attorney.[40]

Furthermore, precedent in the context of criminal procedure suggests that the capacity necessary to enter into an attorney-client relationship is lower than the level of capacity that is required for the individual to participate in legal proceedings *pro se*.[41] For instance, while the Supreme Court has determined that defendants in criminal cases have a constitutional right to represent themselves,[42] it has also held that the "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* [*v. United States*, 362 U.S. 402 (1960)] but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves."[43]

PRACTITIONER'S TIP: Assess, then assess again. In the context of engaging clients whose decision-making capacity may be impaired, it is recommended that the attorney perform not only a preliminary assessment, but also conduct additional inquiries from time to time during the course of the representation in order to track any changes in the client's ability to steer the course of the representation.[44] Implicit in this approach is the understanding that decision-making capacity is not static, as a potential client who had the capacity to enter into the attorney-client relationship at the outset of the representation may later deteriorate significantly. Such deterioration may be caused or

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[38] *See* Model Rules of Prof'l Conduct R. 1.2(a). *See also* American Bar Association Comm. on Ethics and Prof'l Responsibility, Formal Op. 96-404 (1996); Md. Lawyer's Rules of Prof'l Conduct R. 1.2; Va. Rules of Prof'l Conduct R. 1.2.; D.C. Bar Appx. A R. 1.2(a); NY CLS Jud Appx R. 1.2(a); Tex. R. of Prof'l Conduct 1.02(a)(1).

[39] *See, e.g., Sullivan v. Dunne,* 198 Cal. 183, 192-94 (1926) (finding that "the law of principal and agent is generally applicable to the relation of attorney and client . . .").

[40] *Persinger v. Holst,* 248 Mich. App. 499, 505 (2001).

[41] *See Indiana v. Edwards*, 554 U.S. 164 (2008). *See also People v. Johnson,* 53 Cal.4th 519, 523 (2012).

[42] *Faretta v. California*, 422 U.S. 806 (1975).

[43] *Edwards*, *supra* note 41, at 177-178.

[44] Kim, *supra* note 37, at 275-76; ABA Comm'n on Law & Aging and Am. Psychological Ass'n, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, at 3, 5-8, 15-16, *available at* http://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf .

exacerbated by the client's detention. (Please see Chapter IV for further discussion of the interaction between the conditions of detention and the client's health rights). Signs of the deterioration of a client's mental state for which the attorney should be alert include marked emotion changes, the presence of new or increased delusions or hallucinations, and a sudden lack of attention to grooming and hygiene. Any such changes should be evaluated in light of the detainee's specific circumstances, and it should be noted that incapacity with respect to one area or task does not necessary mean incapacity in all areas.

B. How can a *pro bono* attorney evaluate the decision-making capacity of a detainee with a severe mental disability?

An attorney approaching a detainee whose decision-making capacity is in doubt may make use of one or more evaluative techniques and tools. These options range from the relatively quick and direct, such as posing a series of questions designed to elicit the potential client's understanding of the situation and the implications of the offer of representation, to the more time- and resource-intensive, such as seeking (but only after consultation with the detainee) an evaluation and opinion from a mental health professional.[45]

PRACTITIONER'S TIP: Assessing capacity, or assessing the need to assess capacity? It is important to acknowledge that attorneys who do not have formal training in mental disorders or psychological evaluation techniques may be hesitant to make a determination regarding a potential client's decision-making capacity.[46] However, despite the attorney's discomfort with the task, these circumstances require an attorney offering representation to a detainee with a severe mental disability to at least conduct an informal "screening" to gauge the need for a more formal consultation with a mental health professional. Regardless of the approach taken or the way the task is framed, the attorney cannot – and should not – avoid inquiring into and engaging with the implications of the potential client's mental impairments on the attorney-client relationship.

Whatever the technique used, however, the attorney's inquiry should be focused on the potential client's capacity to perform the specific task that is at hand at this stage: namely, to accept an offer of representation by directing the attorney to take a certain course of legal action towards an articulated goal.

To evaluate a detainee's specific capacity to accomplish this task, the attorney may find the ABA's discussion of diminished capacity at Comment 6 to Model Rule of Professional Conduct 1.14 instructive. There, the ABA suggests that the attorney should "consider and balance" the following factors:

- the client's ability to articulate the reasoning that leads her to a decision;
- the variability of the client's state of mind and her ability to appreciate the consequences of a given decision;
- the "substantive fairness" of the client's decision; and
- the consistency of the client's decision with her known long-term commitments and values.

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[45] *See* Kim, supra note 37, at 274; Jennifer Moye, Evaluating the Capacity of Older Adults: Psychological Models and Tools, Nat'l Acad. Elder L. Att'ys Q., Summer 2004, at 3; Assessment of Older Adults with Diminished Capacity, supra note 44, at v. But see Robert B. Fleming & Rebecca C. Morgan, Lawyers' Ethical Dilemmas: A "Normal" Relationship When Representing Demented Clients and Their Families, 35 Ga. L. Rev. 735, 750 (2001).

[46] Assessment of Older Adults with Diminished Capacity, supra note 44, at v.

As these considerations suggest, an attorney evaluating a potential client's decision-making capacity may need to meet with her on multiple occasions. It may also be helpful to consult with the detainee's family members and/or friends – with the duty of confidentiality to the potential client always strictly observed – to assess the variability of her state of mind or to determine whether her current position is consistent with historical commitments and values.[47]

PRACTITIONER'S TIP: Caveats about culture and communication. The attorney should be careful not to conclude that a potential client lacks the requisite decision-making capacity simply because she has come to the "wrong" decision (i.e., a decision that the attorney disagrees with or does not understand). Rather, the attorney should probe the process by which the potential client comes to the decision, while staying alert and sensitive to particular cultural influences that may affect that process.[48] *In addition, the attorney should be aware of the potential pitfalls of communicating with a detainee with a mental disability in non-native languages or dialects. These language barriers, while often difficult or impossible to avoid in detention settings, present an added risk that confused or ambiguous responses to the attorney's questions arising from the detainee's linguistic or vocabulary limitations could be misinterpreted as a lack of decision-making capacity.*[49]

The American Immigration Council also provides attorneys with guidance for assessing a potential client's ability to enter into an attorney-client relationship by focusing her on a discussion of the goals of the proposed representation.[50] The following basic questions may be particularly useful when approaching detainees whose mental impairments preclude them from engaging with the attorney in a more detailed or nuanced discussion of the legal issues and options their case presents:

- Do you want to stay in the United States?
- Do you want me to help you do that?
- Can I help you in the courtroom?

C. What are a *pro bono* attorney's ethical obligations when approaching and engaging a detainee with diminished decision-making capacity?

In approaching and engaging a detainee with an offer of *pro bono* representation, an attorney must be cognizant of her ethical obligations and professional responsibilities.

In providing removal defense in Immigration Court, the attorney may find that she is bound by multiple sets of ethical and professional rules. For instance, it is a common occurrence (perhaps especially so in the Washington, D.C. area) that an attorney who is licensed to practice in one state represents a detainee in an Immigration Court in a different state. In these circumstances, the attorney may be bound by the ethical codes of the jurisdiction in which she is licensed, the jurisdiction in which the detainee is being held, and the jurisdiction in which the Immigration Court sits.

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[47] *See* American Immigration Council, *Practice Advisory: Representing Clients with Mental Competency Issues Under Matter of M-A-M-7* (Nov. 30, 2011), http://www.legalactioncenter.org/sites/default/files/mental-competency-issues-3-8-2012minorupdate.pdf.

[48] *See* Kim, supra note 37, at 271; Nicole A. King, Comment, The Role of Culture in Psychology: A Look at Mental Illness and the "Cultural Defense," 7 Tulsa J. Comp. & Int'l L. 199, 203-04 (1999). See also Evelyn H. Cruz, Validation Through Other Means: How Immigration Clinics Can Give Immigrants a Voice When Bureaucracy Has Left Them Speechless, 17 St. Thomas L. Rev. 811, 828 (2005).

[49] *See* Practice Advisory, supra note 47, at 11.

[50] *Id.*

First, as a general rule, attorneys are bound by the ethical and professional rules of the jurisdiction in which they are licensed to practice. For instance, state ethics codes commonly provide that "a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs."[51] California's ethical rules, for one, indicate that they "shall govern the activities of members in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow rules of professional conduct different from these rules."[52] Texas's ethics code states that a lawyer admitted to practice "may be disciplined [in Texas] for conduct occurring in another jurisdiction or resulting in lawyer discipline in another jurisdiction."[53]

Second, regardless of where she is licensed, an attorney may also be bound by the ethical and professional rules of the jurisdiction in which the detainee is held and where the Immigration Court sits. For example, Maryland's ethics code provides that a lawyer not admitted in Maryland is subject to the disciplinary rules of Maryland if the lawyer "(i) provides or offers to provide any legal services in [Maryland], (ii) holds himself or herself out as practicing law in [Maryland], or (iii) has an obligation to supervise or control another lawyer practicing law in [Maryland] whose conduct constitutes a violation of these Rules."[54] Similarly, Virginia's ethical rules provide that "[a] lawyer not admitted in Virginia is also subject to the disciplinary authority of Virginia if the lawyer provides, holds himself out as providing, or offers to provide legal services in Virginia.. . . A lawyer may be subject for the same conduct to the disciplinary authority of Virginia and any other jurisdiction where the lawyer is admitted"[55] Likewise, in California, the ethical and professional "rules shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state." [56]

In addition to the ethics codes of the states in which the attorney is licensed and practices, attorneys providing removal defense in Immigration Courts are also governed by the ethical and professional rules set forth at 8 C.F.R. §1003.101 *et seq*.

D. Putting it all together: One approach.

Following the points addressed above, an attorney who approaches a detainee with an offer of *pro bono* representation should be alert to signs that her decision-making capacity may be impaired. These signs may arise during the attorney's early interactions with the detainee, or may be evident through information received about the detainee's circumstances prior to the initial meeting.

The presence of any signs of diminished decision-making capacity should prompt the attorney to make an informal assessment of the detainee's ability to understand the offer, to articulate the goals of the proposed representation, and to exert a degree of control over the attorney-client relationship. In making this determination, the attorney should be sensitive to and account for the cultural, socioeconomic, linguistic, and educational factors that may influence the detainee's beliefs, preferences, communication style, and behavior.

An attorney attempting to determine the capacity of a potential client may consider:

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[51] D.C. Bar's Rules of Prof'l Conduct R. 8.5(a). *See also* Md. Lawyer's Rules of Prof'l Conduct R. 8.5(a)(1); Va. Rules of Prof'l Conduct R. 8.5(a); NY CLS Jud Appx R 8.5.
[52] Cal. Rules of Prof'l Conduct R. 1-100(D)(1).
[53] Tex. R. Prof Conduct 8.05.
[54] Md. Lawyer's Rules of Prof'l Conduct R. 8.5(a)(a)(2)(i)-(iii).
[55] Va. Rules of Prof'l Conduct R. 8.5(a).
[56] Cal. Rules of Prof'l Conduct R. 1-100.

- using simplified questions and avoiding legalese;
- breaking complex issues down into smaller components and discussing them one at a time; and/or
- arranging multiple appointments that last for shorter periods of time.

Factors that may be explored with the detainee include:

- the availability and viability of relief from removal;
- the effect of pursuing that relief on the length of detention; and/or
- the appropriateness of using a supported decision-making model, such as those that take into account the input of family members and/or close friends.

PRACTITIONER'S TIP: Supported decision-making vs. guardianship. "Supported decision-making" refers to a process through which an individual comes to a decision interdependently with trusted family, close friends, and/or others of her choosing. Depending upon the detainee's personal circumstances, this approach may provide a desirable and less-intrusive alternative to guardianship for a detainee with a significant mental impairment. For further guidance, the attorney may look to a variety of Canadian government agencies and non-governmental organizations, which are generally well-advanced of their U.S. counterparts in developing and implementing supported decision-making models. For instance, please see the government of Alberta's webpage on supported decision-making at http://humanservices.alberta.ca/guardianship-trusteeship/opg-guardianship-supported-decision-making.html, notes from Michael Bach of the Canadian Association for Community Living at www.un.org/esa/socdev/enable/rights/ahc7docs/ahc7ii3.ppt, and UN Enable's webpage at *http://www.un.org/disabilities/default.asp?id=242.*

In the end, these considerations and techniques should allow the attorney to make an initial assessment of the detainee's capacity to enter into an attorney-client relationship. If the attorney determines that the detainee has the capacity to enter into the attorney-client relationship and set the goals for the representation, the attorney may move forward with the representation towards those goals and should conduct additional assessments periodically thereafter as the circumstances require.

However, where doubt as to the detainee's capacity remains after the initial assessment, the attorney should discuss with the detainee whether additional consultation or a formal clinical evaluation would be necessary or helpful. Where the attorney ultimately concludes that an attorney-client relationship is not possible or advisable, the attorney may explore the possibility of seeking permission from the Immigration Judge to participate in the removal proceedings as an *amicus curiae*.

IV. ADVOCATING FOR A DETAINEE'S HEALTH RIGHTS IN DETENTION

ICE's detention standards require immigration detention facilities to maintain a health care program that includes mental health screening upon intake, follow-up assessments, diagnostic services, access to medication and treatment, daily opportunities to request mental health services, 24-hour emergency care, and referrals to outside health care facilities as necessary. The standards also require the detention center's mental health provider to ensure "continuity of care" from admission to release, transfer, or removal, and to produce and follow a written treatment plan for detainees with chronic conditions and those who require close supervision.[57]

A discussion of the mental health program mandated by the detention standards follows below, as well as suggestions and considerations for a *pro bono* attorney seeking to help a detainee navigate the system, access desired mental health evaluations and treatment, and/or refuse unwanted treatment.

A. What mental health screenings and evaluations might a detainee undergo in detention?

ICE's standards mandate that immigration detention centers conduct screenings, comprehensive health appraisals, and mental health evaluations as the circumstances require.

1. What happens during the initial health screenings of new arrivals?

The timing of the initial health screenings of detainees and the documentation requirements differ slightly for facilities operating under the 2000, 2008, and 2011 detention standards.

Under all three sets of detention standards, the intake screening must be conducted shortly after the detainee's entry to the facility and must include observations and an interview that addresses the detainee's mental health. The 2008 and 2011 standards require that the medical screening include:

- "[o]bservation of behavior, including state of consciousness, mental status, appearance, conduct, tremor, sweating,"
- an inquiry into any "[h]istory of suicide attempts or current suicidal/homicidal ideation or intent"; and
- any "prior history [of] physical, sexual, or emotional abuse."[58]

According to the standards, the initial screening may be performed by either a health care provider or a "trained" detention officer. In many facilities, the screening is almost always conducted by a detention officer and it is very unlikely that a detainee will see a health professional during the intake process.[59]

PRACTITIONER'S TIP: Undetected mental health needs. An attorney representing a detainee with a severe mental disability should bear in mind that the initial mental health screening is only one component of a comprehensive intake process, and it may fail to detect her client's mental health

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[57] *See* 2011 PBNDS, *supra* note 17, at § 4.3(II).

[58] 2008 ICE Performance-Based National Detention Standards § 22(V)(H)(I)(1), (hereinafter, "2008 PBNDS"), *available at* http://www.ice.gov/detention-standards/2008/.; 2011 PBNDS, § 4.3(V)(J).

[59] *See*, e.g., Texas Appleseed, Justice for Immigration's Hidden Population: Protecting the Rights of Persons with Mental Disabilities in the Immigration Court and Detention System 24-31 (March 2010), http://www.texasappleseed.net/index.php?option=com_docman&task=doc_download&gid=313.

needs. The content of the IHSC screening forms that ICE references in its detention standards reveal that these initial interactions rely heavily on self-reporting and are focused on safety considerations and potential liabilities for the facility. As a result, the initial screenings may not provide an adequate forum for a full consideration of the new arrival's mental health needs. For instance, IHSC Form 795-A calls for the intake screener – who is likely to be a detention center staffer rather than a mental health professional – to ask the detainee questions regarding suicide attempts, history of assaultive behavior, and sexual victimization. These questions, especially when asked of a new detainee by jail staff, may not reveal the detainee's true mental health history or current treatment needs. The attorney may consider discussing the results of the intake screening with the client and, if the client authorizes the attorney to access her medical records, specifically request a copy of the documentation of the screening. Please see Chapter V for more information on accessing a detainee's medical records.

2. What is a "comprehensive health appraisal"?

Because of the limitations inherent in the initial screening process, it is likely that only a fraction of detainees with serious mental health needs will be identified upon intake into the facility. However, the detention standards require that a more thorough review of the detainee's mental health occur within fourteen days of her arrival at the facility as part of a "comprehensive health appraisal."

Like the initial screening, the comprehensive appraisal covers a broad set of medical issues, including both physical and mental health. However, unlike the initial screening, the comprehensive health appraisal must be conducted by a health care provider.[60]

Documentation of the comprehensive health appraisal should be included in the detainee's medical records, and should therefore be available to an attorney who is authorized to access the detainee's medical records.

PRACTITIONER'S TIP: Advocating for and expediting the comprehensive health appraisal. Depending upon the circumstances, the detention standards may provide an attorney with an avenue for requesting an expedited health appraisal or advocating for a health appraisal where the facility's health care provider has determined that it is not required. For instance, the 2011 standards provide that "[e]ach facility's health care provider shall conduct a health appraisal including a physical examination on each detainee within fourteen days of the detainee's arrival unless more immediate attention is required due to an acute or identifiable chronic condition."[61] The attorney may consider directing a request for a health appraisal, or an expedited appraisal, to the "clinical medical authority," the official in the facility who is responsible for screenings, assessments and treatment priorities.

3. How are referrals for mental health evaluations made?

Detainees may be referred for a mental health evaluation as a result of the information gathered during either the initial intake screening or the comprehensive health appraisal, or as it is deemed necessary by the clinical medical authority.

Specifically, the detention standards require that "[i]f at any time during the screening process there is an indication of need, or request for, mental health services, the mental health authority must be

[60] *See* 2008 PBNDS, *supra* note 58, at § 22(V)(J); 2011 PBNDS, *supra* note 17, at § 4.3(V)(L).
[61] 2011 § PBNDS, *supra* note 17, at § 4.3 V(L).

notified within twenty-four hours. The clinical medical authority will ensure a full evaluation if indicated."[62]

In addition, the 2008 standards require that, "[b]ased on intake screening, medical documentation or subsequent observations by detention staff or medical personnel, the administrative health authority shall immediately refer any detainee with mental health needs to a mental health provider for a mental health evaluation."[63] The 2011 standards further require that the evaluation be conducted within 72 hours of the referral.[64]

Regardless of the manner of referral, the mental health evaluation must be completed by a mental health provider and must include, at a minimum:

- the reason for the referral;
- history of any mental health treatment or evaluations;
- history of illicit drug or alcohol use or abuse, and any treatment for such;
- history of suicide attempts;
- current suicidal or homicidal ideation or intent;
- current use of any medications;
- estimate of current intellectual functioning;
- prior history of physical, sexual, or emotional abuse;
- impact of any pertinent physical condition, such as head trauma;
- recommendations for appropriate treatment and placement (such as general population with psychotropic medication and counseling, "short-stay" unit or infirmary, special management unit, or community hospitalization); and
- recommendations and/or implementation of a treatment plan, including recommendations regarding transfer, housing, voluntary work, and other program participation.[65]

Practitioner's Tip: Advocating or arranging for a mental health evaluation. If a detainee has completed the intake screening and comprehensive health appraisal process and was not recommended for a mental health evaluation, the attorney may consider submitting a written request to the ICE Enforcement and Removal Operations' ("ERO") Field Office Director for an evaluation pursuant to the 2008 and 2011 detention standards.[66] Alternatively, the attorney may consider seeking out an independent mental health professional to visit the detainee in detention and conduct an evaluation. These type of medical visits must be approved by the ERO Field Office, which typically requests information as to the nature of the visit and the qualifications of the visiting medical professional.[67] Please see Section B below for more information on arranging for an independent evaluation.

4. Summary: Three stages of screening and evaluation in detention.

1. Initial Medical Screening	• Within 12 hours of the detainee's arrival • Conducted by a medical professional or, more likely, a trained detention officer

[62] 2008 PBNDS, *supra* note 58, at § 22(V)(K); 2011 PBNDS, *supra* note 17, at § 4.3(V)(J).
[63] 2008 PBNDS, *supra* note 58, at § 22(V)(K).
[64] 2011 PBNDS, *supra* note 17, at § 4.3(V)(N).
[65] 2008 PBNDS, *supra* note 58, at § 22(V)(K)(3); 2011 PBNDS, *supra* note 17, at § 4.3(V)(N)(3).
[66] *See* 2008 PBNDS, *supra* note 58, at § 22(V)(Y); 2011 PBNDS, *supra* note 17, at § 4.3(V)(CC).
[67] *See* 2011 PBNDS § 4.3 V(CC).

	• Documented on IHSC Form 794, IHSC Form 795A, or the equivalent • Follow-up health appraisal will be conducted unless there has been an appraisal within the previous 90 days and another appraisal is deemed unnecessary.
2. Comprehensive Health Appraisal	• Within 14 days of the detainee's arrival at the facility • Conducted by a health care provider • Recorded in the detainee's medical records.
3. Mental Health Evaluation	• Within 72 hours of a referral • Conducted by a mental health provider • Recorded in the detainee's medical records.

B. What can a *pro bono* attorney do if the detention facility fails to provide any mental health services or medications for a detainee who desires them?

Unfortunately, despite the three-step intake screening, health appraisal, and evaluation process that is mandated by the detention standards, it is common for detainees to experience the symptoms of an undiagnosed and untreated mental health condition while in detention. An attorney representing a detainee in this position should consult with the client about her desire for treatment and develop a strategy for securing appropriate and beneficial mental health care in accordance with those wishes.

As discussed in Section A above, the attorney may consider first requesting documentation of the intake screening, the comprehensive health appraisal, and any evaluations that have been performed to date. If those records demonstrate the need for mental health services or medications that are not being provided, the attorney should immediately alert the facility's mental health provider as well as the ICE Enforcement and Removal Operations officer assigned to manage the client's detention (and the Field Office Director, if necessary). Those communications should be documented.

On the other hand, if the health records from detention do not indicate that the detainee is in need of further mental health services or medications, the attorney may consider obtaining outside evidence of the need for treatment. This evidence may be available from any number of sources, and is perhaps most commonly found in mental health records from periods of criminal incarceration and documentation of prior inpatient or outpatient mental health treatment. (For a detailed discussion of requesting and obtaining a client's mental health records, please see Chapter V.)

Alternatively, the attorney may consider obtaining an independent evaluation of the client's condition and current treatment needs from a mental health professional who is unaffiliated with the detention center or ICE. The detention standards provide a procedure whereby an outside mental health professional may visit the facility and meet with the detainee.[68]

PRACTITIONER'S TIP: Continuity of care and transfers. While the 2008 and 2011 detention standards provide that detainees should "be transferred with proper medication to ensure continuity of care throughout the transfer and subsequent intake process,"[69] transferred detainees often experience

[68] *See* 2011 PBNDS, *supra* note 17, at § 4.3(V)(CC).
[69] 2008 PBNDS, *supra* note 58, at § V(U)(4); 2011 PBNDS, *supra* note 17, at § 4.3(V)(Y)(4).

discontinuation of their medications upon arrival in a new facility. If a detainee with mental health needs does arrive at the new facility without the necessary medication, the attorney should begin advocacy efforts right away by requesting medical records, ensuring that the client receives timely medical screenings and evaluations, and contacting the facility to confirm that it has ordered the necessary medications.

C. How can a *pro bono* attorney challenge the inappropriate segregation or isolation of a detainee for reasons directly attributable to a mental disability?

The 2011 detention standards provide that a detainee with a "serious mental illness" may not be automatically placed in a [special management unit, or segregation] on the basis of such mental illness."[70] Nevertheless, detainees with severe mental health conditions may be placed in segregation or isolation units, sometimes for extended periods of time, through a variety of avenues. For instance, the detention standards specifically authorize a facility's clinical medical authority to place a detainee in non-punitive "medical isolation" (i.e., segregation or solitary confinement) if the detainee is deemed to be at high risk for violent behavior because of a mental health condition.[71] In addition, detainees with significant mental health needs may encounter difficulties in understanding and abiding by the strict rules that govern general population units, which can lead to their confinement in "disciplinary segregation."

Whatever the reason for the segregation, the experience of isolation for any length of time can cause the detainee's mental health condition to deteriorate. Therefore, it can be critical for the health and well-being of the detainee for the attorney to take steps to secure her release from segregation and placement in a more conducive environment, either within the facility or elsewhere. The attorney may consider utilizing the following strategies for helping a client in these circumstances.

First, the attorney should request documentation of the reason or need for segregation as well as the daily assessments of the detainee by health care personnel that the detention standards require.

Second, the attorney should be a vigilant advocate and contact the facility's medical provider regularly to confirm that the facility continues to comply with the detention standards regarding segregation of detainees with mental health needs. Also, the attorney should confirm that the segregated detainee has access to medical personnel at regularly scheduled times ("sick call") as the detention standards require.

Third, the attorney may consult with the client and consider advocating for her transfer to another facility where the detainee's mental health needs can be met outside of a segregation unit. The detention standards provide that a detainee in need of specialized or long-term medical care be transferred to a facility that has the capacity to meet those needs.[72] Frequent or prolonged segregation may be compelling evidence that the current detention facility cannot meet the detainee's mental health needs.

PRACTITIONER'S TIP: Caution about requesting a medical transfer. The attorney and the detainee should be aware that there is no guarantee that a transferred detainee will go to a better facility or to a facility nearby. Therefore, instead of advocating for transfer to another facility within the detention system, it may be advisable to seek out a local treatment center, supportive housing program, or the

[70] 2011 PBNDS, *supra* note 17, at § 2.12(II).
[71] 2008 PBNDS, *supra* note 58, at § 22(V)(K)(5); 2011 PBNDS, *supra* note 17, at § 4.3(V)(M)(5).
[72] 2008 PBNDS, *supra* note 58, at § 22(V)(A); 2011 PBNDS, *supra* note 17, at § 4.3(V)(A).

equivalent that will accept the detainee. In such circumstances, where the attorney is able to provide a post-release care plan, ICE may be receptive to releasing a detainee whose detention is not mandatory. (For information on community-based mental health resources in the D.C.-Virginia-Maryland region, please see the Appendix.)

D. What can a *pro bono* attorney do if the medications provided to a detainee are inconsistent with prior mental health treatment?

Maintaining continuity of treatment is an important element in the overall health care of detainees. Attorneys representing detainees who wish to continue their pre-detention medication regimen may consider utilizing the following advocacy approach:

- with the detainee's authorization, contact the mental health providers the detainee worked with prior to being detained;
- obtain letters or affidavits that include the prior providers' medical opinions as to the appropriate medication regimen; and
- communicate the mental health providers' opinions to the medical decision-makers in the detention facility and within ICE.

PRACTITIONER'S TIP: Unavailability of certain medications. Attorneys and detainees should be aware that some medications may simply not be available inside detention centers because of their addictive properties or potential for abuse. Options for advocacy may be quite limited in these situations. IHSC maintains a formulary of medications that are commonly used in detention centers at http://www.icehealth.org/ManagedCare/DIHS_Formulary.pdf.

E. What can a *pro bono* attorney do if the detainee refuses unwanted, ineffective, or even harmful treatment?

A detainee may refuse mental health treatment for a variety of reasons. For example, the detainee may not feel that she is in need of the treatment that has been prescribed by the medical staff at the detention facility. The prescribed treatment may also be refused because, while the detainee believes that some course of treatment may be appropriate, she does not feel that the proposed treatment will be effective or may feel that the treatment would be harmful (*e.g.*, the detainee feels that the side effects of a certain medication outweighs its beneficial effects).

Whatever the reason, when a detainee with mental health condition refuses prescribed medical treatment, a host of questions may arise for the attorney. An overview of the detainee's right to refuse and a discussion of the implications of invoking this right in the context of immigration detention are provided below.

1. What are the sources and contours of the right to refuse?

The Supreme Court has recognized that a competent individual has a liberty interest, protected by the Due Process clause, in refusing unwanted medical treatment.[73] State laws establish procedures to evaluate a patient's competence and, if necessary, to empower a guardian to make medical treatment decisions on the patient's behalf.[74]

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[73] *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 278 (1990).
[74] *See Sell v. United States*, 539 U.S. 166, 182 (2003) (citing state law provisions).

PRACTITIONER'S TIP: Medical decision-making capacity and informed consent. Determining whether a detainee has the capacity to refuse medical treatment may be a challenge for both lawyers and health care professionals.[75] A widely accepted framework for evaluating decision-making capacity that may be helpful in these circumstances is "Understanding, Appreciation, Reasoning, and Expression of Choice."[76] Understanding refers to the ability to comprehend treatment-related information, appreciation is the ability to appreciate how the proposed treatment will impact the patient's own situation, reasoning is the ability to compare risks and benefits of the treatment options, and expression is the ability to communicate a decision. Furthermore, "[s]everal tools exist for the assessment of decision-making capacity, including the MacArthur Competence Assessment Tool for Treatment (MacCAT-T) and the Hopkins Competency Assessment Test (HCAT)."[77] The MacCAT-T is an interview in which the doctor explains the diagnosis and treatment options to the patient, and at the end of the interview assesses the patient's capacity to consent. The HCAT requires the doctor to read an essay about informed consent, sometimes multiple times depending on the patient's understanding, and then evaluate the patient's comprehension through a short quiz.

Inmates of a jail or prison retain their liberty interest in refusing unwanted medical treatment.[78] To administer medical treatment against an inmate's will, the government must show – "in light of the efficacy, the side effects, the possible alternatives, and the medical appropriateness" of the proposed treatment – that the government's interest in treating the detainee is "sufficiently important to overcome the individual's protected interest in refusing it[.]"[79] Although all forced treatment implicates liberty interests, the balancing is particularly tilted against the government when the medication at issue is an antipsychotic because of its mind-altering properties and potentially serious side effects.[80]

In the criminal context, the Supreme Court has identified two situations in which the governmental interests may be sufficiently important to justify the imposition of forced antipsychotic medication:

- First, to render the inmate non-dangerous, either in relation to himself or to others.[81] Factors to consider in making this determination include whether there is a valid connection between the institution's forced medication policy and the governmental interest advanced to justify it; the impact an accommodation for the inmate would have on the guards, other inmates, and the institution's resources; and the existence, or lack thereof, of alternatives to forced medication.

- Second, to render a defendant competent to stand trial. Specifically, the government may involuntarily administer medication for that purpose if the criminal charge at issue is "serious" and "the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests."[82]

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[75] *See*, e.g., Grant v. Chow et al., CURVES: A Mnemonic for Determining Medical Decision-Making Capacity and Providing Emergency Treatment in the Acute Setting, 137 CHEST 421, 423 (Feb. 2010).
[76] Assessment of Older Adults with Diminished Capacity, *supra* note 44, at 11.
[77] *Chow*, *supra* note 75, at 423.
[78] *See Sell*, *supra* note 74, at 177-79; *Washington v. Harper*, 494 U.S. 210, 221-22 (1990).
[79] *See Sell*, *supra* note 74, at 183.
[80] *See Riggins v. Nevada*, 504 U.S. 127, 134 (1992).
[81] *See Harper*, *supra* note 78, at 1037. *See also Sell*, *supra* note 74, at 181-82.
[82] *Sell*, *supra* note 74, at 179.

2. How is the right to refuse applied in the context of immigration detention?

There is uncertainty about the precise contours of the constitutional right to refuse in the context of civil immigration detention, and lower courts have continued to debate the application of and relationship between *Harper*, *Riggins*, and *Sell*.[83] In light of the governmental interest in ensuring safety in detention facilities, the attorney should be aware that courts may read *Harper* as authorizing involuntary medication of immigration detainees for safety reasons in some circumstances. Although *Harper* itself involved post-conviction imprisonment, the principal that the government can employ forced medication for security reasons has also been applied to pre-trial criminal defendants, who are afforded similar constitutional protections as civil immigration detainees. Further, in at least one case, courts have approved the use of forced medication for the purpose of effectuating a deportation.[84]

On the other hand, the government's interest in restoring competence for the purposes of removal proceedings should not justify forcibly medicating a detainee. Unlike the blanket prohibition on trying incompetent criminal defendants, detainees who are found incompetent by an Immigration Judge may still be subject to removal proceedings. (Please seem Chapter VI on competency in Immigration Court.) Since removal proceedings may go forward even where the respondent is found to be incompetent, providing the detainee with procedural safeguards of the type discussed in *Matter of M-A-M-* would perhaps qualify as a "less intrusive alternative" that, as the reasoning of *Sell* suggests, would preclude forced medication. In addition, the *Sell* line of cases only authorize forced medication to prosecute "serious" criminal charges, and the attorney for a detainee could argue that the government's interest in removal is not analogous to its interest in prosecuting a particularly serious crime.

Attorneys should also be aware that *Harper* and *Sell* require forced medication to be "medically appropriate" or in the detainee's medical interest. If detention officials seek to forcibly medicate a detainee who is resistant because she believes that the medication at issue is less effective than other medication, or more intrusive than similarly effective medical alternatives, an attorney could argue that such forced medication is precluded by *Harper* and *Sell*.

3. What do ICE's detention standards say about involuntary treatment?

ICE's 2000, 2008, and 2011 detention standards all recognize that medical treatment generally cannot be administered against a detainee's will. In fact, both the 2008 and 2011 standards provide that the provision of medical treatment should be governed by the informed consent standards and practices in the jurisdiction in which the facility sits.[85]

These detention standards expressly require that the facility provide an explanation of risks before treatment, and that documentation of a detainee's refusal of medical treatment be kept in the detainee's medical records (translated into the detainee's language, if needed).

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[83] *See, e.g.*, *United States v. Loughner*, 672 F.3d 731, 747-52 (9th Cir. 2012) (discussing a criminal defendant's right to refuse medical treatment).

[84] *See United States v. Bechara*, 935 F. Supp. 2d 892 (S.D. Tex. 1996) (assuming that *Harper* applied to INS detainees and granting the government's motion to forcibly administer "noncontroversial sedatives" (not antipsychotic drugs) to effectuate a deportation, even though the drugs had no medical purpose), *aff'd*, 116 F.3d 478 (6th Cir. April 22, 1997) (unpublished), *cert. denied*, 522 U.S. 843.

[85] 2008 PBNDS, *supra* note 58, at § 22(V)(T); 2011 PBNDS, *supra* note 17, at § 4.3(V)(X).

These requirements generally align with state law standards. Most jurisdictions require disclosure of the following to obtain informed consent from the patient: (1) the patient's diagnosis; (2) details about the proposed treatment and its probability of success; (3) risks of the proposed treatment; and (4) alternative treatments, their probabilities of success, and their risks. As with all general rules, however, there are exceptions recognized in state case law. For example, when a patient is unconscious or otherwise without the capacity to consent to treatment, and there is a risk of serious bodily harm if treatment is not administered, an emergency exception may relieve a physician of the obligation to obtain informed consent in some circumstances.

The detention standards recognize similar exceptions to the detainee's right to refuse treatment. The 2008 detention standards permit involuntary medical treatment, but specify that the decision be "made only by medical staff under strict legal restrictions" and that ICE Office of Chief Counsel be consulted in advance.[86] Similarly, the 2011 standards explain that "[i]nvoluntary treatment is a decision made only by medical staff under strict legal restrictions" and expressly distinguish between emergency and non-emergency involuntary treatment.[87] In the emergency context, a physician may authorize involuntary treatment, while in the non-emergency context, ICE/ERO and ICE Office of Chief Counsel must be consulted in determining whether—and presumably how—to pursue involuntary treatment.

In addition, the detention standards provide rules and procedures specific to the involuntary administration of psychotropic medications.[88] These provisions require compliance with "applicable laws" and require that the forced administration be "pursuant to the specific, written and detailed authorization of a physician."[89] Notably, unless the administration of psychotropic medication is an emergency, the standards "require that the [health services administrator, the facility personnel with overall responsibility for health care in the facility] contact ERO management, who shall then contact the ICE Office of Chief Counsel to facilitate a request for a court order to involuntarily medicate the detainee."[90]

4. What are the potential consequences of refusing prescribed mental health treatment in detention?

The attorney should be aware of and advise the detainee on the potential consequences of refusing a treatment of medication regimen that has been prescribed in the facility. Practically speaking, if a detainee refuses medical treatment:

- It might be administered anyway. As discussed above, the detention standards, as well as federal and state law, recognize exceptions to the general rule that people can refuse medical treatment. ICE must be consulted in most cases of non-consent before the treatment is administered, and it may conclude that forced treatment is appropriate.

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[86] 2008 PBNDS, *supra* note 58, at § 22(V)(T).

[87] 2011 PBNDS, supra note 17, at § 4.3(V)(X).

[88] *See* 2011 PBNDS, *supra* note 17, at §§ 4.2(V)(E), 4.3(V)(N)(6) 4.3(V)(K)(7).

[89] *Id.* A physician authorizing involuntary psychotropic medications to detainees must (1) review the medical record of the detainee and conduct a medical examination; (2) specify the reason for and duration of therapy and whether the detainee has been asked if s/he would consent to such medication; (3) specify the medication to be administered, the dosage and the possible side effects of the medication; (4) document that less restrictive intervention options have been exercised without success; (5) detail how the medication is to be administered; (6) monitor the detainee for adverse reactions and side effects; and (7) prepare treatment plans for less restrictive alternatives as soon as possible.

[90] 2011 PBNDS, *supra* note 17, at § 4.3(V)(N)(6).

- The detainee will be "convinced." The 2008 detention standards provide that, if a detainee refuses medical treatment, medical staff will make "reasonable efforts to convince the detainee to voluntarily accept treatment."[91] According to the 2011 standards, "[i]f the detainee refuses to consent to treatment, medical staff shall make reasonable efforts to explain to the detainee the necessity for and propriety of the recommended treatment."[92]

- The detainee will be segregated. Upon refusal of medical treatment, the 2000 detention standards require the detainee to be segregated from the general population when recommended by the medical staff.[93] In contrast, the 2008 and 2011 standards permit segregation only when medically necessary for a documented medical reason, and not for punitive purposes.[94] The 2011 standards direct that "segregation shall only occur after a determination by a component mental health professional has taken place that shows the segregation shall not adversely affect the detainee's mental health."

[91] 2008 PBNDS, *supra* note 58, at § 22(V)(T).
[92] 2011 PBNDS, *supra* note 17, at § 4.3(V)(X).
[93] 2000 ICE National Detention Standards: Health Services § III(L), *available at* http://www.ice.gov/detention-standards/2000/.
[94] 2008 PBNDS, *supra* note 58, at § 22(V)(T); 2011 PBNDS, *supra* note 17, at § 4.3(V)(X).

V. METHODS FOR ACCESSING A CLIENT'S MEDICAL RECORDS AND GATHERING MENTAL HEALTH EVIDENCE

An attorney may wish to access a detained client's records for a number of reasons early in the course of the representation. The information that may be available in confidential health records and other documentation can assist the attorney in, among other things:

- assessing the client's competency to participate in removal proceedings and preparing for any hearing that might be held on that issue;
- understanding the client's experiences and personal history;
- identifying a claim for relief from removal and establishing elements of it;
- ensuring that the mental health care that is being provided in detention is appropriate and in line with the client's wishes; and/or
- working with the client on post-detention planning.

A. What types of records should a *pro bono* attorney gather?

An attorney representing a detainee with a significant mental disability should consider exploring with the client the existence of records that may contain information relevant to the case. Such records may be available from a variety of sources, including:

- outpatient mental health treatment and case management services;
- hospitalizations or institutionalizations (both involuntary and voluntary);
- incarcerations and jail or prison mental health records;
- criminal court records of competency hearings and evaluations or insanity defenses;
- appointment of a guardian or conservator;
- school records and special education services; and
- disability benefits applications and accompanying evaluations.

Aside from these sources, medical and detention records from the detainee's current facility, including screenings, follow-ups, mental health treatment notes, facility incident reports, and Enforcement and Removal Operations ("ERO") records, may be particularly helpful. Under the detention standards, the detention facility must maintain a complete health record for each detainee that is: (1) organized uniformly in accordance with appropriate accrediting body standards; (2) available to all practitioners and used by them for health care documentation; and (3) properly maintained and safeguarded in a securely locked area within the medical unit.[95] Moreover, as described in Chapter IV, detention facilities must conduct an initial medical screening, a comprehensive health appraisal and, in some cases, a mental health evaluation.

The attorney should note that transfer from one detention facility to another can be common for detainees with significant mental health needs, and a transfer itself generates specific documentation that may contain relevant health information. In particular, the attorney representing a transferred detainee should consider requesting the Form USM-555 (or the equivalent facility-specific medical transfer summary), which the detention standards require the sending facility's medical staff to prepare and send with the detainee to the new facility. The form must include:

- tuberculosis (TB) clearance;

[95] 2011 PBNDS, *supra* note 17, at § 4.3(V)(Y)(1).

- current mental and physical health status, including all significant health issues;
- current medications, with specific instructions for medications that must be administered en route;
- any pending medical or mental health evaluations, tests, procedures, or treatments for a serious medical condition scheduled for the detainee at the sending facility; and
- the name and contact information of the transferring medical official.[96]

PRACTITIONER'S TIP: Medical records and transfers. The detention standards require that all relevant medical records accompany the transferred detainee in a medical care summary marked "Confidential Medical Records." Nevertheless, medical records often do not accompany a transferred detainee to the new facility. Therefore, the attorney will likely need to request records separately from each facility where the detainee has been held.

B. How can a *pro bono* attorney request a client's medical records?

1. How can the client's medical records be requested from facilities within the immigration detention system?

The likely place for an attorney to start is with the detainee's current detention facility. The detention standards provide that a detainee may elect to have her medical records released directly to the detainee's designee.

ICE-operated facilities prefer particular forms for detainee's requests for medical records, and these forms comply with federal medical privacy requirements as well. (the federal Health Insurance Portability and Accountability Act, "HIPAA" is described more fully below.) The 2000 detention standards recommend using Form I-813, a legacy INS Authorization for Disclosure of Healthcare Information, while the 2008 and 2011 standards specify only that "the appropriate request form" be completed for such requests. The attorney should consider using DIHS Form 003, an Authorization for Release of Confidential Health Information, which is available online at http://www.inshealth.org/Forms/DIHS%20003.pdf.

In lieu of a particular form, the attorney may also submit a written authorization from the detainee that complies with the HIPAA Privacy Rules discussed below. If using a release form that specifies an expiration date or event, the detainee may consider indicating that the authorization remain effective through the date of any appeals that may be taken.

According to the detention standards, such written authorization must include:

- address of the facility that is to release the information;
- name of the individual or firm that is to receive the information;
- detainee's full name, alien number (the "A number"), date of birth, and nationality;
- purpose or need for the information to be released (i.e., for legal representation);
- specific information to be released, with inclusive dates of treatment; and
- detainee's signature and date.[97]
- Attorneys should contact the facility directly to request the name and contact information for its designated health care provider or the medical records department to which the request should be directed.

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[96] *Id.* at § 7.4(V)(C)(2).
[97] 2008 PBNDS, *supra* note 58, at § 22(V)(U)(2); 2011 PBNDS, *supra* note 17, at § 4.3(V)(Y)(2).

Practitioner's Tip: The cost of obtaining records. The 2008 and 2011 detention standards provide that copies of medical records will be released at no cost to the detainee.[98] *Some facilities do, however, require a small fee (approximately $20). The HIPAA Privacy Rules allow covered entities to charge a "reasonable, cost-based fee."*[99]

2. How can the client's medical records be requested from facilities outside of the immigration detention system?

Obtaining a client's medical records requires compliance with the federal Health Insurance Portability and Accountability Act ("HIPAA"), applicable regulations (the "HIPAA Privacy Rules"), and any state privacy law that sets stricter standards for the release of a patient's medical records.

a. Federal HIPAA.

HIPAA was passed in 1996 to improve the efficiency and effectiveness of the health care system and includes provisions mandating the adoption of federal privacy protections for individually identifiable health information, known as "protected health information." Acting under that mandate, the U.S. Department of Health and Human Services ("HHS") issued the HIPAA Privacy Rules[100] that govern the use and disclosure of protected health information by health care institutions that qualify as "covered entities" (as defined in the HIPAA Privacy Rules). Generally, the institutions holding a detainee's medical records (*e.g.*, ICE detention centers, hospitals, mental health centers, and criminal justice facilities) are considered covered entities under HIPAA.

Under the HIPAA Privacy Rules, individuals generally have the right to review and obtain a copy of their medical records held by covered entities.[101] Individuals also have the right to an electronic copy of protected health information maintained in an electronic health record, under the Health Information Technology for Economic and Clinical Health ("HITECH") Act. A covered entity may require individuals to make requests for access in writing, and may charge reasonable cost-based fees for such requests. A detainee's request to release medical records should, at a minimum, comply with the HIPAA Privacy Rules.

However, there are exceptions to the general right of access to one's own health records. These exceptions include "psychotherapy notes," which the HIPAA Privacy Rules define as "notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record."[102] A covered entity may deny an individual access to psychotherapy notes without providing the individual an opportunity for review.

The HIPAA Privacy Rules also allow a covered entity that is a correctional institution (or acting under the direction of one) to deny an inmate's request for a copy of protected health information without providing an opportunity for review if disclosure would "jeopardize the health, safety, security, custody, or rehabilitation of the individual" or other inmates, or the "safety of any officer, employee or

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[98] *Id.*
[99] 45 C.F.R. § 164.524(c)(3).
[100] 45 C.F.R. Parts 160, 162 and 164.
[101] 45 C.F.R. § 164.524.
[102] 45 C.F.R. § 164.501.

other person at the correctional institution or responsible for the transporting of the inmate."[103] The Rules also list certain other circumstances in which a covered entity may deny access, but must give the individual an opportunity to have the denial reviewed.

Practitioner's Tip: The scope of a HIPAA-compliant request for mental health records. A HIPAA-compliant authorization form can be found online at http://members.mobar.org/pdfs/publications/public/HIPAA.pdf. Although the attorney should generally be as inclusive as possible in requesting medical records, she should be careful not to be too broad. For instance, as discussed above, psychotherapy notes are given greater protection under HIPAA and cannot be aggregated with a request for other medical records,[104] and the holder of the notes does not necessarily have to provide the detainee or his designee with them in response to a general request for medical records. Therefore, the attorney should specifically request the psychotherapy records using a separate authorization form.

b. State medical privacy laws.

The federal HIPAA Privacy Rules establish a floor for protecting patients' privacy. State laws that have more stringent standards protecting patients' privacy rights are not preempted by HIPAA. Therefore, an attorney requesting a detainee's medical records must also consult applicable state law to determine whether more onerous standards apply. Health care providers that qualify as covered entities under HIPAA are also obligated to comply with these state laws. If a state law conflicts with the HIPAA Privacy Rules, the health care provider must follow the authority that is most protective of the patient's rights.

Most states have laws or rules that grant individuals the right to access their medical records. Many states, including California, Maryland, New York, Texas, and Virginia, have medical record access laws that are as detailed or almost as detailed as HIPAA, covering the right of access, mandatory response times, maximum fees for copying, and rules regarding denial of access. In addition, some jurisdictions, including the District of Columbia and Maryland, have laws specifically governing access to mental health records. Virginia also has a specific law governing the exchange of mental health information and records of prisoners.[105]

PRACTITIONER'S TIP: Quick-reference guide to state medical records access laws. For a review of state law regarding access to medical records, see the Department of Health and Human Services' Health Information Security and Privacy Collaboration Report on State Medical Record Access Laws (2009), at http://healthit.hhs.gov/portal/server.pt?open=512&objID=1240&parentname=CommunityPage&parentid=2&mode=2. For a compilation of state-specific guides on laws applicable to patients' access to medical records, see the website of Georgetown University's Center on Medical Records Rights and Privacy Rights, at http://ihcrp.georgetown.edu/privacy/records.html.

C. How can a *pro bono* attorney request a client's non-medical records held by government entities?

An attorney may access a detainee's non-medical records by making a request under the federal Freedom of Information Act ("FOIA")[106] or state laws governing public access to state records. While

[103] 45 C.F.R. § 164.524.
[104] 45 C.F.R. § 164.508(b)(3).
[105] Va. Code. § 53.1-133.03.
[106] 5 U.S.C. § 552 *et seq.*

all fifty states have public records laws that allow members of the public (including non-residents) to obtain documents and other public records from state and local government bodies, state public records laws are not identical to FOIA. Also, state court interpretations of state statutes with language similar to FOIA are not identical to federal court interpretations of FOIA. The appropriate request (federal or state) depends on whether the records sought are in the possession of a federal or state entity.

1. How can records of the client in DHS's possession be requested under FOIA and the Privacy Act?

If a detainee is held in a federal detention facility, the requested information is likely subject to the Privacy Act of 1974, a code of fair information practices that governs the collection, maintenance, use, and dissemination of information about individuals contained in federal agency record systems. The Privacy Act generally prohibits federal agencies from disclosing any record contained in a system of records to any person or another agency unless pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, subject to twelve exceptions.[107] The detention standards provide that, when information is covered by the Privacy Act, specific legal restrictions govern the release of medical information or records.[108]

Under FOIA, a federal agency must disclose records that the agency holds when requested in writing by any person (with the exception of specific exemptions and exclusions by statute). An attorney seeking records on a detainee should submit a FOIA request to U.S. Citizenship and Immigration Services ("USCIS"), which holds alien files ("A-Files").

Practitioner's Tip: One agency, three FOIA requests. While USCIS holds a non-citizen's A-File, the attorney should be aware that additional records are held by ICE and U.S. Customs and Border Protection ("CBP"). (USCIS, ICE, and CBP are all subdivisions of the U.S. Department of Homeland Security ("DHS")). For example, ICE holds records of the detainee's apprehension and entry into the detention system and any transfers between detention centers that might occur thereafter, while CBP holds any available records of an individual's inspections and entries into the United States. Therefore, to obtain a complete collection of a detainee's immigration records, FOIA requests should be made to all three agencies. Generally speaking,, though, the A-File obtained from USCIS often contains the information that attorneys would require for purposes of representing the detainee in removal proceedings.

The USCIS FOIA website[109] and the ICE FOIA website[110] both provide specific instructions for making FOIA/Privacy Act requests and suggest using a specific form (the Form G-639), though that form is not required and a request may be made by letter. The attorney should carefully review and comply with the agency's requirements for FOIA requests, as a missing signature or the failure to include a required document may result in a significant delay in processing the request or even an outright denial of the request.

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[107] 5 U.S.C. § 552a(b).
[108] 2011 PBNDS, *supra* note 17, at § 4.3(V)(Y)(2).
[109] USCIS FOIA, http://www.uscis.gov/foia (last visited October 10, 2012).
[110] ICE FOIA, http://www.ice.gov/foia (last visited October 10, 2012).

The attorney should also note that if the FOIA request includes disclosure of any protected health information (such as medical records from the detention center), the HIPAA Privacy Rules apply as well and the attorney must include a HIPAA-compliant authorization from the detainee.[111]

PRACTITIONER'S TIP: Expedited "Track Three" processing. USCIS and ICE use a three-track system to process FOIA requests. "Track Three" is dedicated to requests by individuals with a currently scheduled hearing pending before an Immigration Judge, and provides expedited processing and accelerated access to a detainee's A-File. A Track Three request must be submitted along with proof of a pending Immigration Court date, such as a Notice to Appear (Form I-862) and a Notice of Hearing with a future court date noted. The attorney should be aware that wait times for expedited requests under Track Three can be unpredictable, and have in some cases even taken up to six months or more to be delivered.

2. How can records of the client be requested under state FOIA and public records laws?

When an attorney seeks to obtain records relating to a client that are in the possession of a state government entity, the request should be made under state public-access law. All states have public-access laws allowing members of the public to obtain public records from state and local government bodies. Though many laws are worded similarly to FOIA, state courts may interpret the state laws differently than federal courts interpret FOIA. State public access laws also may have more exemptions than those enumerated in FOIA. Maryland, for example, has thirty-two categories of documents exempted from public disclosure. For a compilation of state public-access laws, see http://www.foiadvocates.com/records.html.

State public-access requests are generally fulfilled more quickly than federal FOIA requests, in some cases taking less than a week.

[111] FOIA specifically permits the government to withhold all information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). However, this exemption cannot be invoked to withhold from a requester information pertaining to the requester.

VI. STRATEGIZING AROUND ISSUES OF MENTAL INCOMPETENCY IN REMOVAL PROCEEDINGS

It bears noting at the outset of this discussion that most people with mental disabilities are capable self-advocates, and mental incompetency should not be presumed from the mere presence of a mental disability or illness, even a serious one. With that said, however, some individuals do have mental health conditions or disabilities that impair their ability to perform certain tasks that are critical in the context of removal proceedings, such as presenting evidence and testifying on one's own behalf.

This chapter focuses on representation of the relatively small number of immigration detainees with mental disabilities whose circumstances and level of functioning create a doubt as to their ability to participate fully in removal proceedings.

A detailed look at the framework for assessing competency in removal proceedings is offered first, including a discussion of safeguards that may be ordered to ensure that a detainee who has been found incompetent has a "full and fair hearing," followed by an overview of applications of the concept of incompetency in the criminal system to contextualize the issues.

A. What is the standard for mental competency in Immigration Court?

The Board of Immigration Appeals directly addressed the issue of mental competency in removal proceedings for the first time with its 2011 precedent decision in *Matter of M-A-M-*, 25 I&N Dec. 474, 479 (BIA 2011). There, the BIA explained that the Due Process requirement of "fundamental fairness" is achieved in removal proceedings only where the respondent has the opportunity to exercise the "rights and privileges" guaranteed to her by the Immigration and Nationality Act ("INA") and the Fifth Amendment. Among these are the "privilege of being represented" by legal counsel and the right to a "reasonable opportunity" to examine and present evidence and to cross-examine witnesses.[112]

The BIA articulated a competency standard that tracks those rights and privileges:

> [T]he test for determining whether an alien is competent to participate in immigration proceedings is whether she 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 present evidence and cross-examine witnesses.[113]

By definition, then, an incompetent respondent is one who, because of mental disability or otherwise, cannot avail herself of the specific rights and privileges that make removal proceedings fundamentally fair.

PRACTITIONER'S TIP: Fluxuating competency. As the BIA notes in Matter of M-A-M-, mental competency is not a static condition, and therefore a competency inquiry may be appropriate or necessary at any point throughout the proceedings. Indeed, a detainee whose functioning and comprehension raise no concerns at the outset of the removal proceedings may deteriorate significantly over the course of a lengthy period of detention, such that she is unable to perform the tasks required by the time the Individual is held. For this reason, the attorney representing a detainee who is competent at the outset of proceedings should nonetheless remain vigilant to the issue of competency

[112] *Matter of M-A-M-* at 478.
[113] *Id.* at 479.

by inquiring into to the mental health care the client is receiving in detention, taking action to remedy any problems with the kind or quality of such care in accordance with the client's wishes, and staying alert to any changes in the client's ability to perform the tasks that will be required of her in court.

B. What triggers an inquiry into the respondent's competency in Immigration Court?

Under *Matter of M-A-M-*, an inquiry into a respondent's competency in Immigration Court is triggered by the presence of "indicia of incompetency," whenever in the course of proceedings they may arise.[114] These indicia include any of "a wide variety of observations and evidence" that raise a question as to the respondent's functioning and comprehension.

Indicia of incompetency may be apparent in the respondent's behavior in court, such as her:

- inability to understand and respond to questions; and/or
- high level of distraction.

Indicia of incompetency may also be found in records and documentary evidence, such as:

- medical records from current or past mental health treatment;
- mental health assessments from criminal proceedings;
- testimony or affidavits from mental health professionals;
- school records, including special education services or individualized education plans;
- reports or letters from teachers, counselors, or social workers;
- participation in programs for people with mental disabilities;
- applications for disability benefits; and/or
- testimony or affidavits from family members or friends.

Because a respondent's incompetency undermines the fundamental fairness of the removal proceedings, the Immigration Judge and the DHS attorney are both charged with detecting these indicia of incompetency.

C. What is the DHS attorney's role in a competency inquiry?

The DHS attorney is specifically tasked with presenting evidence in DHS's possession that may bear on the issue of the respondent's competency to the Immigration Judge. As *Matter of M-A-M-* points out, by regulation, "[DHS] counsel shall present on behalf of the government evidence material to any . . . issues that may require disposition by the immigration judge."[115] The case makes clear that a respondent's competency is such an issue, stating that "DHS has an obligation to provide the court with relevant materials in its possession that would inform the court about the respondent's mental incompetency." DHS policy on the use of detainees' medical records is in compliance with these requirements.[116]

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[114] *Id.* at 479-80.

[115] *Id.* at 480. *See* 8 C.F.R. § 1240.2(a).

[116] *See* Department of Homeland Security, *Privacy Impact Assessment for the Alien Medical Records System* 15 (July 25, 2011), *available at* http://www.dhs.gov/xlibrary/assets/privacy/privacy-pia-ice-arms.pdf (clarifying that, "[i]f there is a question regarding the mental competency of an alien in immigration proceedings before a[n] . . . immigration judge, ICE may present the results of a competency or other mental health evaluation, and/or related medical information, to the judge so that the judge can make a competency determination").

Notably, DHS counsel must present evidence bearing on the respondent's competency even where DHS itself – or the contracted mental health providers in the detention facilities, for that matter – are not persuaded of the respondent's incompetency. The regulation requires DHS counsel to submit evidence on any issue that "may" require disposition by the Immigration Judge.[117]

The strictness of DHS's responsibility under the regulation and the broadness of the BIA's interpretation of it are consistent with the concern for the "fundamental fairness" of the proceedings that underlie them. This concern is perhaps even more crucial to detained respondents because, as *Matter of M-A-M-* points out, "DHS will often be in possession of relevant evidence, particularly where the alien is detained."[118]

PRACTITIONER'S TIP: DHS's "Motions to Consider Mental Health Records" and IHSC Form 883. In cases that present clear "indicia of incompetency," it has been observed that DHS counsel files a document with the court styled as a "Motion to Consider Mental Health Records." The boilerplate language in this one-page motion alerts the Immigration Judge to the fact that DHS has "indicia of incompetency" in its possession, but specifically indicates that DHS "takes no position regarding the mental competency of the respondent at this time." The motion further states that the "direct release to the respondent of certain medical records may cause harm to the respondent and/or damage the therapeutic relationship between the treating medical practitioner(s) and respondent," but notes that DHS will "promptly" serve the respondent and provide copies to the court of any records it is ordered to disclose by the Immigration Judge. It appears to be DHS practice to file this motion together with an attached IHSC Form 883, which is a two-page "Mental Health Review" completed by a medical professional employed or retained by DHS. The form provides space for very brief notations regarding the detainee's diagnosis, symptoms, current treatment and functioning, and health history. Notably, however, the form does not track the BIA's competency standard and does not contain the medical professional's opinion as to the detainee's competency. In addition, the form typically provides no indication of how it was prepared (for example, what tests or examinations were performed, what records were reviewed, who was consulted, etc.) For these reasons, the "Mental Health Review" may not adequately reflect the true history or severity of the detainee's impairments. An attorney representing a detainee who is the subject of such a "Mental Health Review" should carefully consider its limitations and prepare a response in light of the case strategy.

D. What is the Immigration Judge's role in a competency inquiry?

Under *Matter of M-A-M-*, The Immigration Judge is required to independently detect indicia of incompetency, assess the evidence presented, make a legal finding as to the respondent's competency to proceed, and articulate the reasoning behind that determination.[119]

1. The Immigration Judge's responsibility to detect indicia of incompetency.

The Immigration Judge is required to detect and evaluate indicia of incompetency independently of the parties and, if necessary, *sua sponte*.[120] To fulfill this responsibility, the Immigration Judge must observe the respondent's behavior in Immigration Court hearings and review the record and submitted

[117] 8 C.F.R. § 1240.2(a).
[118] *Matter of M-A-M-* at 480.
[119] *Id.* at 480-81.
[120] *Id.* at 479-80 (while "DHS has an obligation to provide the court with relevant materials in its possession that would inform the court about the respondent's mental competency," the Immigration Judge is independently tasked with "consider[ing] indicia of incompetency throughout the course of proceedings").

evidence – including any medical, criminal, and educational records and any affidavits or testimony from friends or family members – for indications that the respondent either has a history of mental impairment or may not have a rational or factual understanding of the proceedings.

2. The Immigration Judge's responsibility to make a "good cause" determination.

On the basis of the indicia of incompetency that are before the court, the Immigration Judge must next "consider whether there is good cause to believe that the alien lacks sufficient competency to proceed without safeguards."[121]

If the Immigration Judge concludes that there is such "good cause," she must then make a further inquiry into the issue and "take measures to determine whether [the] respondent is competent to participate in proceedings."[122]

3. Measures available to Immigration Judges to assess a respondent's competency.

Once the Immigration Judge has determined that a full inquiry into the respondent's competency is warranted, she may utilize one or more of a variety of tools and techniques in coming to a decision.

The Immigration Judge has broad discretion to decide which measures to use at this stage of the competency inquiry. *Matter of M-A-M-* emphasizes that competency determinations should be individualized and tailored to the unique facts and specific circumstances of the respondent's case.[123]

Therefore, depending on the circumstances of the case, the Immigration Judge may:

- pose simple and direct questions to the respondent, such as checking to see if the respondent knows where the hearing is taking place, asking whether the respondent is taking any medication for a mental health condition, and inquiring after the respondent's state of mind and her understanding of the nature of the proceedings;
- permit a family member or close friend to provide relevant information to the court;
- continue the proceedings so that further evidence regarding the respondent's mental condition may be gathered and submitted, such as medical records, documentation from any criminal proceedings, and letters or affidavits from third party sources;
- manage the case to facilitate the respondent's ability to obtain mental health care and/or legal representation, such as by granting a continuance or a motion to change venue;
- continue the proceedings to allow for an assessment of any changes in the respondent's condition over time; and/or
- order that a mental competency evaluation of the respondent be performed by a medical practitioner.

PRACTITIONER'S TIP: DHS's refusal to provide competency evaluations or take a position regarding competency. Though ICE policy specifically allows DHS attorneys to "present the results of a competency or other mental health evaluation" to the Immigration Judge during a competency inquiry,[124] it appears that, in practice, the agency typically declines to take a position in competency

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[121] *Id.* at 479.

[122] *Id.* at 480.

[123] *Id.* (directing that "[t]he approach taken [by the Immigration Judge to assess competency] in any particular case will vary based on the circumstances of the case").

[124] Privacy Impact Assessment for the Alien Medical Records System, supra note 116, at 15.

inquiries and refuses Immigration Judges' orders to arrange, pay for, or otherwise provide for competency evaluations of detainee in its custody. In these cases, DHS counsel have argued that the respondent's incompetency is a determination to be made by the Immigration Judge and the agency should not be compelled to take a position on the issue by submitting an evaluation that contains a psychiatrist or psychologist's medical opinion on the question. The attorney who represents a detainee who is the subject of a competency inquiry should be prepared for such an argument and, if appropriate, explore alternative evidence on which the Immigration Judge could base her competency decision, such as an independently-obtained evaluation, mental health records from the detention center, prior mental health assessments, documentation from other mental health treatment, etc.

4. The Immigration Judge's responsibility to render a decision on competency on the record and to articulate the reasoning for it.

Ultimately, competency is a legal determination, and under *Matter of M-A-M-*, the Immigration Judge "must weigh the results from the measures taken and determine, under the test for competency . . . whether the respondent is sufficiently competent to proceed with the hearing without safeguards."[125] The Immigration Judge "must also articulate that determination and his or her reasoning" on the record.[126]

PRACTITIONER'S TIP: Mental competency as a legal finding vs. medical opinion. Given the complexity of the issues encountered during a competency inquiry, an Immigration Judge may be inclined to simply defer to the opinion of a mental health professional, if an evaluation has been entered into the record. However, under the procedures set forth in Matter of M-A-M-, whether a respondent is competent to participate in proceedings is a specifically legal determination that is to be made on the record by the Immigration Judge, and one that, like any other, must be supported by a reasoned analysis of all the evidence. While an evaluation by a mental health professional may be a persuasive piece of evidence for an Immigration Judge who has undertaken an inquiry into the respondent's competency, the Immigration Judge may not simply cede judgment to the physician or psychologist's conclusion and must still "weigh the results from the measures taken [to assess competency] and determine, under the [competency standard], whether the respondent is sufficiently competent to proceed with the hearing without safeguards."[127]

E. What happens if the Immigration Judge finds that the respondent is incompetent?

Matter of M-A-M- is clear that removal proceedings may go forward after a finding of incompetency only if "safeguards" can be prescribed that will enable the respondent to exercise her "rights and privileges" in a "full and fair hearing."[128] Without those safeguards, the prosecution of removal proceedings against an incompetent respondent would violate "traditional standards of fundamental fairness."

Some of these safeguards can be found in the regulations and should be implemented in every case involving an incompetent respondent, such as:

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[125] *Id.* at 481.
[126] *Id.*
[127] *Id.* at 480-81 (listing a psychiatric evaluation as but one of many measures that can be used to assess competency and distinguishing legal and medical conceptions of competency by discussing respondents who are "medically competent" yet are nonetheless found to require "appropriate safeguards" to proceed in court).
[128] *Id.* at 481-84.

- the enhanced requirements for service of the Notice to Appear on an incompetent respondent at 8 C.F.R. §103.5a(c);
- the prohibition against an Immigration Judge accepting an admission of removability from an unrepresented incompetent respondent at 8 C.F.R. § 1240.10(c); and
- the allowances for the appearance of certain third parties on behalf of an incompetent respondent at 8 C.F.R. § 1230.4.

Beyond these specific regulatory requirements, the BIA directs the Immigration Judge to use "discretion to determine which [additional] safeguards are appropriate, given the circumstances" of the particular case."[129] These potential safeguards, some of which may have already been utilized in the process of coming to a decision on the respondent's competency, include:

- the identification and appearance of a family member or close friend who can assist the respondent and provide the court with information;
- docketing or managing the case to facilitate the respondent's ability to obtain legal representation and/or medical treatment in an effort to restore competency;
- participation of a guardian in the proceedings;
- continuance of the case for good cause;
- closing the hearing to the public;
- waiving the respondent's appearance;
- active assistance from the Immigration Judge in developing the record, including examining and cross-examining witnesses; and/or
- reserving appeal rights for the respondent.

It bears noting that there is no single safeguard that is superior to all others in every case. Because safeguards are by their very nature intended to account for the specific manifestations of a respondent's incompetency, they should be individualized and tailored to the specific facts and circumstances of each proceeding.

Indeed, under the procedures outlined in *Matter of M-A-M-*, the Immigration Judge should identify and articulate the specific nature of the respondent's incompetency in order to facilitate and support the decision that follows regarding which safeguards are necessary and appropriate, given the particular facts and circumstances of the case. The Immigration Judge must then select, from a wide variety of available safeguards, those that will cure the Due Process deficiencies underlying the finding of incompetency such that the respondent has, like her competent counterparts, the opportunity to exercise her "rights and privileges" in a "full and fair hearing" on the merits going forward.

PRACTITIONER'S TIP: The presence of an attorney is not a "one-size-fits-all" safeguard. In some cases involving incompetent respondents, Immigration Judges and DHS counsel have taken the position that, if pro bono counsel is present, there is no need for any other safeguards and the removal proceedings may go forward as usual. However, while the presence of an attorney may cure the Due Process deficiencies in one respondent's proceedings, it may not do so in another. For instance, the presence of pro bono counsel would do nothing to cure the Due Process deficiency that is apparent when a respondent's mental impairment prevents him from articulating a claim to fear-based relief and testifying in support of that claim. Indeed, the respondent's inability to consult with his attorney in these

[129] *Id.* at 481-82.

circumstances would itself be a clear indication of his incompetency and the necessity for additional safeguards.[130] *(Please see Chapter VIII for a more detailed discussion of fear-based claims to relief.)*

F. What strategic considerations should a *pro bono* attorney have in mind when approaching a case where the client's competency may be in doubt?

In some instances, an attorney may become involved in a case after the Immigration Judge has found the respondent to be incompetent and implemented a set of procedural safeguards. Indeed (subject to the caveats discussed above), the attorney's participation in the case following the finding of incompetency may be a safeguard in and of itself.

However, in other cases, the attorney may undertake representation of a detainee whose functioning and comprehension raise doubts as to her competency to participate in the removal proceedings and perform the tasks that will be necessary to achieve the goals of the representation. (Please see Chapter III for a discussion of entering into an attorney-client relationship with a detainee with significant mental impairments.) In these circumstances, the attorney will be in a unique position to make an initial assessment of the detainee's competency, which encompasses the client's ability to consult meaningfully with the attorney by evincing an understanding of the nature and object of the proceedings, identifying evidence in support of a claim for relief, and displaying the capacity to testify on her own behalf.

As the attorney investigates the indicia of incompetency, she may consider evaluating them in light of several factors, including:

- Exactly what tasks must the client be able to perform in order to achieve the goals that she has articulated for the representation?
- How is the client's disability or impairment affecting the attorney-client relationship?
- What evidence would enter the record during a formal competency inquiry? Is there information in medical records, for example, or from past criminal proceedings that would be detrimental to the client's application for a discretionary form of relief? Could the formal hearing be conducted fairly without those records being disclosed?
- What protections would a finding of incompetency bring for the client? Could these be achieved without the need for a formal competency inquiry on the record in court?

These and other considerations should be discussed, to the fullest extent possible, with the client before a decision is made to move for a competency hearing.

PRACTITIONER'S TIP: The appointment of guardians ad litem in removal proceedings. Regulations allow for the legal guardian of a respondent to appear in removal proceedings on her behalf. However, there is no explicit statutory or regulatory provision authorizing an Immigration Judge to appoint a guardian for an incompetent respondent for the limited purposes of the removal proceedings (though it should be noted that some Immigration Judges have determined that the authority to appoint a guardian ad litem is implicit in their powers and responsibilities to manage the proceedings). Nevertheless, the Second Circuit's decision in Calero v. INS, 957 F.2d 50 (2d Cir. 1992), is noteworthy. There, the Second Circuit rejected an attorney's request for the appointment of a guardian ad litem for his fifteen year-old client in immigration proceedings. However, in coming to that decision, the court emphasized the respondent's competency to consult with his attorney (despite

[130] *See id.* at 479 (incorporating the respondent's ability to consult with an attorney into the test for competency).

his age) as a primary factor, and cautioned that it did "not address whether the appointment of such a guardian may be constitutionally required in isolated, unusual and egregious circumstances" – a caveat that perhaps suggests that the appointment of a guardian ad litem may be appropriate in cases where a represented respondent is incompetent and otherwise unable to communicate meaningfully with the attorney. By way of comparison, Federal Rule of Civil Procedure Rule 17(c) specifically addresses the appointment of guardians in civil litigation. While that rule requires a court to appoint a guardian for an unrepresented incompetent litigant, courts have also recognized the need for the appointment of guardians in cases where an incompetent litigant is represented by an attorney. In considering the potential of seeking guardian, however, the attorney must always return to the fundamental question of whether it would allow the client to exercise her rights and privileges in a meaningful way.

G. By way of comparison, how is a defendant's mental competency addressed in the criminal system?

Unlike the treatment of competency in Immigration Court, a finding that a defendant is not mentally competent in a criminal proceeding may prevent the case from moving forward.

1. What is the standard for competency in criminal court?

The often-cited test for mental competence in the criminal context is set forth in *Dusky v. U.S.*, 362 U.S. 402 (1960), and *Drope v. Missouri*, 420 U.S. 162 (1975). These cases outline a three part test for competency to stand trial. Under the *Dusky/Drope* test, the trial court must determine whether the defendant:

- "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding";
- has "the capacity . . . to assist in preparing his defense"; and
- "has a rational as well as factual understanding of the proceedings against him."

In addition, *Godinez v. Moran*, 509 U.S. 389 (1993) provides that the standard of competency articulated by *Dusky* and *Drope* applies to the defendant's decision to plead guilty or waive the right to counsel.

2. What is the procedure for a competency inquiry in criminal court?

Under federal law, either the defense or the prosecution may file a motion for a hearing to determine the defendant's mental competency, and such motion may be filed at almost any time prior to sentencing.[131] If a motion to determine mental competency is filed, the court is required to grant the motion "if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense."[132]

[131] 18 U.S.C. § 4241(a).
[132] *Id.*

Once a hearing is granted on the issue of the defendant's mental competency, the defendant must be represented by counsel at such hearing, and the government is required to appoint counsel if the defendant is unable finally to obtain adequate representation.[133]

Prior to the hearing, the court may order that the defendant undergo a psychiatric or psychological examination, and a report of such examination will be filed with the court. The court will appoint a licensed or certified psychiatrist or psychologist to conduct the examination and it may order that the defendant be committed for no more than thirty days while the examination takes place. Evidence presented at the hearing will include this report, but it may also include additional evidence presented by the defense or prosecution.

If, based on the evidence presented at the hearing,

> the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General.[134]

Once a defendant is found incompetent and delivered to the custody of the Attorney General, she will be placed in a mental health facility for treatment and the case will be placed on hold until the defendant is restored to competency. However, if the defendant is not able to become competent, in the opinion of her treating physician, within specified time frames, the case may be dismissed.

[133] 18 U.S.C. §4241(c); 18 U.S.C. §4247(d).
[134] 18 U.S.C. §4241(d).

VII. MENTAL HEALTH AS A POSITIVE OR MITIGATING FACTOR IN SEEKING A FAVORABLE EXERCISE OF PROSECUTORIAL DISCRETION

It should be noted at the outset that prosecutorial discretion is not a form of relief provided for by the immigration laws, as are, for example, asylum and cancellation of removal. Generally speaking, "prosecutorial discretion" refers to a government entity's authority to decide whether or not to pursue a law enforcement action in a particular case and at a particular time. In the immigration context, the favorable exercise of prosecutorial discretion by DHS means that ICE (the agency's prosecutorial arm) decides not to assert the full scope of its enforcement authority in a given case.[135] Such a favorable exercise of discretion frees up agency resources so that they can instead be dedicated to identifying and removing individuals who are designated as higher priorities by ICE.

The U.S. Supreme Court has made it clear that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."[136] Therefore, while a request for a favorable exercise of prosecutorial discretion in a particular case may seem to be warranted under the ICE policy guidelines discussed below, the attorney and the detainee should keep in mind that there is no legal right to an exercise of prosecutorial discretion.

The sections below offer a discussion of ICE's current policy regarding the exercise of discretion in civil immigration enforcement actions – particularly as they pertain to mental health factors – as well as strategic considerations and suggestions for making requests for an exercise of prosecutorial discretion.

A. What factors warrant an exercise of DHS's prosecutorial discretion?

The prosecutorial discretion of federal immigration authorities has been addressed in a series of internal agency memoranda. The attorney should ground her analysis and request for prosecutorial discretion in these memos. Two of the most recent memos, which both touch upon mental health as a positive or mitigating discretionary factor, are discussed below.

1. "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens," by ICE Director John Morton, dated June 17, 2011.

This memorandum (commonly referred to as the "Morton Memo" after its author, current ICE Director John Morton) builds upon several prior directives and articulates a policy regarding the exercise of prosecutorial discretion by ICE officers and agents. The memorandum acknowledges the limited resources ICE has to pursue its mission of "promot[ing] national security, border security, public safety, and the integrity of the immigration system."

The memo calls for ICE officials to consider a number of factors when deciding whether or not to exercise prosecutorial discretion in a given case. Though decisions are to be made on the totality of the circumstances, the memo lists 19 positive and negative factors that should be taken into account,

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[135] See John Morton, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), available at http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

[136] *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

including the non-citizen's length of presence in the United States, her criminal and immigration history, and ties to the community. In addition, ICE officials are directed to consider:

- whether the non-citizen is the primary caretaker of an individual with a mental or physical disability or a seriously ill relative; and
- whether the non-citizen or the non-citizen's spouse suffers from severe mental or physical illness.

On top of these factors, the Morton Memo specifies several categories of individuals that require particular care and consideration. These categories include individuals who suffer from a serious mental or physical disability and individuals with serious health conditions.

It is important to note that prosecutorial discretion can be exercised at any stage of the enforcement proceeding. However, according to the Morton Memo, it is best to exercise discretion early in the process to avoid the unnecessary expenditure of resources. In light of this, the Morton Memo advises that ICE officers, agents, and attorneys should consider favorable exercise of prosecutorial discretion without prompting by the non-citizen or an attorney.

2. "Guidance to ICE Attorneys Reviewing the CBP, USCIS, and ICE Cases before EOIR," dated November 17, 2011.

This memorandum pertains to the implementation of the Morton Memo and sets forth two categories – one for enforcement priorities that should be pursued in an accelerated matter before the Immigration Courts, and the other for cases that should be considered for the favorable exercise of prosecutorial discretion.[137] Among those who should be considered for discretion is a non-citizen "who suffers from a serious mental or physical condition that would require significant medical or detention resources."

PRACTITIONER'S TIP: Results of the Morton Memo. According to the Transactional Records Access Clearinghouse at Syracuse University ("TRAC"), ICE's implementation of the Morton Memo through its case-by-case review program resulted in the exercise of discretion in 5,684 cases through June 28, 2012, which amounts to approximately 1.9% of the case backlog in Immigration Courts nationwide.[138] It is not clear what portion of those cases involved detained respondents.

B. In making a request for a favorable exercise of prosecutorial discretion, what specifically can a *pro bono* attorney ask DHS to do?

ICE memos on prosecutorial discretion make clear that the agency has broad latitude in deciding whether and how to pursue an immigration enforcement action. The attorney representing a detainee with a significant mental disability should be aware of the possible outcomes and strategically tailor her request to the respondent's goals and the specific facts and circumstances of the case.

1. What is termination of proceedings?

Termination of removal proceedings is akin to a dismissal without prejudice. In the event that a removal proceeding is terminated, the case will be over, the detainee will be released, and the

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[137] *Guidance to ICE Attorneys Reviewing the CBP, USCIS, and ICE Cases Before EOIR* (Nov. 17, 2011), *available at* http://www.immigrantjustice.org/sites/immigrantjustice.org/files/DHS%20Guidance%20to%20ICE%20Attorneys%20111711.pdf

[138] TRAC Immigration, ICE Prosecutorial Discretion Program (June 28, 2012), http://trac.syr.edu/immigration/reports/287/ (last visited October 10, 2012).

detainee will maintain whatever immigration status she had before the enforcement action began. In addition, if ICE officials decide to pursue removal proceedings in the future (whether on the same or different grounds), they may only do so after properly serving and filing a new charging document (the Notice to Appear, or "NTA").

In a given case, DHS may unilaterally terminate its enforcement action only before the NTA is filed with the Immigration Court. It may do so at this early stage if it determines, among other reasons, that (i) the NTA was improperly issued or (ii) the circumstances of the case have changed after the NTA was issued to such an extent that continued prosecution is no longer in the best interest of the government.[139]

Once an NTA has been filed with the Immigration Court, however, jurisdiction vests with the Immigration Judge and only she may terminate the proceedings.[140] Generally speaking, the Immigration Judge may terminate proceedings at the motion of either party. However, an Immigration Judge does not have the authority to grant a respondent's unilateral request for termination where it is based solely on a request for the favorable exercise of prosecutorial discretion rooted in ICE's policy guidelines (as opposed to a legal deficiency in the charging document, for example).

Where DHS has agreed to a respondent's request to terminate the proceedings on the basis of its discretionary authority to forego enforcement actions, DHS and the respondent should make a joint motion to terminate to the Immigration Judge. While joint motions are routinely granted in Immigration Court, the attorney should be aware that the Immigration Judge is not required to automatically grant such a motion and may probe the factors underlying the parties' agreement.[141]

2. What is administrative closure of proceedings?

Administrative closure temporarily removes a detainee's case from the Immigration Court's docket. However, administrative closure brings about no change in the respondent's immigration status, and the respondent is considered to be subject to ongoing removal proceedings. Although the respondent can remain in the United States for the duration of the administrative closure, DHS can place her case back on the court's calendar at any time with a motion to recalendar.

As with termination of proceedings, once an NTA has been filed with the Immigration Court, only the Immigration Judge may grant administrative closure. To determine whether administrative closure of proceedings is appropriate, the Immigration Judge weighs all relevant factors including, but not limited to: (i) the reason why administrative closure is sought; (ii) the basis for any opposition to closure; (iii) the likelihood that the respondent will succeed on any petition, application, or other action that she may be pursuing aside from the removal proceedings; (iv) the anticipated duration of the closure; (v) the responsibility of either party (if any) in contributing to any delay (current or anticipated); and (vi) the ultimate outcome of the removal proceedings when the case is re-calendared.[142]

With certain notable exceptions, respondents whose cases are administratively closed generally do not have the right to obtain employment authorization documents ("EADs"). An EAD can only be obtained if the immigrant has an independent basis for the work authorization, such as a pending adjustment of status or application for asylum.

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[139] *See* 8 C.F.R. § 239.2.
[140] *See* 8 C.F.R. § 1239.2.
[141] *See In re G-N-C-*, 22 I&N Dec. 281 (BIA 1998).
[142] *Matter of Avetisyan,* 25 I&N 688 (BIA 2012).

PRACTITIONER'S TIP: Administrative closure and prolonged detention. Although administrative closure may be an appropriate and desirable solution in certain cases, an attorney representing a detainee with mental health needs should be aware of the potential that administrative closure may result in the client's prolonged detention. Because administrative closure is a mechanism that does not resolve the legal issues underlying the removal proceedings, DHS's authority to detain the respondent continues through the period of administrative closure. Therefore, before making a request for administrative closure, the attorney should consider exploring with the client, and proposing to DHS, release options and the availability of community-based resources and supports if administrative closure were to be granted.

3. What is deferred action?

Deferred action is a determination by DHS that it is not in the government's interest to either place a non-citizen in removal proceedings or execute a final order of removal for a specific period of time. As such, deferred action cannot be granted by an Immigration Judge and it is not subject to judicial review. In addition, following a grant of deferred action, ICE conducts periodic reviews to determine if circumstances have changed such that the individual should now be prosecuted or removed.[143]

If deferred action is granted, the non-citizen may be eligible for certain benefits. For example, some classes of non-citizens who have been granted deferred action are eligible to apply for an EAD.[144] However, it is important to note that deferred action does not confer lawful immigration status to the individual or alter her existing immigration status, and ICE may commence removal proceedings against the individual or execute a final order of removal in the future.

4. What is an administrative stay of removal?

In cases where the respondent is subject to a final order of removal, ICE's Enforcement and Removal Operations has the discretion to grant a stay of removal up to the moment of physical departure from the United States.[145] However, a stay provides only temporary relief from removal and is generally granted in one year increments. It should be noted that, depending upon the posture of the case, the non-citizen may also be eligible to apply separately for a stay of removal from the Immigration Judge or the Board of Immigration Appeals (such as would accompany a motion to reopen or a motion to reconsider) or from the federal Circuit Court of Appeals (as in conjunction with an appeal from an adverse decision of the BIA).

The request for a stay of removal from ERO must be made on Form I-246, along with supporting documentation and a filing fee. If ERO grants the stay, the non-citizen will be placed on an Order of Supervision with restrictions and conditions, which commonly include reporting requirements. In addition, ERO may require the posting of a Delivery or Order of Suspension bond (minimum $1,500). The ICE ERO Field Office Director may also grant employment authorization, at her discretion.[146]

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[143] *See* Duane Morris, Penn State University Dickinson School of Law, and Maggio & Kattar, *Private Bills & Deferred Action Toolkit*, http://law.psu.edu/_file/PBDA_Toolkit.pdf.

[144] *See, e.g.*, 8 C.F.R. § 274a.12(c)(14) (providing for the granting of a work permit to "[a]n alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment").

[145] *See* 8 C.F.R. § 241.6.

[146] See Private Bills & Deferred Action Toolkit, supra note 143.

C. How and when should a *pro bono* attorney request prosecutorial discretion based on mental health factors?

Aside from the application for a stay of removal, there is no official application form to request a favorable exercise of prosecutorial discretion from DHS in a given case. In addition, prosecutorial discretion can be exercised – and therefore requested – at any stage of the proceedings, from the initial administrative arrest through Immigration Court proceedings, at all stages of the appeals process, and up to the point of actual removal from the country. However, because the purpose and logic of prosecutorial discretion is for DHS to preserve its resources for higher-priority cases, it may be advisable to make the request as early in the proceedings as possible, before the ICE attorney has expended much time or effort on the case.

Following are suggested strategic considerations when pursuing a favorable exercise of prosecutorial discretion on behalf of a detainee who has a mental disability or is a caregiver of a family member with a mental disability:

- Evaluate the totality of the respondent's circumstances to determine whether a request for the favorable exercise of prosecutorial discretion would be appropriate.
- Determine which form of discretion should be requested. For example, if the respondent is currently in custody and detained, administrative closure may not be desirable.
- Contact the local ICE Office of Chief Counsel to determine how the request should be submitted. In some jurisdictions, an e-mail address has been established to receive prosecutorial discretion requests.
- Request the favorable exercise of prosecutorial discretion in writing and attach supporting documentation, such as medical/mental health records, affidavits, and letters of support. (Please see Chapter V for a discussion of accessing client records.)
- Explicitly state the type of prosecutorial discretion being sought and describe the hardships that would result if such discretion is not granted.
- Highlight how the respondent fits within the positive factors identified in the Morton Memo and/or the Guidance (e.g., has a severe mental disability, is a caregiver to someone with a severe mental disability, etc.).
- Include documentation of the respondent's mental disability, such as evaluations, diagnoses, and letters or affidavits from health care providers.
- Provide additional supporting documentation to bolster other positive factors (i.e., respondent's immigration history, school records, military records, work history, ties to the community, involvement in the community or charities, family ties in the United States, age, age at entry to the United States, etc.).
- Emphasize that the favorable exercise of prosecutorial discretion will help ICE adhere to its enforcement priorities.
- Do not ignore any negative factors. Such factors should be discussed in the request and framed in a way that emphasizes the client's rehabilitation and resilience. Also highlight any extenuating circumstances surrounding the negative factors.
- Make sure to highlight the client's intentions to access treatment, the mental health services that will be available upon her return to community, and the support network that will be in place upon her release.

There is no set procedure for notification regarding requests for prosecutorial discretion. In some cases, the attorney may receive a phone call or a letter, while in others, the ICE attorney may provide

an oral response before or during an Immigration Court hearing. Practitioners should follow-up with ICE officials on the status of the request for prosecutorial discretion.

VIII. MENTAL HEALTH AS A BASIS FOR A CLAIM TO THE FEAR-BASED FORMS OF RELIEF FROM REMOVAL

If a detainee with a severe mental disability is afraid of returning to her native country, the attorney should investigate the viability of filing a "fear-based" claim for relief from removal. The three forms of fear-based relief in immigration law are asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). All three claims for fear-based relief can be made using the Form I-589, "Application for Asylum and for Withholding of Removal."

Although the three claims are related in the general sense that they are all rooted in the detainee's fear of returning to her native country, there are several important distinctions. Below is a table that highlights the primary differences, following which is a more detailed overview of the forms of relief as well as guidance and considerations for an attorney representing a client with a mental disability.

	Asylum	Withholding of Removal	CAT Protection
Must show:	Well-founded fear of persecution (one in ten possibility)	More likely than not will be persecuted (greater than 50%)	More likely than not will be tortured (greater than 50%)
Harm caused by:	The government, or group(s) the government is unwilling or unable to control	No specific actor requirement in the statute	The government, or with the government's acquiescence
On account of:	Race, religion, nationality, political opinion, or membership in a particular social group	Race, religion, nationality, political opinion, or membership in a particular social group	Any reason

A. What is asylum?

The Immigration and Nationality Act provides for the granting of asylum status to a non-citizen who meets the definition of a "refugee" at INA § 101(a)(42).[147] The statute there defines a refugee as a person who is outside her country of nationality and is unwilling or unable to return there and avail herself of the protection of its government "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . ."

1. What rights and benefits come with a grant of asylum?

Asylum status brings with it the most rights and benefits of the three fear-based claims for relief, and is therefore generally the most desirable. Non-citizens who are granted asylum:

- are permitted to remain in the United States in lawful status as an asylee;

[147] *See* INA § 208.

- may apply for derivative asylee status for immediate family members, whether in the United States or abroad;
- are authorized to work in the United States;
- are eligible for certain social services and benefits; and
- after one year, may apply to adjust to Lawful Permanent Resident (LPR) status, which ultimately provides a pathway to U.S. citizenship through naturalization.

2. What is the burden of proof for a grant of asylum?

As an applicant for asylum, the respondent bears the burden of establishing that she meets the definition of a "refugee." To do that, she must show that:

- she has a well-founded fear of persecution in the country of removal;
- the persecution she fears would be inflicted by the government or a group the government is unwilling or unable to control; and
- the feared persecution would be inflicted because of her race, religion, nationality, membership in a social group or political opinion.

In a seminal case on asylum, the Board of Immigration Appeals (BIA) defined persecution broadly as "a threat to the life or freedom of, or the infliction of suffering or harm upon those who differ in a way regarded as offensive."[148]

The statute at INA § 208 and the regulations on asylum at 8 C.F.R. § 1208.13 create a burden-shifting scheme: if the respondent successfully establishes that she has suffered persecution in the country of removal in the past, she is entitled to a presumption that her fear of persecution is well-founded. The burden then shifts to DHS to show that conditions in the country of removal have changed so fundamentally since that persecution occurred that she would no longer face persecution if she were to return there now.

On the other hand, if the respondent has not suffered persecution in the past, she must show that there is a "reasonable possibility" of future persecution on account of one or more of the protected grounds. The Supreme Court has held that the quantum of proof needed to establish a "reasonable possibility" may be as little as a one in ten chance of persecution.[149] Thus, a fear of persecution may be well-founded "even if there is only a slight, though discernible, chance of persecution."[150]

The respondent satisfies her burden by demonstrating that her fear is both subjectively genuine and objectively reasonable – in other words, that a reasonable non-citizen would also be afraid to return to the country of removal under similar circumstances.[151]

PRACTITIONER'S TIP: The unavailability of corroborating evidence. The law on asylum specifies that the respondent's credible testimony alone, without corroboration, may be sufficient to meet the burden of proof.[152] *Nevertheless, it is generally not advisable to proceed on an asylum application based solely on the respondent's testimony. The attorney should locate and submit corroborating evidence, such as affidavits from supporting witnesses and experts and documentation of conditions in the*

[148] *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985).
[149] *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).
[150] *Diallo v. INS*, 232 F.3d 279, 284 (2d Cir. 2000).
[151] See, e.g., Valdiviezo-Galdamez v. Attorney General of the United States, 663 F.3d 582, 590-91 (3rd Cir. 2011).
[152] INA § 208(b)(1)(B)(ii); 8 C.F.R. § 1208.13(a).

country of removal. The attorney should also be aware that the Immigration Judge has the discretion to require corroborating evidence, even for otherwise credible testimony, "unless the applicant does not have the evidence and cannot reasonably obtain the evidence."[153] *With that said, however, the respondent's mental impairments may make locating and providing the corroborating evidence that an Immigration Judge requests difficult or impossible. The attorney representing a detainee in this position should argue on the record that the respondent "cannot reasonably obtain the evidence" because of her mental health condition.*[154]

It is important to remember that asylum is a discretionary form of relief. Therefore, even if the applicant is successful in meeting her burden, the Immigration Judge may still deny the application as a matter of discretion.[155]

3. What are the bars to eligibility for asylum?

Aside from the discretionary aspect of asylum, there are exclusionary factors that will bar a respondent from even being considered for asylum.[156] These bars include:

- failing to file the application for asylum within one year of arrival in the United States;
- having been "firmly resettled" in another country prior to coming to the United States;
- having been previously denied asylum, unless there are changed circumstances that materially affect the claim;
- participation in the persecution of others;
- conviction of a serious nonpolitical crime outside the United States;
- conviction of a "particularly serious crime," including any aggravated felony;
- posing a danger to the security of the United States;
- being a member of or materially supporting a terrorist organization; and
- engaging in or inciting terrorist activity.

PRACTITIONER'S TIP: The one-year filing deadline. Though this bar is strictly enforced, an applicant for asylum may be exempted from the one-year filing deadline if she can prove the existence of "changed circumstances which materially affect the applicant's eligibility for asylum" or "extraordinary circumstances relating to the delay in filing the application within the prescribed period" and she files the application within a "reasonable period given the circumstances."[157] *The types of circumstances that may justify an exception to the one-year deadline must relate to the failure to meet the deadline. They include the applicant's serious physical or mental illness or disability and the death or incapacity of the applicant's legal representative or family member.*[158] *Several of these exceptions may apply to*

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[153] INA § 208(b)(1)(B).

[154] *See, e.g., Vera-Villegas v. INS,* 330 F.3d 1222, 1235 (9th Cir. 2003) (holding that petitioner with a mental illness and was homeless was held to an unreasonable standard of having to provide evidence to corroborate credible testimony establishing his eligibility for relief from removal).

[155] *See, e.g., Kouljinski v. Keisler*, 505 F.3d 534 (6th Cir. 2007) (denying asylum on discretionary grounds because the applicant had three DUI convictions).

[156] *See* INA § 208(a)(2); INA § 208(b)(2).

[157] INA § 208(a)(2)(D); 8 C.F.R.§ 1208.4(a)(2).

[158] 8 C.F.R. § 1208.4(a)(5).

an applicant with a mental disability who failed to file within one year of arriving in the United States.[159]

It should be noted that the application of these bars to a particular set of facts can be exceedingly complex. Therefore, before deciding to forgo filing for any form of relief, the attorney should consult with a seasoned immigration attorney or a mentoring attorney from the referring organization.

B. What is withholding of removal under INA § 241(b)(3)?

By function of law, an application for asylum automatically includes a claim for withholding of removal.[160] Therefore, in the event the respondent's asylum application is denied (whether for failure to establish eligibility or for discretionary reasons), the Immigration Judge will consider whether she is entitled to withholding of removal.[161]

Withholding of removal and asylum are quite similar, but there are very important distinctions that the attorney and the detainee should be aware of.

1. What rights and benefits come with a grant of withholding?

Withholding of removal is not a true form of relief. Unlike asylum, a grant of withholding results in a final order of removal being entered against the respondent. The benefit lies in the fact that the withholding grant bars DHS from executing the removal order and deporting the respondent to her native country.

With that said, DHS may seek (or require the respondent to seek) travel documents, a visa, or a residency permit from any other country in the world where the respondent's life or freedom would not be threatened. Under the law of withholding, if DHS locates such a third country that is willing to accept the respondent, it may remove her to that third country.[162] In practice, however, this is extremely rare.

With respect to other benefits, a grant of withholding does not entitle the respondent to bring any family members into the United States as derivatives, nor does it bring any of the federal benefits that may be available to asylees. A person with a grant of withholding is eligible to apply for work authorization.

2. What is the burden of proof for a grant of withholding?

Section 241(b)(3)(A) of the INA outlines the foundational requirement for withholding of removal: an individual may not be removed to a country where her life or freedom would be threatened because of her race, religion, nationality, membership in a particular social group, or political opinion. Therefore,

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[159] For example, the Seventh Circuit affirmed the Immigration Judge's recognition that "extraordinary circumstances – [petitioner's] mental health condition – could excuse his untimely filing, at least for the period after his arrival before he received treatment." *Disha v. Gonzales*, 207 F. App'x. 694, 696 (7th Cir. 2006). However, the immigration judge ultimately determined that because petitioner could have filed earlier than he did – i.e. when he began receiving medical treatment and his mental condition stabilized – he did not file his application for asylum within a "reasonable period."

[160] 8 C.F.R. § 1208.13(c).

[161] Withholding of removal as described in this section is also known as "statutory withholding of removal" or "INA withholding." This form of withholding of removal is distinct from withholding of removal under the Convention Against Torture, which is discussed below.

[162] 8 C.F.R. § 1208.16(f).

like asylum, withholding requires a showing that the respondent would be harmed on account of one or more of the five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion. However, unlike asylum's lower standard, the respondent must establish that the likelihood of persecution is greater than fifty percent – or "more likely than not."[163]

As with asylum, withholding claims are subject to a burden-shifting scheme: if the respondent establishes that has been persecuted in the past, she is entitled to a presumption that she would be persecuted in the future on the same grounds.[164] The government may rebut this presumption if it can show either that circumstances have fundamentally changed in the applicant's country since the past persecution occurred or that relocation to a different part of the country where she would not be persecuted is reasonable.[165]

Withholding of removal is not discretionary.[166] Therefore, if the respondent meets her burden of proof and is not subject to any eligibility bars, the Immigration Judge must grant her withholding of removal.

3. What are the bars to eligibility for withholding?

Like asylum, there are mandatory bars to withholding of removal.[167] These bars include:

- participation in the persecution of others;
- commission of a serious nonpolitical crime outside the United States;
- conviction of a particularly serious crime which demonstrates that the applicant constitutes a danger to the community;
- posing a danger to the security of the United States; and
- being a member of or providing material support for a terrorist organization.

PRACTITIONER'S TIP: Particularly Serious Crime. The standard for the "particularly serious crime" bar is much lower for asylum applicants than for applicants for withholding of removal. Thus, many crimes which would bar an applicant from applying for asylum would not bar an applicant from applying for withholding. Generally speaking, any aggravated felony will bar an applicant from asylum. However, with regard to withholding, if a respondent has been convicted of one or more aggravated felonies and sentenced to less than five years of imprisonment (in the aggregate), the Immigration Judge may determine that she has not been convicted of a particularly serious crime.

As noted above, the application of these bars to a particular set of facts can be complex, and before deciding to forgo filing for any form of relief, the attorney should consult with a seasoned immigration attorney or a mentoring attorney from the referring organization.

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[163] *Cardoza-Fonseca*, 480 U.S. at 430.
[164] 8 C.F.R. § 1208.16(b)(1).
[165] 8 C.F.R. § 1208.16(b)(1)(A) and (B).
[166] INA § 241(b)(3)(A).
[167] *See* INA § 241(b)(3)(B).

C. What role might a detainee's mental disability play in an application for asylum or withholding of removal?

1. How could a detainee's mental disability constitute membership in a particular social group?

A detainee may fear persecution in the home country on account of several grounds. For example, she may fear persecution on account of her political opinion, race, or religion. She may also fear persecution on account of her mental illness or disability. The attorney should never limit the application for asylum to just one ground if the respondent's fear is based on more than one.[168]

In the case of a respondent who fears that she would be subjected to persecution on account of her mental illness or disability, the attorney should include membership in a particular social group ("PSG") as a basis for asylum and withholding of removal in the I-589 application. The foundational BIA case that defines membership in a PSG is *Matter of Acosta*.[169] The *Acosta* decision defines a particular social group as a:

> group of non-citizens all of whom share a common immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or…shared past experiences. [The characteristic] must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.

Following *Acosta*, the BIA has elaborated on the PSG definition, requiring in addition to the immutability requirement that the protected group also be "socially visible" and defined with "particularity."[170]

To be "socially visible," a respondent must demonstrate that society in the country of removal recognizes individuals with the immutable characteristic that defines the proposed PSG as a group. However, the BIA has been inconsistent with this requirement, in some cases finding groups to be PSGs without any reference to social visibility while in others refusing to deem socially invisible groups

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[168] *See INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

[169] 19 I&N Dec. 211 (BIA 1985), overruled in part by *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

[170] *In re C-A-*, 23. I&N Dec. 951 (BIA 2006). For one example of further refinement of the PSG standard, *see Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092 (9th Cir. 2000) (citing *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986) and holding that a PSG should be small and readily identifiable)).

as PSGs.[171] In addition, the social visibility requirement has been criticized in many quarters, including by the Seventh Circuit Court of Appeals.[172]

The "particularity" requirement is designed to determine whether the group can be described in a sufficiently distinct manner that it would be recognized in the relevant society as a discrete group of people.[173] Therefore, the PSG must be defined with sufficient particularity to delimit its membership.[174]

When pursuing a fear-based claim based on persecution on account of the respondent's membership in a PSG, the attorney should articulate the PSG with more specificity than simply "individuals with mental illness in the country of removal."[175] The attorney should be specific in identifying the particular illness or disability that delimits the group (particularity), explain how non-citizens with such an illness or disability are identifiable as a group in the home country (socially visible), and assert that the illness or disability is an incurable or lifelong condition (immutability).

While defining a PSG primarily by an applicant's mental illness or disability may be challenging,[176] it can be done. For example, in an unpublished 2007 BIA case,[177] the BIA held that "Peruvian psychiatric patients with serious and chronic mental illness" can constitute a PSG. Although the Immigration Judge never assessed the social visibility of the proposed PSG at trial,[178] the BIA noted that this "does not compel us to disturb the conclusion that such individuals constitute a particular social

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[171] *See Gatimi v. Holder*, 578 F.3d 611, 615-16 (7th Cir. 2009) (citing cases were BIA ruled that PSGs existed without discussing social visibility – *In re Kasinga*, 21 I&N Dec. 357, 365-66 (BIA 1996) (young females of a tribe that practice female genital mutilation but who have been subject to it), *In re Toboso-Alfonso*, 20 I&N Dec. 819, 822-23 (BIA 1990)(homosexuals), and *In re Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988) (former members of the national police)).

[172] *See id*. at 615-16 (7th Cir. 2009) (stating that the "social visibility" requirement "make no sense…Women who have not yet undergone female genital mutilation in tribes that practice it do not look different from anyone else. A homosexual in a homophobic society will pass as heterosexual. If you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible; and to the extent that the members of the target group are successful in remaining invisible, they will not be 'seen' by other people in the society 'as a segment of the population.'…The only way, on the Board's view, that the Mungiki defectors can qualify as members of a particular social group is by pinning a target to their backs with the legend 'I am a Mungiki defector.'"); *Benitez Ramos v. Holder*, 589 F.3d 426, 430 ("In our society, for example, redheads are not a group, but veterans are, even though a redhead can be spotted at a glance and a veteran can't be"); *Valdiviezo-Galdamez*, *supra*, at 604 and 608 ("Since the 'social visibility' requirement is inconsistent with past BIA decisions, we conclude that it is an unreasonable addition to the requirements for establishing refugee status where that status turns upon persecution on account of membership in a particular social group" "[W]e are hard-pressed to discern any difference between the requirement of 'particularity' and the discredited requirement of 'social visibility.' Indeed, they appear to be different articulations of the same concept…").

[173] *See Matter of S-E-G*, 24 I&N Dec. 579, 584 (BIA 2008) ("the key question is whether the proposed description is sufficiently particular, or is too amorphous…to create a benchmark for determining group membership").

[174] *See, e.g.*, *Rivera-Barrientos v. Holder*, 658 F.3d 1222 (10th Cir. 2011) (stating that El Salvadorean women between the ages of 12 and 25 who have resisted gang recruitment was a group described with sufficient particularity). But see *Escobar v. Holder*, 657 F.3d 537 (7th Cir. 2011) (particularity was not mentioned in determining PSG).

[175] Compare *Kholyavskiy v. Mukasey*, 540 F.3d 555 (7th Cir. 2008) and *Raffington v. INS*, 340 F.3d 720 (8th Cir. 2003).

[176] *See, e.g., Disha v. Gonzales*, 207 F.App'x. 694, 698 (7th Cir. 2006) (unpublished) (stating in dicta that "it is doubtful that 'mental patients who cannot receive proper treatment in Albania' could constitute a 'particular social group' for asylum purposes."); *Raffington v. INS*, 340 F.3d 720, 723 (8th Cir. 2003) (holding that petitioner, a 43-year old Jamaican citizen with a history of depression and attempted suicide failed to show that mentally ill Jamaicans, or mentally ill female Jamaicans, qualify as a particular social group for asylum purposes because they are not a "collection of people closely affiliated with each other, who are actuated by some common impulse or interest") (*quoting Safaie v. INS,* 25 F.3d 636, 640 (8th Cir. 1994)).

[177] BIA decision, May 31, 2007 re Asylum.

[178] *Matter of C-A-*, I&N Dec. 951, 957 (BIA 2006) (social visibility should be a factor in identifying a PSG); *Hernandez-Montiel v. INS,* 225 F.3d 1084, 1092 (9th Cir. 2000) (citing *Sanchez-Trujillo v. INS,* 801 F.2d 1571 (9th Cir. 1986) (holding that a PSG should be small and readily identifiable).

group." The Board cited expert testimony and record evidence that the applicant's "bipolar disorder was a chronic psychiatric condition subject to treatment and not cure" to show that the applicant's condition "was an immutable characteristic" that could thus constitute a PSG.

A more thorough discussion of how a mental illness can be the basis for a PSG claim is provided in the Immigration Judge's decision, attached in the Appendix. There, the Immigration Judge held that "indigent, schizophrenic, bipolar individuals in Colombia" constitute a PSG.[179] He specifically held that the defined group satisfied three requirements: (1) members of the group share a common immutable characteristic that they cannot or should not be required to change,[180] (2) it had "social visibility"[181] and (3) it was defined with sufficient "particularity."[182]

To satisfy the first factor ("common, immutable"), the applicant provided testimony from his physician and case manager which convinced the immigration judge that the applicant's psychiatric disorders were incurable. To satisfy the second factor ("social visibility"), the applicant provided evidence that even when treated, he manifested symptoms of schizophrenia and bipolar disorder. Additionally, the applicant's doctor asserted that without constant medical care, the applicant exhibited delusional, paranoid, and illogical behavior which could sometimes appear frantic and aggressive. Further, the immigration judge noted that homelessness would render the applicant socially visible, "as life on the street would situate Respondent, and his behavior, in the public sphere." To satisfy the third factor ("particularity"), the immigration judge noted that "respondent's particular social group narrows his membership to a small subset of individuals who are not only mentally ill, but schizophrenic, bipolar, and indigent."[183] The immigration judge writes that "unlike the generally mentally ill population, this subset of individuals, without access to medication on the street, share a particularized characteristic of manifesting uniquely psychotic and dissociated behavior."

2. How can a nexus be established between the persecution and the detainee's membership in the particular social group?

Establishing that an applicant is a member of a PSG or other protected class is not enough to win an asylum case. The applicant must also establish that she has a well founded fear of persecution by the government (or by a group the government is unwilling or unable to control) on account of a protected ground.

Establishing that the asylum seeker would suffer the necessary persecution on account of her membership in a PSG centered on mental illness or disability has proven difficult for applicants. For example, in *Kholyavskiy v. Mukassey* (cited above), the Seventh Circuit found that the unavailability of medications to treat the applicant's mental illness was not enough to establish persecution on account

[179] Order of the Immigration Judge re Applications: Withholding of Removal to Columbia.
[180] *Citing Matter of Kasinga*, 23 I&N Dec. 357 (BIA 1996).
[181] *Citing Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006).
[182] *Citing Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007) (holding that the terms "wealthy" and "affluent" standing alone are too amorphous to meet the PSG definition).
[183] The immigration judge explicitly distinguishes this case from *Raffington v. INS.*, 340 F.3d 720 (8th Cir. 2003) where the 8th circuit upheld the Board's finding that the mentally ill are "too large and diverse a group to classify."

of such illness, because it was not "the result of the Russian government's attempt to injure [the applicant] or, more generally, individuals with mental illnesses."[184]

Similarly, the Eighth Circuit held that unsupported assertions of being stigmatized and discriminated against because of the petitioner's mental illness were not enough to establish persecution on account of the mental illness.[185] Further, a report that Jamaica devotes limited resources to treating those who are mentally ill did not establish a pattern of persecution on account of this disability.[186]

In an unpublished opinion, the Third Circuit held that evidence of the likelihood of persecution, including expert testimony that the applicant would have difficulty proceeding through the airport, would have his clothes and money taken, and that he would act out if his medical illness was untreated, was not enough to establish the necessary persecution based on a PSG. In addition, there was no evidence presented that suggested authorities in Liberia were unable or unwilling to control any harm that may befall the petitioner and no evidence that Liberia had a policy of state action directed against the mentally ill.[187]

While difficult, the nexus argument is not an impossible one. In *Matter of P-C*, the Immigration Judge found that State Department and World Organization Against Torture reports indicated a sufficient nexus, strongly suggesting that "an indigent on the streets of Colombia who visibly exhibits the Respondent's specific mental illness would be judged as 'socially undesirable' or 'marginalized' and a threat to Colombia's social order by paramilitary, guerilla, and vigilante groups."[188] A copy of this well-reasoned decision is included in the Appendix.

PRACTITIONER'S TIP: Evidence makes the record. Fear-based claims for relief based on mental illness or disability are difficult, and the attorney is strongly encouraged to submit evidence establishing each element of the claim, including but not limited to:

- *Expert opinion confirming the respondent's illness or disability and explaining its manifestations;*
- *Affidavits, oral testimony, criminal records, etc. showing instances and consequences when the respondent has manifested symptoms of the illness or disability;*
- *Expert opinion describing treatment of individuals with mental illness or disability in the respondent's home country;*

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[184] *Kholyavskiy,* 540 F.3d at 574 (holding, however, that the unavailability of medications to treat petitioner's mental illness is a valid consideration for purposes of humanitarian asylum (see "humanitarian asylum," *supra*)). Importantly, the court highlighted that the applicant "never has claimed that he suffered past persecution on the basis of his mental illness" and those documents that the applicant submitted to show "a prevalent anti-mental illness attitude" and "considerable lack of mental health treatment" in Russia actually show otherwise; they note that "progress has been made instituting legal provisions for humane and responsible health care for the mentally ill," that these provisions set "minimum standards for humane treatment of psychiatric patients," and that "reforms have seen the focus of psychiatric care change…[with institution of] modern hospitals, with patients allowed to live in the community as much as possible."

[185] *Raffington,* 340 F.3d at 723.

[186] See Id.

[187] *Massaquoi v. AG of the U.S.*, WL 4946203 (3d Cir. 2008).

[188] The immigration judge held that these reports indicate "that the government either encourages or does not effectively control efforts by organized groups of Colombians to overcome, eradicate, or punish the characteristics of mentally ill Colombians… Specifically, the 2001, 2003, and 2005 Department of State Country Reports describe the continuation of Colombia's "social cleansing" killings by paramilitary groups, guerillas, and vigilante groups," which according to the 2003 report included targeting the mentally ill. The World Organization against Torture report further noted that "murders of socially marginalized persons has become a systematic practice in recent years."

- *State Department Country Reports documenting persecution of individuals with mental disabilities;*
- *Reports documenting persecution from other sources, such as the World Organization Against Torture, Human Rights Watch, Disability Rights International, Amnesty International, etc.;*
- *News reports or other evidence suggesting patterns or widespread instances of abuse and stigmatization of people with mental illnesses or disabilities.*[189]

3. What is humanitarian asylum?

As mentioned above, a detainee claiming asylum or withholding of removal may present evidence of past persecution as a reason to fear similar persecution in the future. However, in *Matter of Chen*, the BIA acknowledged that there may be cases in which the favorable exercise of discretion is warranted for humanitarian reasons, even if future persecution is unlikely.[190]

Under 8 C.F.R. § 1208.13(b)(1)(iii), an asylum seeker may qualify for humanitarian asylum if she (1) "has demonstrated compelling reasons for being unwilling or unable to return to the country [designated for removal] arising out of the severity of past persecution" or (2) has experienced past persecution and "has established that there is a reasonable possibility that she may suffer other serious harm upon removal to that country." The satisfaction of either of these prongs could qualify an applicant for humanitarian asylum. The attorney should keep in mind the *Kholyavskiy* court's holding (cited above) that lack of medications and access to mental health treatment in the respondent's home country may constitute "serious harm" and may be grounds for a successful humanitarian asylum claim based on the second prong.[191] Humanitarian asylum is an important form of relief for those applicants who have been persecuted in the past but are unlikely to be persecuted in the future.

D. What is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment?

States that are members of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT")[192] are prohibited from deporting individuals to countries where there is a strong likelihood that they will be tortured. This form of protection is very important in U.S. immigration law because it often functions as a "safety net" for individuals who do not qualify for asylum or withholding of removal. An Immigration Judge's determination that there is no relief available based on the application of the bars to asylum or statutory withholding does not render an applicant ineligible for CAT protection.[193] Thus, no matter the *respondent*'s past history or the success

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[189] *See Raffington v. INS*, 340 F.3d 720, 723 (8th Cir. 2003) for how a State Department's Country Report was insufficient to present a *prima facie* case that the Jamaican government practices or condones widespread persecution of the mentally ill. Here, the Report described an incident in which a group of homeless persons that may have included the mentally ill was rounded up in Montego Bay. The court wrote that it was unclear who did the rounding up and whether any individuals were targeted because of their mental illness. In any event, the Report related that the incident triggered an official inquiry, compensation for the victims, and public criticism of those responsible. Thus, the court held that "this one incident hardly shows a pattern of mistreatment of the mentally ill." In this case, other evidence supplementing the report and filling in its noted inadequacies may have produced a different result.

[190] 20 I&N Dec. 16, 19 (BIA 1989).

[191] *Kholyavskiy*, 540 F.3d at 576.

[192] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) entered into force on June 26, 1987, ratified by the United States on April 18, 1988 and implemented in 1998 when Congress passed the Foreign Affairs Reform and Restructuring Act (FARRA), Pub. L. No. 105-277, Div. G, Title XXII, § 2242, 112 Stat. 2681-822 (codified as a note to 8 USC § 1231).

[193] *Li Fang Lin v. Mukasey*, 517 F.3d 685, 696-97 (4th Cir. 2008).

or failure of other fear-based claims for protection, CAT should always be considered if the practitioner believes that his *respondent* may be subject to severe mistreatment – for any reason – if returned to the home country.

1. What rights and benefits come with CAT?

There are actually two forms of relief available under CAT: CAT withholding and CAT deferral of removal. Much like statutory withholding, a final order of removal is entered against the applicant under either form of CAT relief. However, due to treaty obligations, DHS must refrain from executing the final order and may not remove the individual to the torturing country.

Like statutory withholding, a grant of deferral or withholding under CAT does not provide a pathway for the recipient to become a Lawful Permanent Residents, does not allow the applicant to bring family members to the United States, and does not guarantee that the applicant will be granted permission to work while in the United States. Also, both forms of CAT relief may be terminated should the threat of torture cease to exist in the home country. Further, winning a CAT claim prevents ICE from removing a *respondent* to his country of origin, but does not preclude it from attempting to remove the *respondent* to any other country in the world.[194]

2. What is the burden of proof for CAT protection?

The Convention Against Torture requires that its signatories not "expel, extradite, or otherwise effect the involuntary return of any non-citizen to a country in which there are substantial grounds for believing the non-citizen would be in danger of being subjected to torture."[195] The Convention Against Torture defines "torture" as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a non-citizen for such purposes as obtaining from her or a third non-citizen information or a confession, punishing her for an act she or a third non-citizen has committed or is suspected of having committed, or intimidating or coercing her or a third non-citizen, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other non-citizen acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[196]

Mental pain or suffering may constitute torture if it is prolonged mental harm caused by or resulting from the intentional or threatened infliction of severe physical pain or suffering, the actual or threatened administration or application of mind-altering substances or other procedures intended to profoundly disrupt the senses or the personality, the threat of imminent death, or the threat that another non-citizen will be subject to any of the foregoing.[197]

In addition to showing that the treatment the *respondent* may suffer rises to the level of "severe pain and suffering," a CAT applicant has the burden to establish that it is "more likely than not" that she

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[194] 8 C.F.R. § 1208.16(f).
[195] *In re J-F-F-*, 23 I&N Dec. 912 (A.G. 2006) (citing FARRA § 2242(a), 112 Stat. 2681, 2681-761, 2681-822.).
[196] Convention Against Torture, art. 1; *see* 8 C.F.R. § 1208.18(a).
[197] *See* 8 C.F.R. § 1208.18(a)(4).

would be subject to such treatment in the country of removal.[198] In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture should be considered, including but not limited to:[199]

- evidence of past torture inflicted upon the applicant;[200]
- evidence that the applicant could relocate to a part of the country of removal where she is not likely to be tortured;[201]
- evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and
- relevant information regarding conditions in the country of removal.[202]

As with asylum and statutory withholding claims, the testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration; however, as recommended above, the practitioner should present as much expert testimony and corroborating evidence as the practitioner can to support the *respondent*'s claim.[203] In a CAT claim, the burden of proving that the torture is more likely than not to occur always rests with the applicant, and there are no presumptions or burden shifting as there are with the other forms of fear-based protection. It is also important to show that the torture is not due to a sanctioned or lawful punishment, but occurs extra-judicially or without lawful basis.[204]

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[198] "Because [CAT] does not provide a definition of 'lawful sanction,' the United States Senate was concerned when it ratified the Convention that the 'lawful sanctions' exception could be interpreted too broadly. Although the Senate did not adopt a reservation defining the term, it did qualify its ratification with the understanding that a state 'could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture' . . . [a]ccordingly, [an applicant] is entitled to relief under the Convention if he has shown that 'he is more likely than not to suffer intentionally-inflicted cruel and inhuman treatment that either (1) is not lawfully sanctioned by that country or (2) is lawfully sanctioned by that country, but defeats the object and purpose of CAT.'" *Nuru v. Gonzales,* 404 F.3d 1207, 1221 (9th Cir. 2005) citing *Wang v. Ashcroft*, 320 F.3d 130, 134 (2nd Cir. 2003).

[199] 8 C.F.R. § 208.16(c)(3).

[200] "Past torture is the first factor we consider in evaluating the likelihood of future torture because past conduct frequently tells us much about how an individual or a government will behave in the future. Specifically, if an individual has been tortured and has escaped to another country, it is likely that he will be tortured again if returned to the site of his prior suffering, unless circumstances or conditions have changed significantly, not just in general, but with respect to the particular individual." *Gonzales,* 404 F.3d at 1218. It is important to note, however, that past torture does not create any sort of presumption or burden shifting as it does in asylum and statutory withholding of removal claims.

[201] ". . . it will rarely be safe to remove a potential torture victim on the assumption that torture will be averted simply by relocating him to another part of the country." *Gonzales,* 404 F.3d at 1219.

[202] "It is well-accepted that country conditions alone can play a decisive role in granting relief under CAT.'" *Gonzales,* 404 F.3d at 1219; *cf Matter of J-E-,* 23 I&N Dec. 291 (BIA 2002) ("country conditions alone are not sufficient to qualify for relief"); *In re S-V-,* 22 I&N Dec. 1306, 1313 (BIA 2000) ("the existence of a consistent pattern of gross, flagrant, or mass violations of human rights in a particular country does not, as such, constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon her return to that country. Specific grounds must exist that indicate that the individual would be personally at risk").

[203] 8 C.F.R. § 1208.16(c); *cf. Gonzales*, 404 F.3d at 1216, (" . . .under the applicable law, [finding the applicant's uncontradicted testimony credible] is not enough"). "When an alien credibly testifies to certain facts, those facts are deemed true, and the question remaining to be answered becomes whether these facts, and their reasonable inferences, satisfy the elements of their claims for relief." However, specific facts must demonstrate that the alien would be personally at risk. *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000).

[204] 8 C.F.R. §§ 208.18(a)(3), 1208.18(a)(3).

Two important distinctions between CAT protection and asylum or statutory withholding are that: (1) there is no requirement that the feared torture be inflicted "on account of" a protected ground; and, (2) the feared harm cannot be mere "persecution" but must rise to the level of torture.[205]

A third distinction lies in the requirement that the applicant show that the torture will occur at the hands of or with the acquiescence of someone acting in an official governmental capacity.[206] Though there has been some dispute between the BIA and circuit courts about what constitutes government acquiescence, the prevailing opinion is that willful blindness is enough to meet the standard.[207]

3. What are the bars to eligibility for CAT protection?

As noted above, CAT protection may be granted in the form of either withholding of removal or deferral of removal.[208] The regulations provide that CAT withholding shall be granted unless the alien is subject to a mandatory denial of statutory withholding under INA § 241(b)(3). If the applicant is not eligible for CAT withholding, then the regulations require that deferral of removal be considered instead.[209] It is important to remember that both withholding and deferral under CAT are mandatory forms of relief and the adjudicator may not deny either one in his discretion.

Withholding of removal under CAT will protect the immigrant from returning to a specific country where he/she may be tortured. This is a more secure form of protection compared to deferral of removal because withholding can only be terminated if DHS establishes that the immigrant is not likely to be tortured in that country.

A grant of deferral is the least desirable form of fear-based protection because it is the most tenuous. It can be more easily terminated than withholding or asylum grants because the government is not required to file a motion to reopen to terminate a deferral grant.[210] In addition, deferral does not necessarily lead to a detainee being released from custody.[211]

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[205] 8 C.F.R. § 1208.16(c)(3).

[206] "To qualify for relief under [CAT], the torture must be 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." *Zheng v. Ashcroft*, 332 F.3d 1186, 1188 (9th Cir. 2003) citing 8 C.F.R. § 208.18(a)(1) (emphasis included). *See* 8 C.F.R. § 1208.18(a)(7); *Valdiviezo-Galdamez, supra*, at 592 ("[T]orture [under CAT] covers intentional governmental acts, not negligent acts or acts by private individuals not acting on behalf of the government" citing *In re J-E-*, 23 I&N Dec. 291, 299 (BIA 2002)).

[207] *See Asylum Primer*, *supra*, at 269; *Valdiviezo-Galdamez*, *supra*, at 610, *quoting Silva-Rengifo*, 473 F.3d 58, 70 (3d Cir. 2007). *See also Villegas v. Mukasey*, 523 F.3d 984, 989 (9th Cir. 2008) (holding, among other things, that conditions in the Mexican mental health system exist not out of a deliberate intent to inflict harm, but merely because of officials' historical gross negligence and misunderstanding of the nature of psychiatric illness) *quoting Pierre v. Gonzales*, 502 F.3d 109, 113-19 (2d Cir. 2007) ("A private actor's behavior can constitute torture under the CAT without a government's specific intent to inflict it if a government official is aware of the persecutor's conduct and intent and acquiesces in violation of the official's duty to intervene . . . But in that scenario, there is specific intent – the intent of the private actor"). "Accordingly . . . to establish a likelihood of torture for purposes of the CAT, a petitioner must show that severe pain or suffering was specifically intended – that is, that the actor intend the actual consequences of his conduct, as distinguished from the act that causes these consequences." *Id*. *See also Pierre v. Attorney General of the United States*, 528 F.3d 180 (3d Cir. 2008) ("for an act to constitute torture, there must be a showing that the actor had the intent to commit the act as well as the intent to achieve the consequences of the act").

[208] 8 C.F.R. § 1208.16(c)(4).

[209] *See* 8 C.F.R. §§ 1208.16(c)(4), 1208.17.

[210] 8 C.F.R. § 1208.17(b)(iii), (iv).

[211] 8 C.F.R. § 1208.17(b) and (c).

E. What role might a detainee's mental disability play in an application for CAT protection?

An attorney representing a detainee with a mental disability who is applying for CAT should be familiar with the Attorney General's decision in *In Re J-F-F.*[212] In that case, the respondent applied for deferral of removal under CAT. The respondent, who suffered from schizoaffective disorder and bipolar disorder, claimed that as a result of not taking or not having adequate medication, he would be picked up by the police in his home country, incarcerated, and subjected to treatment that was the equivalent of torture. Both the immigration judge and the BIA agreed with his argument, and supported his grant of CAT deferral.

On review, however, the Attorney General ("AG") denied the respondent's claim. The AG noted that in order to qualify for deferral of removal under CAT, the court must find that the respondent "is more likely than not to suffer intentionally-inflicted cruel and inhuman treatment that either (1) is not lawfully sanctioned by that country or (2) is lawfully sanctioned by that country, but defeats the object and purpose of CAT."[213] After applying the above definition, the AG found that "the Immigration Judge improperly strung together a series of suppositions: that respondent needs medication in order to behave within the bounds of the law; that such medication is not available in the Dominican Republic; that as a result respondent would fail to control himself and become "rowdy"; that this behavior would lead the police to incarcerate him; and that the police would torture him while he was incarcerated."[214] The AG held that when arguing this sort of claim, the applicant must prove that each step in the hypothetical chain of events will more likely than not occur.[215] Thus, if the practitioner argues that the *respondent* will suffer torture based on his mental illness that involves a cascading chain of events, it is essential to provide evidence that each event will more likely than not occur.[216]

It has been possible for applicants with a mental illness or disability to succeed on a CAT claim and provide enough evidence to satisfy the chain of evidentiary proof standard articulated in *In re JFF*. Both the Ninth and Eleventh Circuits have held that Haitian criminal deportees with mental illness can find relief under CAT due to the possibility that they will be singled out because of their mental illnesses in Haitian prisons and thus be subject to torture.[217]

The Eleventh Circuit in *Jean-Pierre v. U.S. Attorney General* held that the BIA failed to give reasoned consideration to the CAT claims of petitioner, a Haitian national with advanced HIV/AIDS and AIDS-related dementia, who alleged that he was entitled to withholding of removal under CAT because he

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[212] 23 I&N Dec. 912 (A.G. 2006).

[213] *Id.*, citing *Gonzales* 404 F.3d at 1221.

[214] *Id.*

[215] *Id.* (citing *Matter of Y-L-*, 23 I&N Dec. 270 & n. 16 (A.G. 2002) (holding that a string of speculative events in a country with violent incidents but a non-complacent government insufficient for CAT showing)).

[216] *See Adrien v. U.S. Attorney General*, 446 F. App'x 172, No. 10-15925, 2011 WL 5167130 (11th Cir. 2011) (unpublished) (upholding BIA's decision that the respondent, who suffered from psychosis, was not eligible for CAT protection because he did not provide evidence that he would be arrested or placed in jail as a criminal deportee in Haiti and thereby would be signaled out for torture).

[217] *See Saint-Fort v. Mukasey*, 305 F. App'x 364, No. 06-73645, 2008 WL 5383583 (9th Cir. Nov. 21, 2008) (recognizing that "the BIA has held that mentally ill criminal deportees face a likelihood of torture in Haitian prisons because of their mental illness" (citing *In re M-D-,* No. A-40-136-479 (BIA Oct. 6, 2005), *In re J-F-,* No. A-23-606-566 (BIA Jun. 2, 2005), and *In re-,* 26 Immig. Rptr. B1-161 (BIA Mar. 18, 2003), noting that "in each of those cases, the BIA held that evidence of mental illness sufficiently distinguished the petitioner's circumstances from those in *In re J-E-.*"); *See also Jean-Pierre v. AG,* 500 F.3d 1315 (11th Cir. 2007) (remanding because BIA failed to consider that it was likely that if returned to Haiti, petitioner would be singled out for crawl-space confinement, striking on held and ears, and beatings with metal rods as a result of mental illness.)

was more likely than not to be tortured in a Haitian prison by guards who beat mentally ill patients.[218] The Eleventh Circuit noted that in prior similar cases, "petitioners failed because, among other things, they could not establish that they would be individually and intentionally singled out for harsh treatment."[219] In this case, however, petitioner "was not limited to the assertion that placing a man with AIDS in a Haitian prison amounts to a death sentence but instead claimed that 'placing this man in a Haitian prison, with guards who beat mentally ill patients with metal rods and lock them in small crawl spaces, would violate the commitment of the U.S. not to remove a non-citizen who is 'more likely than not to be tortured in the country of removal.'"[220]

In *Soobrian v. Attorney General*,[221] the respondent, a mentally ill man from Guyana, argued that he would face persecution upon deportation due to his mental health, his Indo-Guyanese ethnicity, and his status as a criminal deportee. Soobrian filed for withholding of removal and CAT protection. Although the immigration judge twice granted Soobrian's claim for CAT protection, each grant was reversed by the BIA.

The Immigration Judge had determined that Soobrian was not entitled to withholding of removal, but granted CAT protection after determining that it was likely that Guyanese police would arrest and torture Soobrian due to his mental illness. The Immigration Judge also concluded that each step in the chain culminating in torture was established and more likely than not to happen. Specifically, the Immigration Judge determined that the following was supported by the record:

- Soobrian has a mentally illness and is subject to a daily regimen of medications;
- even while medicated, it is difficult for Soobrian to engage in a coherent conversation;
- while typically non-violent, Soobrian has a prior conviction for assault (which occurred while he was medicated);
- if deported, Soobrian's eventual arrest by the Guyanese police is almost certain; and
- Soobrian's "certain exposure to arrest and detention will likely result in the intentional infliction of severe pain or suffering at the hands of the police, prison guards, or fellow prisoners without prison authority interference when, due to a total lack of proper, daily medications, he will unlikely be capable or obeying or understanding orders and directives from authorities."[222]

The BIA disagreed with the Immigration Judge's determination and ruled that each link in the hypothetical chain of events was not supported by the evidence. It noted that "on this record it is far from clear whether [Soobrian's] behavior…would bring [about] the…eventual torture of [Soobrian]."[223] Soobrian appealed the BIA's ruling and the Third Circuit granted Soobrian's petition for review of his deportation order with respect to the CAT claim. The Third Circuit determined that the BIA applied an

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[218] *Jean-Pierre,* 500 F.3d at 1315. In this case, the petitioner had a physical ailment, but the court considered him mentally ill due to the high likelihood of psychiatric complications and consequent deviant behaviors of persons afflicted with advanced HIV/AIDS.

[219] *Id.* at 1324. The cases referenced in this opinion include *In re J-E-,* 23 I&N Dec. 291 (BIA 2002) (*en banc*) and *Cadet v. Bulger*, *377* F.3d 1173 (11th Cir. 2004), both of which held, among other things, "that Haiti is a poor country, and that its inability to maintain better prisons did not mean that it tortures those it holds, even when it indefinitely confines criminals deported from the United States and may subject them to mistreatment short of torture." *Jean-Pierre,* 500 F.3d at 1324.

[220] *Id.* at 1325 (emphasis included).

[221] 388 Fed. App'x 182, No. 08-4626, 2010 WL 2889548 (3rd Cir. 2010) (unpublished).

[222] *Id.* at 188.

[223] *Id.* at 189.

incorrect standard of review by not giving deference to the Immigration Judge's factual determinations, including those regarding causal chains.[224]

PRACTITIONER'S TIP: CAT and causal chains. In pursuing a CAT claim based on torture that the detainee will suffer because of her mental illness, the attorney must satisfy the chain of evidentiary proof standard (i.e., each link must "more likely than not" occur). A typical pattern is as follows:

- If removed to X country, then no access to treatment will trigger or exacerbate symptoms. (*Consider including a doctor's statement, expert testimony of availability of treatment, and a country conditions report. Even if treatment is available, is it available to all individuals? Expensive?)*
- If no treatment, then symptoms manifest. (*Consider discussing general information about the illness including symptoms, manifestations, etc., and the respondent's history, including prior arrests, homelessness, hospitalization when he/she did not have treatment*)
- If symptoms manifest, then the respondent will face persecution and torture by the government or with the government's acquiescence. (*Consider expert testimony, country condition reports regarding social cleansing, jail conditions, mental health facilities, etc.*)

[224] *Id.* at 192.

IX. MENTAL HEALTH AS A FACTOR IN CANCELLATION OF REMOVAL

Cancellation of removal is a form of relief that allows an Immigration Judge, in an exercise of discretion, to "cancel" the removal of a respondent who meets certain eligibility criteria.[225] In essence, cancellation of removal affords an otherwise removable respondent a second chance at remaining in the United States and allows her to maintain, or obtain, Lawful Permanent Resident ("LPR") status.

It should be noted that the immigration laws provide for only one "second chance" – that is, a respondent who has been granted cancellation of removal in the past cannot reapply for cancellation in any future removal proceedings.

The discussion below centers on cancellation of removal for certain (but not all) LPRs, sometimes referred to as "seven-year cancellation," and cancellation of removal for certain (but not all) non-citizens who are not LPRs, or "ten-year cancellation."[226]

Below is a table that highlights key differences between the two forms of relief. Following the table is a more detailed description of the standards for each type of removal and how they may apply to a particular case.

	LPR Cancellation (7 Year Cancellation)	**Non-LPR Cancellation (10 Year Cancellation)**
Years of LPR status required:	5	0
Years of continuous residence in U.S. required:	7	10
Minimum character requirements	No aggravated felony convictions	Good moral character for last ten years, plus no convictions that would render applicant inadmissible or removable
Discretionary Standard:	Warrants favorable discretion	Removal would result in "exceptional and extremely unusual hardship" to a U.S. citizen or LPR spouse, parent, or child

A. What is cancellation of removal for certain Lawful Permanent Residents?

1. What are the requirements and bars to eligibility for LPR cancellation?

Under INA § 240A(a), the eligibility criteria for applying for LPR cancellation are that the respondent have:

- at least five years in LPR status;

[225] An application for cancellation of removal is made on Form EOIR-42A, which can be found at http://www.usdoj.gov/eoir/eoirforms/eoir42a.pdf.

[226] *See* INA § 240A(b)(2) for another form of cancellation of removal, not discussed here, for certain victims of domestic violence, known as "VAWA cancellation."

- at least seven years of continuous residence in the United States after having been admitted in any status; and
- no aggravated felony conviction.

In addition to these basic requirements, INA § 240A(c) makes LPR cancellation unavailable to individuals who pose a threat to national security, have provided material support to a terrorist organization, have persecuted others, or have previously been granted cancellation.

With regard to the requirement of five years of LPR status, this clock starts running when the respondent obtained her LPR status. Any time accumulated in the United States prior to obtaining LPR status, whether in other legal immigration status or not, does not count towards this five-year requirement. In addition, a cancellation applicant may not rely on a parent's LPR status to meet the five year requirement, and if the applicant's LPR status was obtained by fraud or mistake, she will be deemed to have no time in LPR status at all.[227]

With regard to the requirement of seven years of continuous residence in the United States, this clock starts running when the respondent is lawfully admitted to the United States in any status (temporary or permanent). An unlawful entry such as entry without inspection, therefore, does not start the clock. In addition, this clock, once started, can be stopped under the "stop time rule" if one of the following events occur:

- DHS issues a "Notice to Appear." Once this document is served on the respondent, the time accumulating toward the seven year requirement stops.
- The respondent commits an offense that renders him removable or inadmissible. At the time the respondent commits a crime or other offense which renders him removable or inadmissible, the time accumulating toward the seven year requirement stops.

PRACTITIONER'S TIP: Absences from the United States. In addition to the issuance of an NTA and the commission of a removable offense, an extended absence from the United States could also interrupt the respondent's continuous presence, though there are no specific guidelines that detail the number of days outside the country that will render a respondent ineligible for LPR cancellation.[228] Thus, if the respondent has been absent from the United States for an extended period of time, either continuously or in the aggregate, the attorney should be prepared to show the Immigration Judge that the respondent nevertheless intended to keep the United States as her permanent home. This can be done by showing the respondent has certain ties to the United States, such as a home, other property, a job, family members, a bank account, etc.

In addition, the respondent must not have been convicted of an aggravated felony at any time. A complete list of aggravated felonies can be found at INA § 101(a)(43). Commonly-charged aggravated felonies include:

- drug trafficking;
- certain convictions with a sentence of one year or more (whether that time was actually served or not), including:

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[227] *Savoury v. U.S.* ,449 F.3d 1307, 1313-17 (11th Cir. 2006) (where petitioner fully disclosed his prior drug conviction but DHS granted AOS by mistake, BIA correctly concluded he was not an LPR because LPR status acquired by fraud or mistake nullifies status).

[228] *See* the section below on the continuous presence requirement for non-LPR cancellation for more detailed information on the time requirements for that form of relief.

    - theft
    - burglary
    - a crime of violence
    - document fraud
    - obstruction of justice, perjury or bribing a witness
    - commercial bribery, counterfeiting, forgery, or trafficking in vehicles with alter identification numbers
- fraud or income tax evasion if the victim lost over $10,000.

As with all cases involving a criminal conviction, the attorney should carefully examine the respondent's criminal records – including the judgment, charging document, and sentencing report – and consult with a seasoned immigration practitioner or the referring organization for a full analysis of the respondent's criminal history.

2. What must a respondent show to win LPR cancellation?

Once the respondent's eligibility for LPR cancellation has been established, the attorney must demonstrate that the respondent warrants a favorable exercise of the Immigration Judge's discretion. In coming to a decision on whether to grant cancellation or not, the Immigration Judge will examine the totality of the evidence, weighing positive and negative factors to determine whether an applicant merits discretionary relief.

In any given case, positive factors may include:

- Family ties within the U.S.;
- Residency of long duration in the U.S.;
- Evidence of hardship to the respondent and family if deportation occurs;
- Military service;
- History of employment;
- Property or business ties;
- Value and service to the community;
- Proof of genuine rehabilitation if a criminal record exists; and/or
- Evidence attesting to a respondent's good character.

Negative equities may include:

- Nature and underlying circumstances of grounds of removal;
- Additional significant immigration violations;
- Existence of a criminal record; and/or
- Other evidence of bad character or undesirability.[229]

In addition to providing evidence of all positive equities, the attorney representing a respondent with mental illness or disability may wish to establish and emphasize three other important factors:

- hardship to the respondent if she were to be forced to return to a country with inadequate medical care;
- hardship to the respondent's family if they were forced to return to their native country to care and provide for the respondent upon her deportation;

[229] *See In re C-V-T-*, 22 I&N Dec. 7 (BIA 1998).

- the damage the respondent's removal would cause her family members who remain in the United States.
- manifestations of the respondent's mental illness as the cause of past criminal behavior and/or other adverse factors (such as unstable employment history); and
- the respondent's commitment to continuing or pursuing treatment, evidenced by a concrete plan.

PRACTITIONER'S TIP: Case study. In an unpublished decision by an Immigration Judge, the respondent applied for LPR cancellation of removal pursuant to section 240A(a) of the INA. The respondent had a significant mental illness for which he had been admitted to several psychiatric hospitals during his time as an LPR in the United States. Nevertheless, with the proper medications and treatment, he functioned well and supported his family. DHS initiated removal proceedings because of a criminal conviction, and the respondent then filed for LPR cancellation in order to prevent his removal to Jamaica. The Immigration Judge granted relief on the grounds that he satisfied the statutory eligibility criteria and warranted a discretionary grant of relief. The Immigration Judge took special note that DHS's refusal to move the respondent to a psychiatric facility during his immigration detention prevented the respondent from participating fully in his own hearing. As a result, the Immigration Judge determined that the following factors compelled a grant of relief:: (1) the length of respondent's presence in the United States (over 20 years); (2) his strong family ties in the United States; (3) the lack of any meaningful ties to Jamaica; and (4) the likelihood that respondent would become homeless and bereft of any assistance on account of his mental illness.

B. What is cancellation of removal for certain non-LPRs?

1. What are the requirements and bars to eligibility for non-LPR cancellation?

Under INA § 240A(b), the eligibility criteria for cancellation of removal for non-LPRs are more stringent than for LPR cancellation. To be eligible for a discretionary grant of cancellation, a non-LPR must:

- Have been physically present in the United States for a continuous period of not less than ten years immediately preceding the date of the application;
- Be able to show good moral character during that ten year period;
- Have no convictions for certain removable criminal offenses;[230] and
- Be able to demonstrate that his/her removal from the United States would cause "exceptional and extremely unusual hardship" to her U.S. citizen or LPR husband, wife, parent, or unmarried child/children under age twenty-one.[231]

As with LPR cancellation, INA § 240A(c) makes non-LPR cancellation unavailable to individuals who pose a threat to national security, have provided material support to a terrorist organization, have persecuted others, or have previously been granted cancellation.

With regard to the 10-year continuous presence requirement, the respondent must establish that she has lived in the United States continuously for ten years and not be subject to a "stop time" interruption, which can be triggered by the following events:

- DHS issues a "Notice to Appear" and files it with the Immigration Court. Once this document is served on the *respondent*, the time accumulating toward the ten year requirement is stopped.

[230] INA § 212(a)(2); 237(a)(3).
[231] INA § 240A(b)(D).

- The respondent commits an offense that renders her removable or inadmissible. At the time the offense is committed, the time accumulating toward the ten year requirement is stopped.[232]
- A trip outside of the United States that lasts 91 days or more, or an aggregate of 181 days outside of the United States, may interrupt continuous presence.[233]

In addition, an application for non-LPR cancellation may be barred by a conviction for a removable offense, including any of the following crimes:

- high speed flight from an immigration checkpoint;
- firearm offense;
- espionage, sabotage, treason for which the sentence was five years or more;
- document fraud;
- false claim to U.S. citizenship;
- domestic violence;
- stalking;
- child abuse, neglect, or abandonment;
- a crime involving moral turpitude (exception for certain petty offenses);
- drug offenses (except for one offense for possession of Marijuana less than 30 grams);
- drug trafficking;
- two or more crimes with aggregate sentences to confinement of 5 years or more;
- prostitution or procuring prostitution; or
- serious offense for which the applicant received immunity from criminal prosecution.

As with all cases involving a criminal conviction, the attorney should carefully examine the *respondent*'s criminal records – including the judgment, charging document, and sentencing report – and consult with a seasoned immigration practitioner or the referring organization for a full analysis of the immigration consequences of *respondent*'s criminal history.

2. What must a respondent show to win non-LPR cancellation?

Once the respondent's eligibility for non-LPR cancellation has been established, the attorney must demonstrate that the respondent is an individual of good moral character and that her removal from the country would cause "exceptional and extremely unusual hardship" to a U.S. citizen or LPR spouse, child, or parent.

With regard to the good moral character requirement, INA § 101(f) governs the statutory eligibility requirements, which are subject to a substantial-evidence test.[234] Under the statutory requirements, a respondent will not be deemed to be a person of good moral character if, during the requisite ten year time period, she is or has been one of the following:

- a habitual drunkard;
- a non-citizen who derives most of his income from illegal gambling activities or who has been convicted at least twice for gambling offenses;
- a non-citizen who gave false testimony in order to obtain immigration benefits;

[232] The types of crimes that may stop your client's time are the same crimes that can also make her ineligible to apply for cancellation altogether. These are described in more detail below. INA §240A(d)(1).
[233] INA § 240A(d)(2).
[234] *Omagah v. Ashcroft*, 288 F.3d 254, 258 (5th Cir. 2002) (affirming BIA determination that conviction for conspiracy to possess illegal immigration documents with intent to defraud the government demonstrates a lack of good moral character).

- a practicing polygamist, prostitute, or smuggler;
- a non-citizen convicted of a crime of moral turpitude,[235] multiple crimes, or a drug crime (except a single offense for simple possession of thirty grams or less of marijuana);
- a non-citizen who has been convicted of any crime and confined in jail or prison for an aggregate period of 180 days or more;
- a non-citizen who has been convicted of an aggravated felony at any time; or
- a non-citizen who at any time has assisted in Nazi persecution, genocide, or commission of acts of torture or extrajudicial killings, or a non-citizen who, at any time, has been involved in severe violations of religious freedom.

If the respondent falls within one of the above statutory provisions, it is an automatic bar to a finding of good moral character. However, even if a respondent does not fall into one of the statutory bars, the attorney must still convince the Immigration Judge to make a discretionary finding of good moral character. The judge will consider past criminal behavior and the immigrant's general conduct over time.[236] While violations of the immigration laws and criminal convictions may weigh against an applicant's good moral character, it is important to keep in mind that the BIA has "long held that good moral character does not mean moral excellence and that it is not destroyed by a single incident."[237]

The next element to establish is the "exceptional and extremely unusual hardship" the respondent's U.S. citizen or LPR immediate family member would suffer if the *respondent* is removed. Hardship to the applicant himself or herself is generally not relevant to a non-LPR cancellation case. However, the BIA has held that an applicant's hardships may be considered "to the extent they affect the potential level of hardship to her qualifying relatives."[238]

"Exceptional and extremely unusual hardship" is not defined in the INA, but instead has been developed through case law. In considering a non-LPR cancellation claim, the Immigration Judge will weigh the following factors:

- Age of affected family member(s);
- Strength of family ties;
- Length of residency in the United States;
- Health and medical conditions;
- Economic impact on family;
- Political conditions in the country of removal;
- Financial status;
- Immigration history.[239]

Hardship can be established based on finances, emotional hardship, and medical history, among other things. Because all of these factors may be taken into account, it is important to show as many examples as possible that may present "exceptional and extremely unusual hardship" on the

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[235] A crime involving moral turpitude is a term of art in immigration law, and involves a very unwieldy and case-law defined series of crimes. You should consult an immigration practitioner or source of information outside of this manual before making determinations about crimes involving moral turpitude.

[236] *See, e.g., Ikenokwalu-White v. INS*, 316 F.3d 798, 804-05 (8th Cir. 2003); *Matter of Turcotte*, 12 I&N Dec. 206 (BIA 1967) (where specific conduct does not result in statutory ineligibility for good moral character, the Immigration Judge may still consider it as a discretionary matter).

[237] *Matter of Sanchez-Linn*, 20 I&N Dec. 362 (BIA 1991).

[238] *Matter of Recinas*, 23 I&N Dec. 467, 471 (BIA 2002).

[239] *Matter of Recinas,* 23 I&N Dec. 467, 471 (BIA 2002); *and see Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978).

respondent's qualifying relatives. This is especially true when the hardships can be aggregated. The BIA has held that even if each individual hardship is not extreme in and of itself, all hardships must be considered in the aggregate in determining whether the "exceptional and extremely unusual hardship" standard is met.[240]

The attorney must establish that the hardship faced by qualifying family members are much greater than the usual hardships faced by family members losing a loved one to deportation. The attorney representing a respondent with mental illness or disability should emphasize the unique circumstances that illness or disability creates for the family and how they significantly increase the level of hardship to the family.

PRACTITIONER'S TIP: Unique hardships surrounding mental disability. When arguing that removing a respondent with a mental illness or disability from the United States would create an "exceptional and extremely unusual hardship" for his qualifying relative(s), it is important to emphasize the unique hardships that the relative(s) will face if relief is not granted. Examples of such unique hardships that should be emphasized include:

- *Exceptional emotional trauma of knowing that a loved one will be removed to a country where she will not receive necessary or appropriate care;*
- *Exceptional financial burden of having to send costly medications otherwise unavailable to the respondent in the home country (if indeed, sending medication is even possible);*
- *Exceptional stress of ensuring that any medication sent is received;*
- *Exceptional stress of arranging for medical assistance in the country the respondent is removed to;*
- *Exceptional burden of arranging for proper living arrangements, financial assistance, psychiatric treatment, and other special accommodations necessary for the respondent to reside safely outside of the U.S.;*
- *Exceptional hardship the family member would face if forced to accompany the respondent to his home country.*

To document these hardship factors, the attorney may consider the viability of having psychological and/or medical evaluations done for qualifying family members to establish the impact the respondent's removal would have on their health. The attorney should also submit affidavits from each qualifying family member that describe the hardship in each family member's own words. The affidavits should describe the type of relationship they have with the respondent and what it would mean to them if she were to be removed from the United States. In particular, if any qualifying family member believes that she would be forced to return with the respondent to the home country, the family member should describe what it would mean to have to leave the United States, how hard life in the new country would be, and what sort of hardships would be involved in trying to support the respondent in that country.

The attorney may also consider submitting a schedule of expenses that would be incurred by the family, including the costs of medication, costs of sending medication abroad, and all other costs associated with special arrangements needed for the care of the respondent.

Affidavits and letters of support need not come from family members alone. Former employers, doctors, treating nurses, friends, church members, probation officers and individuals familiar with the

[240] *Matter of Ige,* 20 I&N Dec. 880 (BIA 1994).

respondent's condition and character are excellent sources of corroborating evidence in the respondent's case.

The attorney should also submit records or evaluations of the respondent's mental health status and, if at all possible, arrange for a treating physician or mental health expert to testify on the respondent's behalf. If, for instance, the mental health condition contributed or resulted in the respondent being arrested or convicted of a crime, the expert can explain why this was the case, and what sort of rehabilitation the respondent (or his family members) have sought on the respondent's behalf.

The attorney should also provide documentation of conditions in the home country pertaining to healthcare, education, political unrest, and other circumstances that would demonstrate the difficulties U.S. or LPR family members would suffer if they returned with the respondent to the country of removal. In addition, documentation about the conditions in the respondent's home country regarding the treatment of people with mental illnesses and disabilities will be especially relevant. For instance, is there evidence of a government-sponsored cleansing program (or government acquiescence to such a program)? Is there any evidence that the government routinely targets or mistreats individuals with mental illnesses (or ignores such mistreatment)? Are people with mental illness regularly incarcerated? Is there any mental health treatment or medications available to a deportee with a mental illness? All of this information will be relevant in trying to persuade the Immigration Judge to exercise discretion favorably, particularly if the attorney can link the harsh country conditions to the suffering or hardship that distant or helpless family members will experience if the respondent is subjected to mistreatment.

X. MENTAL HEALTH AS A FACTOR IN APPLYING FOR U VISA NON-IMMIGRANT STATUS FOR VICTIMS OF CRIMES

A non-citizen crime victim who assists law enforcement in the investigation or prosecution of certain types of criminal activity may be eligible for temporary U non-immigrant status, often referred to as the "U visa." This non-immigrant status will allow her to live and work in the United States for up to four years, and eventually apply for Lawful Permanent Residence.

Unlike the other forms of relief discussed in this chapter, a respondent must apply for a U visa with U.S. Citizenship and Immigration Services, not with the Immigration Court.

A. What rights and benefits come with the U visa?

Congress created U non-immigrant status in 2000 with the goals of: (1) strengthening law enforcement agencies' ability to detect, investigate, and prosecute cases of domestic violence, sexual assault, human trafficking, and other crimes; and (2) offering protection to non-citizen victims of such crimes.[241]

Recognizing that a victim's cooperation is essential to the effective detection, investigation, and prosecution of crimes, but that a victim who fears deportation is unlikely to come forward, Congress provided an avenue through which non-citizen crime victims who cooperate with law enforcement can obtain lawful immigration status and protection against deportation.[242]

If approved for a U visa, the applicant receives the following benefits:

- Non-immigrant legal status for four years, which may, under certain circumstances, be extended.[243]
- The opportunity to apply for LPR status after three years, provided that continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest.[244]
- Employment authorization for the principal applicant.[245]
- Derivative U non-immigrant status for certain immediate family members.[246]
- Eligibility for certain federal and state public benefits, such as cash aid, food stamps, and medical insurance.
- Ability to travel outside the U.S. under certain circumstances (but with potential risks).[247]

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[241] New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,015 (Sept. 17, 2007) (citing Battered Immigrant Women Protection Act § 1513(a)(2)(A)).

[242] *Id.*

[243] 8 C.F.R. § 214.14(g) (2012).

[244] Immigration and Nationality Act ("INA") § 245(m), 8 U.S.C. § 1255(m) (2011).

[245] 8 C.F.R. § 214.14(c)(7) (2012).

[246] 8 C.F.R. § 214.14(f) (2012).

[247] While individuals with U status may apply for a U visa to be used to reenter the U.S. after a trip abroad, overseas travel poses a number of risks and practitioners should advise their clients accordingly. For example, there is no guarantee that a visa will be issued, and if the applicant accrued "unlawful presence," departure from the U.S. may trigger a three- or ten-year bar to future immigration benefits in the U.S. INA § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B) (2011). U status holders in the process of applying for LPR status must demonstrate continuous physical presence in the U.S. The regulations state that "an alien shall be considered to have failed continuous physical presence . . . if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate of 180 days." 8 C.F.R. 245.24(a)(1) (2012).

B. What are the eligibility criteria for a U visa?

To be eligible for a U visa, the applicant must satisfy the following criteria:

(1) The crime must have occurred in the U.S. or have violated U.S. law.[248]
(2) The applicant must have suffered "substantial physical or mental abuse" [249] as a victim of a "qualifying criminal activity."[250]
(3) The applicant must possess information about the criminal activity.[251] However, applicants who were under 16 when the criminal activity occurred or lack capacity or competence do not have to prove that they possess information if a parent, guardian, or next friend possesses that information.[252]
(4) The applicant must help or have helped with the investigation or prosecution of the crime (or be willing to do so in the future),[253] and obtain a certification on Form I-918 Supplement B, "U Nonimmigrant Status Certification," from the law enforcement agency that she has cooperated with, signed within six months of filing the U-visa application.
(5) The applicant must be admissible for nonimmigrant status, or seek a waiver of any grounds of inadmissibility.[254]

C. What role might mental health play in an application for a U visa?

1. What is a "direct" vs. an "indirect" victim of the crime?

Both direct and indirect victims of qualifying criminal activity are eligible to apply for U visa. A "direct victim" is a non-citizen who is directly or proximately harmed as a result of the commission of a criminal activity, including bystanders who suffer unusually severe harm as a result of witnessing criminal activity.[255]

With regard to mental health factors, an "indirect victim" may include any of the following:

- Qualifying family members of crime victims who are incapacitated or incompetent.[256]
- The "next friend,"[257] or non-citizen who appears in a lawsuit to act for the benefit of another individual, where that individual is incapacitated or incompetent and has suffered substantial physical or mental abuse as a result of being a victim of qualifying criminal activity.[258]

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[248] 8 U.S.C. § 1101(a)(15)(U) (2011).
[249] *See* 8 U.S.C. § 1101(a)(15)(U)(i)(I) (2011); 8 C.F.R. § 214.14(a)(8) ("Physical or mental abuse means injury or harm to the victim's physical person, or harm to or impairment of the emotional or psychological soundness of the victim."). For more on the "substantial abuse" definition *see* 8 C.F.R. § 214.14(b)(1) (2012).
[250] 8 U.S.C. § 1101(a)(15)(U)(iii) (2011); 8 C.F.R. § 214.14(a)(9) (2012).
[251] *See* 8 U.S.C. § 1101(a)(15)(U)(i)(II) (2011); 8 C.F.R. § 214.14(b)(2) (2012) ("The alien must possess specific facts regarding the criminal activity leading a certifying official to determine that the petitioner has, is, or is likely to provide assistance to the investigation or prosecution of the qualifying criminal activity.").
[252] *See* INA § 101(a)(15)(U)(i), 8 U.S.C. §1101(a)(15)(U)(i) (2011).
[253] *See* 8 U.S.C. § 1101(a)(15)(U)(i)(III); 8 C.F.R. § 214.14(b)(3) (2012)
[254] 8 C.F.R. § 212.17(b)(1) (2012).
[255] 8 C.F.R. § 214.14(a)(14) (2012); USCIS Interim Final Rule: New Classification for Victims of Criminal Activity; Eligibility for 'U' Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,016-17 (Sept. 17, 2007), effective October 17, 1007.
[256] 8 C.F.R. § 214.14(a)(14)(i) (2012).
[257] 8 C.F.R. § 214.14(a)(7) (2012).
[258] Note that the next friend is not a party to the legal proceeding and is not appointed as a guardian.

2. What kind of cooperation must be provided to law enforcement?

Eligibility for U non-immigrant status requires certification that the applicant was helpful, is being helpful, or is likely to be helpful in the criminal investigation or prosecution of the crime.[259] The applicant must obtain a "U Nonimmigrant Status Certification," on Form I-918, Supplement B, from a federal, state or local law enforcement official, or a judge investigating or prosecuting the criminal activity.[260]

Although not required by the statute, federal regulations require the applicant to continue to cooperate in the investigation or prosecution even after receipt of U status. The applicant must not refuse or fail to provide information and assistance "reasonably requested."[261]

Notably, for crime victims who are unable to help with an investigation because they are incapacitated or incompetent, a parent, guardian, or next friend may provide the required assistance.[262]

3. What makes for qualifying "substantial physical or mental abuse"?

The applicant must document substantial physical or mental abuse as a result of being a victim of an enumerated crime or substantially similar criminal activity.[263] The regulations define physical or mental abuse as "injury or harm to the victim's physical non-citizen, or harm or impairment of the emotional or psychological soundness of the victim."[264]

The term "substantial" is used in both the definition of severity of the injury to the victim and the severity of the abuse inflicted by the perpetrator. The regulations indicate "no single factor is a prerequisite to establish that the abuse suffered was substantial."[265] A series of acts taken together may constitute substantial physical or mental abuse, even when no single act alone rises to that level.[266]

The U visa application should include an explanation (with documentation) of how the applicant suffered substantial injury both subjectively and objectively. The applicant's own statement is critical to establishing the subjective nature of the injury, and may include issues pertaining to that applicant's particular vulnerability, such as mental incapacity or illness.[267] The regulations state that aggravation of preexisting conditions will be considered.[268] Moreover, it is not necessary to support the subjective elements with a professional evaluation. The victim's statement in her own words outlining the injury that resulted from the criminal activity may be sufficient.

If there are medical reports, they may certainly be included as they provide useful objective evidence of physical injuries and harm. If the applicant seeks counseling, consider including a psychological evaluation. The application should include a description of how the physical and mental abuse

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[259] 8 USC § 1101 (a)(15)(U)(i)(III) (2011).
[260] 8 C.F.R. § 214.14(c)(2)(i) (2012).
[261] 8 C.F.R. § 214.14(b)(3) (2012).
[262] *Id.*
[263] 8 USC § 1101(a)(15)(U)(i)(I) (2012).
[264] 8 C.F.R. § 214.14(a)(8) (2012).
[265] 8 C.F.R. § 214.14(b)(1) (2012).
[266] *Id.*
[267] 8 C.F.R. § 214.14(c)(2)(iii) (2012).
[268] 8 C.F.R. § 214.14(b)(1) (2012).

constitutes substantial harm as defined by the regulations and discuss the factors that warrant a favorable exercise of discretion.

XI. INDEFINITE DETENTION OF INDIVIDUALS WITH MENTAL DISABILITIES WHOSE FINAL ORDERS OF REMOVAL CANNOT BE EXECUTED

Pursuant to 8 C.F.R. § 241.14, the Department of Homeland Security has the authority to "continue detention of particular removable aliens on account of special circumstances even though there is no significant likelihood that the alien will be removed in the reasonably foreseeable future." "Removable" detainees include those with administratively final orders of removal that cannot be executed, either because the individual's native country will not accept her return or, as with withholding of removal and protection under the Convention Against Torture, DHS is legally prohibited from executing the order.

Specifically relevant to the detention of individuals with mental disabilities is 8 C.F.R. § 241.14(f). That provision authorizes the ongoing detention of individuals with final orders of removal that cannot be executed if:

- the detainee has committed a crime of violence, as defined at 18 U.S.C. § 16;
- she is "likely to engage in acts of violence" in the future "due to a mental condition or personality disorder and behavior associated with that condition or disorder"; and
- "no conditions of release can reasonably be expected to ensure the safety of the public."

Questions and considerations regarding this form of detention are discussed below.

A. How does the post-order detention of non-citizens with mental disabilities fit into the general scheme of post-order detention?

The regulations on the detention of individuals with final orders of removal – including those determined to be "specially dangerous" due to a mental health condition – are part of a regulatory scheme that was promulgated in the wake of the Supreme Court's 2001 ruling in *Zadvydas v. Davis*. That decision, the INA provisions it interpreted, and the regulations that flowed from it create the following procedures for the detention of individuals with administratively final orders of removal:

- First, the INA directs DHS to take aliens with administratively final orders of removal into custody and remove them from the United States within 90 days.[269]
- Second, if the 90-day removal period expires and the alien has not been removed, the statute directs ICE to release the alien with certain conditions and restrictions while ICE continues to pursue removal.[270]
- Third, DHS may decline to release the alien and continue the detention beyond the 90-day removal period only where the alien is either inadmissible, deportable for certain criminal convictions, or has been explicitly determined to be a "risk to the community" or "unlikely to comply with the order of removal."[271] For those aliens held beyond the initial 90-day removal

[269] INA § 241(a)(1).
[270] INA § 241(a)(3).
[271] INA § 241(a)(6).

period, the statute authorizes only an additional 90 days of detention, for a total of six months in detention after the entry of the removal order.[272]

- Fourth, under the regulations issued to conform post-order detention procedures to the *Zadvydas* decision, ICE must release the alien once the "presumptively reasonable" six months of post-order detention have expired.
- Fifth, DHS may only detain an alien for more than six months after the entry of the removal order if there is a "significant likelihood of removal in the reasonably foreseeable future,"[273] or certain narrowly-defined "special circumstances" are present that justify ongoing detention.[274] As noted above, "special dangerousness" due to a mental health condition is one such "special circumstance."

B. Is the "special circumstances" detention of non-citizens with mental disabilities authorized by the INA?

It could be argued that 8 C.F.R. § 241.14(f), which permits continued detention even where there is "no significant likelihood that the alien will be removed in the reasonably foreseeable future," goes beyond the scope of detention authorized by the INA.

The Supreme Court has not clearly ruled on whether the INA authorizes indefinite detention in the "special circumstance" of a non-citizen with a mental disability who is deemed "specially dangerous" to the public. In the absence of clear guidance from the Supreme Court, a circuit split has developed as to whether the INA authorizes the regulation that authorizes their indefinite detention. Both the Fifth and Ninth Circuits have addressed the issue of whether the INA authorizes indefinite detention of "specially dangerous" non-citizens, and both have concluded that the INA does not provide such authority.[275] However, the Tenth Circuit has held the opposite, deciding in *Hernandez-Carrera v. Carlson* that the government does have the authority to indefinitely detain aliens if "special circumstances" warrant it.[276] The Tenth Circuit reasoned that, because the INA is ambiguous, the Court must defer to the executive branch's reasonable construction of the statute.

Ultimately, the question of whether DHS possesses the authority to detain non-citizens with mental disabilities who have final orders of removal that cannot be executed remains unsettled.

C. Does the "special circumstances" detention of non-citizens with mental disabilities violate their substantive due process rights?

The Supreme Court has stated that "the Due Process Clause 'requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.'"[277] The Court in *Zadvydas* pointed out that detention is only constitutionally acceptable in two situations: (1) following a criminal proceeding with adequate procedural protections; and (2) "in certain special and 'narrow' nonpunitive 'circumstances,' where a special justification, such as harm-threatening

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[272] *See Zadvydas*, 533 U.S. at 699-700 (holding that INA § 241(a)(6), 8 U.S.C. § 1231(a)(6), authorizes the detention of aliens only for an additional period that is reasonably necessary to secure removal, and finding that six months of post-order detention is the "presumptively reasonable" period). *See also Clark v. Martinez*, 543 U.S. 371 (2005) (holding that the ruling in *Zadvydas* applies equally to aliens who were previously lawfully admitted to the United States and to those who were not).

[273] 8 C.F.R. § 241.13.

[274] 8 C.F.R. § 241.14.

[275] *Tran v. Mukasey*, 515 F.3d 478, 485 (5th Cir. 2008); *Thai v. Ashcroft*, 366 F.3d 790, 792 (9th Cir. 2004).

[276] 547 F.3d 1237, 1244 (10th Cir. 2008).

[277] *Jones v. United States*, 463 U.S. 354, 368 (1983) (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)).

mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'"[278]

On its face, the regulation authorizing the ongoing detention of "specially dangerous" non-citizens aims to "ensure the safety of the public." However, while specifically citing the Fifth Amendment's Due Process Clause, the Court in *Zadvydas* stated that "a statute permitting indefinite detention of an alien would raise a serious constitutional problem." The Court also held that, in order to comply with due process guarantees, post-proceedings detention of removable aliens cannot be indefinite, and may only continue for as long as removal is "reasonably foreseeable."

It could be argued, then, that because the Court found that detention of removable aliens becomes unconstitutional once removal is no longer "reasonably foreseeable," detention of non-removable, mentally ill aliens must also be unconstitutional. Further support for this position can be found in the Zadvydas Court's acknowledgement that it found no sign of congressional intent to authorize indefinite detention of aliens, "whether protecting the community from dangerous aliens is a primary or (as we believe) secondary statutory purpose."[279]

Yet, citing *Zadvydas* for the proposition that deprivation of liberty is unconstitutional when a detainee's removal is not "reasonably foreseeable" can still be problematic in the context of a mentally ill individual who has been deemed "specially dangerous." Indicating that a case involving a dangerous, mentally ill individual may pose a unique problem, the Court pointed out that "in cases in which preventive detention is of potentially *indefinite* duration, [the Court has] also demanded that the dangerousness rationale be accompanied by some other special circumstance, such as a mental illness, that helps to create the danger."[280] Moreover, the Court in *Zadvydas* indicated that the goal of protecting the community does not necessarily disappear, even when an individual's removal is no longer foreseeable.[281]

Generally, the Supreme Court has upheld only those statutes that authorize civil commitment of individuals who are both dangerous and have some type of mental illness or disorder.[282] The Court has indicated that this coupling of dangerousness and mental illness is required to overcome the Due Process prohibition against arbitrary deprivation of liberty.[283]

D. Does the "special circumstances" detention of non-citizens with mental disabilities violate their procedural due process rights?

The Supreme Court has made it clear that statutes authorizing civil confinement or detention are only constitutional if they provide for strict procedural protections.[284]

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[278] *Zadvydas*, 533 U.S. at 690 (*quoting Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)).
[279] *Id.* at 697.
[280] *Id.* at 691.
[281] *See id.* at 690-91.
[282] *See Hendricks*, 521 U.S. at 358-360; *Foucha v. Louisiana*, 504 U.S. 71, 76 (1992); *Heller v. Doe*, 509 U.S. 312, 314-315 (1993) (upholding statute that allowed commitment of "mentally retarded" or "mentally ill" and dangerous individuals); *Allen v. Illinois*, 478 U.S. 364, 366 (1986) (upholding statute that allowed commitment of "mentally retarded" or "mentally ill" and dangerous individuals); *Minnesota ex rel. Pearson v. Probate Court of Ramsey Cty.*, 309 U.S. 270, 271-272 (1940)(finding no due process violation where statute authorized commitment of individuals with a "psychopathic personality" that made them "dangerous to other persons").
[283] *See Foucha*, 504 U.S. at 80.
[284] *See Zadvydas*, 533 U.S. at 691; *Hendricks*, 521 U.S. at 368.

1. Are the burden of proof and persuasion allocated correctly?

The Supreme Court has already held that the burden to prove non-dangerousness cannot fall on the individual to be involuntarily committed; instead, it is the government's burden to prove that the individual is dangerous.[285] The Court has also held that the burden of persuasion necessary to warrant civil commitment is a high one, requiring clear and convincing evidence of the individual's mental illness and dangerousness.[286]

With regard to the detention of "specially dangerous" non-citizens by DHS, the regulation establishes the procedural requirements that the government must meet in order to continue to detain mentally ill aliens who have been deemed "specially dangerous":

- First, an Immigration Judge must hold a preliminary hearing to determine whether the evidence supporting DHS's determination that the individual meets the requirements of § 241.14(f) is sufficient to establish reasonable cause to go forward with a merits hearing. This initial reasonable cause standard is not as high as the clear and convincing standard.
- However, at the second step, if DHS does show reasonable cause for a merits hearing, it "shall have the burden of proving, by clear and convincing evidence, that the alien should remain in custody because the alien's release would pose a special danger to the public, under the standards of paragraph (f)(1) of this section."[287]

However, if an Immigration Judge determines that an alien should remain in custody after a merits hearing, "the alien shall bear the initial burden to establish a material change in circumstances such that the release of the alien would no longer pose a special danger to the public . . ."[288] As this burden is only placed on the detainee after the government has already born the initial burden to prove that detention was warranted, it is unclear whether this scheme violates Supreme Court precedent that requires the government to carry the burden of proving that an individual is dangerous before initially committing that individual.[289]

2. Is "special circumstances" detention subject to the required period reviews?

Supreme Court precedent has established that civil commitment schemes must not only require that the committee be both dangerous and have a mental illness or disorder, but they must also provide for periodic reviews of the committee's continued status.[290] In order to comply with due process procedural requirements, the government must establish that the committee continues to be dangerous to the public throughout the commitment.[291]

The regulation at 8 C.F.R. § 241.14(k) provides for "subsequent review for aliens whose release would pose a special danger to the public." Specifically, this regulation requires ongoing, periodic review after an Immigration Judge has decided that the alien should remain in custody after a merits hearing pursuant to 8 C.F.R. § 241.14(i). However, before such a hearing, there is no requirement of periodic review to determine whether mentally ill detainees continue to meet the requirements for

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[285] *Foucha v. Louisiana*, 504 U.S. 71, 84 (1992).
[286] *Addington v. Texas*, 411 U.S. 418, 433 (1979).
[287] 8 C.F.R. § 241.14(i)(1).
[288] 8 C.F.R. § 241.14(k)(4).
[289] *See Hernandez-Carrera v. Carlson*, 547 F.3d at 1253.
[290] *See Jones v. United States*, 463 U.S. 354, 368 (1983); *Humphrey v. O'Cady*, 405 U.S. 504, 512.
[291] *Foucha*, 504 U.S. at 77-79.

continued detention. Additionally, this regulation establishes no specific timeframe or frequency for the "ongoing, periodic review."[292] Thus, there may be an argument that the regulation sets forth constitutionally inadequate provisions for the periodic review of detention of "specially dangerous" non-citizens.

3. Are the conditions of "special circumstances" detention truly civil and not punitive?

The Supreme Court has also made clear that involuntary civil commitment must not be punitive because civil proceedings that can result in involuntary commitment do not provide all of the procedural safeguards afforded in criminal proceedings.[293]

In *Allen*, the Supreme Court determined that the statute authorizing involuntary commitment was civil, rather than criminal, in nature because "the State has disavowed any interest in punishment, provided for the treatment of those it commits, and established a system under which committed persons may be released after the briefest time in confinement."[294] The Court suggested that if the statute had authorized detention that amounted to "a regimen which is essentially identical to that imposed upon felons with no need for psychiatric care," the Court may have considered that to be a criminal statute that would require a criminal trial with all of the attending procedural safeguards.[295]

Based on these cases, there could be an argument that DHS's detention of "specially dangerous" non-citizens is improperly punitive unless they are provided with psychiatric treatment that is designed to stabilize their condition and bring about their release as quickly as possible.

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[292] The lack of specified timeframe or frequency for review under 8 C.F.R. § 241.14(k) contrasts with other sections of the regulation, such as 8 C.F.R. § 241.14(c)(3), which calls for "ongoing review on a semi-annual basis."
[293] *See Zadvydas*, 533 U.S. at 690; *Allen v. Illinois*, 478 U.S. 364, 367-70 (1986); *Addingto*n, 441 U.S. at 428.
[294] *Allen*, 478 at 370.
[295] *Id.* at 373; *Jenine E. Elco, Kansas v. Hendricks*, 36 Duq. L. Rev. 471, 488 (Winter 1998).