ADVOCATING FOR AND REPRESENTING CLIENTS WITH MENTAL ILLNESS IN DETAINED IMMIGRATION REMOVAL PROCEEDINGS

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I. Introduction

Immigration detention is a punitive and dehumanizing experience. However, the harmful effects of immigration detention are often exacerbated for individuals with mental illness.[1] According to some estimates, 15 percent of individuals in immigration detention experience mental health issues.[2] Because U.S. Immigration and Customs Enforcement (ICE) often fails to provide sufficient mental health screening and care at its detention facilities, advocates believe the prevalence of mental illness is more widespread than what ICE currently reports.[3]

Due to the prevalence and fluidity of mental illness, practitioners should be mindful of mental health and trauma indicators throughout the client-lawyer relationship. The awareness of mental illness indicators is critical in the detained context, where the stressors of a client's loss of liberty and separation from family can increase a client's vulnerability to mental illness.[4] A client may have a history of mental illness or experience mental illness symptoms for the first time while in immigration custody. Symptoms rooted in mental illness can affect a client's ability to meaningfully participate in their legal proceedings and inhibit their ability to convey critical and accurate case information to their legal representative, the immigration judge (IJ), or ICE officials. Although a finding of incompetency will prevent a criminal proceeding from moving forward, this finding will likely not stop immigration proceedings from advancing. A client with mental illness will often be required to present their claim for relief.[5] Shockingly, IJs frequently order the removal of individuals with mental illness, many of whom are unrepresented and exhibit symptoms that interfere with their ability to fully present their claim for relief. In addition to these significant legal consequences, untreated mental illness can result in emotional and physical harm to the client, especially in the detained context.

Although a mental health expert must make all clinical assessments, a legal practitioner with a basic understanding of mental health indicators and relevant caselaw can help better protect their client's due process rights. If a client has a diagnosed mental illness, this can be a basis to advocate for their release from detention, and in some situations, a client's mental illness may create a foundation for legal relief. Additionally, clients with mental illness can request legal safeguards or accommodations to help protect their procedural and substantive due process rights. This practice advisory[6] provides an overview on advocating for clients with mental health issues and discusses legal authority that can be utilized to protect a client's due process rights, specifically focusing on representation in the detained setting.[7]

II. A Client's Mental Illness and the Client-Lawyer Relationship[8]

A client's mental illness symptoms may affect how a practitioner interacts with their client. However, a practitioner must "as far as reasonably possible, maintain a normal client-lawyer relationship with the client."[9] As with any client-lawyer relationship, a practitioner must respect

their client's autonomy, allowing the client to set the goals of representation (e.g., seek voluntary departure, apply for asylum), while the practitioner determines the best way to reach the client's identified goals. Maintaining a normal client-lawyer relationship means a practitioner must keep a client informed about case updates.[10]

A zealous advocate should also make appropriate modifications that appreciate the client's unique needs while continuing to respect their client's autonomy and decision-making authority. For example, a client's symptoms or the side effects of the client's medication may affect their ability to engage during a legal meeting. In these situations, taking a break or rescheduling the meeting may be ideal. A practitioner should also check in with the client throughout the legal meeting. Frequent check-ins can demonstrate respect for the client's agency and help the client maintain a form of control in a very dehumanizing detention context.

A legal practitioner should avoid using harmful language often used against people with mental illness. For example, phrases such as "that is crazy," or "that is insane," can be hurtful language that creates a barrier between a legal practitioner and their client. A practitioner should also be cognizant of how harmful narratives used against people with mental illness may prompt them to make a knee-jerk reaction that causes the client harm. For example, a damaging narrative often labels people with mental illness as dangerous. This narrative may prompt a practitioner to immediately call a detention guard when a client's mental health symptoms manifest. In these situations, a practitioner may instead choose to develop a safety plan that utilizes de-escalation techniques to aid the practitioner in responding in a supportive way that also addresses the practitioner's safety concerns.[11]

Although a legal practitioner is not a mental health professional, utilizing de-escalation techniques may help practitioners better advocate for their clients and allow the case to progress. De-escalation techniques are also a form of self-care for the advocate. These techniques can help practitioners and clients feel safe and comfortable during a legal meeting. In addition to de-escalation techniques, it is essential to note that everyone has a different "window of tolerance"[12] that allows them to manage their emotions. Trauma and stress can affect and shrink a person's window of tolerance. Therefore, practitioners should be mindful of stressors that may affect their client and their window of tolerance and modify client meetings as needed. Additionally, a practitioner should try to understand how a client's mental illness symptoms may manifest, rather than taking a client's critical words or actions personally.

Situations may arise where a practitioner may seek the involvement of a third party to assist with legal proceedings. However, the participation or appointment of a third party, such as a legal guardian, may present ethical concerns, as this can infringe on the client's autonomy. The appointment of a legal guardian also raises concerns regarding an attorney's duty of

confidentiality to the client. Therefore, many advocates often seek the least restrictive measures that don't include the legal appointment of a third party, such as seeking the aid of a family member or friend.[13] A practitioner should also ensure that any potential course of action complies with their state bar ethical rules.

Note: A finding of legal incompetence[14] in the immigration context[15] is distinct from a medical diagnosis of mental illness. The legal standard in removal proceedings is whether the individual "has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses."[16] A person may have a diagnosed mental illness, but the symptoms of their mental illness may not rise to the level of incompetency. However, even if an immigration judge (IJ) rules a client is competent, their mental illness may manifest in ways that affect their ability to participate in their removal proceedings and exercise their due process rights.

III. Screening for Mental Health Concerns

Mental illness is a broad term that encompasses a spectrum of mental health diagnoses and behavior, including psychiatric disorders, post-traumatic stress disorder (PTSD), cognitive delays, and traumatic brain injuries. During the first client meeting, a practitioner should conduct a thorough legal screening and assess for past and current medical diagnoses or symptoms. When meeting with a client and gathering medical records and case evidence, a practitioner should be mindful that symptoms of mental illness can manifest in different ways. Some symptoms may present obviously while others may present in a subtle manner. Taking sufficient time to meet with a client and build trust will increase the likelihood that a legal practitioner will notice potential indicators of mental illness.

A. Intake

A practitioner should respectfully ask questions when screening for mental health issues. Unfortunately, mental illness continues to be stigmatized, and a client may have suffered persecution in their home country on account of their mental illness. A client may be embarrassed to disclose a mental health diagnosis or disclose that they are currently experiencing symptoms stemming from their mental illness (e.g., suicidal ideation, delusions, etc.). When asking questions, a practitioner should be mindful of the terms they use and utilize people-first language. People-first language acknowledges that a person may have a disability or diagnosis, but that diagnosis does not define them.[17] For example, instead of saying "my PTSD client," a person could say "my client diagnosed with PTSD." People-first language can be an important way to demonstrate respect for a client.

A client's mental illness may be undiagnosed, and an individual may not even be aware they have a mental illness. A client may also be experiencing mental illness symptoms for the first time. Therefore, asking a direct question such as, "Do you have a mental illness?" may not provide the legal practitioner with the accurate information needed to fully assess their case. Although a practitioner should ask direct questions, they should also ask questions that screen for unknown mental health diagnoses and mental incompetency. The types of questions a legal practitioner asks will depend on a client's awareness and willingness to speak about their mental health.

Below are potential questions to ask a client to screen for mental health issues:

- How are you feeling today?
- Do you feel safe? If you do not feel safe, why not?
- Are you currently taking any medications to treat any medical symptoms? Have you ever taken medications in the past to treat any medical symptoms?
- If you are taking medication, are you experiencing any side effects?
- Do you have any known medical diagnoses?
- Have you ever been hospitalized? If so, do you recall the reason for the hospitalization?
- Since you have been detained, have you visited with any ICE medical staff?
- Since you have been detained, have you received off-site treatment at another medical facility?
- Do I have permission to speak with any friends or family who may have information about your medical history or diagnosis? If yes, what information am I allowed/not allowed to share?

As mentioned above, mental illness and mental incompetency manifestations may be different. However, a practitioner should be mindful of the following indicators of mental illness:

- Does your client seem confused?
- Does your client seem highly distracted and unable to focus?
- Is your client unable to recall basic personal history or case information?
- Do you have to repeat basic case information to your client?
- Does your client make statements that seem unreasonably suspicious of others?

- Does your client's tone or mood seem to shift unexpectedly?
- Does your client appear nervous or restless?
- Does your client seem to "shut down" during the meeting or display a flat affect?

Note: The symptoms of a client's mental illness may cause them to be singled out by ICE. Unfortunately, ICE often places individuals with mental illness in solitary confinement for extended periods, causing further harm and traumatization to the client.[18] If a legal practitioner discovers their client has been placed in solitary confinement, they can advocate their client receive proper mental health care and, if possible, be released from detention rather than be placed in a highly restrictive situation that will further harm their mental health.[19] A statement or letter from a mental health expert can support this type of request. If the client's assigned ICE deportation officer denies this request, the request can be elevated to an ICE supervisor. The legal practitioner can also submit a complaint to the newly created Office of the Immigration Detention Ombudsman (OIDO),[20] which investigates potential detention standards violations and DHS misconduct, and to the Office for Civil Rights and Civil Liberties (CRCL),[21] which investigates allegations of civil rights and civil liberties violations committed by DHS.

B. Requesting a Client's Medical Documents

A mental health screening should include a thorough review of a client's medical documents. A practitioner should ask a client for permission to acquire a copy of their medical records and obtain the appropriate signed releases from their client. Additionally, when an indicia of incompetency exists, the Department of Homeland Security (DHS) must provide all relevant records to help aid the court in its competency assessment.[22]

Practice Alert: ICE recently issued a directive, "Identification, Communication, Recordkeeping, and Safe Release Planning for Detained Individuals with Serious Mental Disorders or Conditions," that details ICE's duty to identify and communicate relevant medical information to a client's legal counsel, the client's family, and the Office of the Principal Legal Advisor (OPLA) when a person in immigration custody has a mental illness.[23] A practitioner can utilize this new directive to help obtain medical information and advocate on their client's behalf. The ICE directive can also support a client's release requests. *See* V. Advocating for Release, *infra*.

1. ICE Medical Records

ICE Detention Standards require that a detention facility "maintain a complete health record"[24] for each individual in immigration detention. If an individual indicates they would like a copy of their medical information, ICE must provide them with the appropriate medical request form and inform them of the procedure for obtaining their medical records.[25] The medical records can be released to the client or anyone a client designates to receive their records (including their legal representative).[26] After a request is submitted, an individual should receive medical records within a "reasonable timeframe."[27] If a practitioner is waiting on medical records to assist with a client's mental health assessment, the practitioner can inform the court of this request, and if needed, submit a written "Motion to Continue" proceedings to allow the practitioner sufficient time to obtain and review the client's medical records.[28] If ICE records indicate a client was transferred to an off-site facility to receive treatment, the practitioner should also submit a request to obtain the medical documents from the off-site facility.

ICE medical care is often substandard, and reports of harmful conditions are common.[29] ICE medical staff often fail to accurately diagnose and treat a person's mental illness symptoms.[30] ICE medical staff may also not speak a client's best language, resulting in additional inaccuracies. Therefore, it is crucial a practitioner review ICE medical documents with a critical eye. A practitioner should judiciously evaluate ICE medical records and ensure the records they submit to the court do not contain inaccurate information or information that could be harmful to a client's immigration case (e.g., admission of drug use, misdiagnosis, etc.).

2. Other Medical Records

In addition to obtaining medical records from the ICE facility where a client is detained, a practitioner should request medical records from every medical facility where their client received past treatment. This may include medical treatment at jails and prisons if the client has a history of incarceration or arrests. Each hospital will likely have a separate medical release form that will need to be completed by the client. Therefore, besides obtaining the client's signature, the practitioner should ensure they know what each facility requires so all the appropriate forms can be signed during the client meeting. The practitioner should also obtain a few copies of each medical release, as some facilities require original signatures on forms, whereas other facilities may request an electronic version of the signed release.

3. Mental Health Evaluation

Although individuals in immigration detention receive a mental health screening, ICE mental health care is often inadequate, and, as mentioned above, ICE medical records frequently contain errors. Thus, an independent evaluation is ideal if a client has mental health concerns.

Before speaking with a medical expert about the case details, obtain your client's permission to share their case and medical information.

A practitioner may find it challenging to secure a mental health expert willing or able to spend the hours required to travel and conduct the evaluation at the detention center. Therefore, it is advisable to speak to local practitioners representing clients in detained removal proceedings and ask if they can recommend a mental health professional. Once a practitioner secures a mental health expert, the practitioner should provide the expert with all known client medical information. A practitioner should also provide an expert with sufficient background information about the purpose of the evaluation and how it relates to the client's immigration proceedings. For example, explain how the expert's assessment will be used to make a competency finding or determine appropriate safeguards. A practitioner should also inform the expert about the three factors the court will consider when assessing competency. *See* IV. *Matter of M-A-M-*, *infra*.

Once a practitioner secures a mental health expert to conduct an evaluation, the expert will need to obtain ICE clearance to enter the detention center. Contact ICE to determine all the required information to obtain ICE clearance. Although each ICE facility will have its specific clearance procedure, often a mental health professional will need to provide the following information:

- A written request stating the reason for the ICE clearance. The mental health professional does not need to disclose confidential client information. A general statement, such as "to conduct a mental health evaluation," should be sufficient. The request should also include proposed dates to conduct the evaluation;
- Proof of the mental health professional's credentials (active license, certificates, etc.); and
- The mental health professional's government-issued identification.

Due to the stigma surrounding mental illness, and the possibility a client may have suffered past harm due to their mental illness, a client may be nervous about the evaluation. Therefore, a practitioner should provide as many details as possible about the assessment to help address the client's concerns. A practitioner should inform their client about the purpose of the evaluation and how it can be helpful to their case. Details such as the date, estimated length of time, and types of questions the expert may ask are helpful in preparing the client for the evaluation.

The practitioner should give the mental health expert a realistic idea of the time required for the evaluation. The time estimate should include travel to the detention facility and wait time at the facility before the expert visits the client. If possible, the practitioner should accompany the mental health expert to the facility and introduce the expert to the client. The practitioner can also help address any access issues the expert may encounter at the detention center. If a

practitioner cannot accompany an expert to the facility, a practitioner should ensure the expert is aware of all important detention center policies, including the dress code and restricted items (e.g., laptops, pens, etc.). A practitioner should suggest the ideal times to arrive at the facility and highlight times to avoid, such as "count time," when movement stops at the facility, and visitation is often delayed.

Practice Tip: It is recommended a practitioner call the facility on the day they or the mental health expert plan to visit a client to confirm the client is available for visitation. If a client was recently exposed to contagions, such as COVID-19, the flu, or chickenpox, they will likely be under medical quarantine, even if they have not contracted the illness.

C. Other Document Gathering

1. Criminal Records

A client's criminal history can potentially provide insight into their mental health. Sometimes, a client's symptoms can result in interactions with law enforcement. However, these interactions may not reflect a client's danger to others and may instead be due to a misunderstanding of mental illness. The BIA, in *Matter of B-Z-R-*, 28 I&N Dec. 563, 567 (A.G. 2022), recently held that IJs may consider an individual's mental health when assessing if an individual "convicted by a final judgment of a particularly serious crime, constitutes a danger to the community."[31] Practitioners should use the positive legal development in *Matter of B-Z-R-* to help refute "danger to the community" claims.

A practitioner should examine the root cause of a client's interaction with law enforcement and advocate for a more accurate understanding of these interactions. When evidence demonstrates the law enforcement interaction was rooted in the client's mental illness, a practitioner can use this information to address any danger to the community concerns before ICE and the IJ. If a client may have been arrested (even if the arrest did not result in a conviction), a practitioner should conduct an FBI background check and request a client's state criminal records and ICE arrest records. For more information on requesting criminal records, *see* ILRC, *Practice Advisory: How to Check if You Have a Criminal Record* (November 2019).[32]

2. Court Records

Court documents may also reveal evidence of mental health concerns. For example, in a prior criminal proceeding, a judge may have ordered a psychiatric evaluation, and a client may have been deemed incompetent to stand trial. If a practitioner knows or believes their client has a criminal history, a practitioner should obtain available court documents for each case, including the charging document and final disposition. The process for obtaining documents varies with

each jurisdiction, and the practitioner must contact the local court for more information on the procedure for obtaining court documents.

If a client was unrepresented at prior immigration hearings, a practitioner can request to view the client's immigration court file to determine what documents were previously submitted. A practitioner can also request and review the court's digital audio recording (DAR), as the client's past testimony may flag potential competency issues. Under the newly implemented EOIR Courts and Appeals System (ECAS), practitioners can request and download electronic records of proceedings (eROPs) for most cases.[33] However, eROPs may not be available for older cases, and if the option is not available to download the eROP, the ROP is only available in paper format.[34]

3. FOIA Requests

In addition to speaking directly with the local immigration court and ICE office, a practitioner can submit a Freedom of Information Act (FOIA) request to each government agency that may have client immigration records. Although FOIA requests should be made for every client who may have records with certain government agencies, FOIA requests can be particularly beneficial when a client's mental illness prevents them from being an accurate historian. Agencies with immigration records include U.S. Citizenship and Immigration Service (USCIS),[35] the Executive Office for Immigration Review (EOIR),[36] U.S. Customs and Border Protection (CBP),[37] ICE,[38] and the U.S. Office of Biometric Identity Management (OBIM).[39]

As FOIA requests can take several months to process, a practitioner should submit them as soon as possible. Expedited processing may be available for specific FOIA requests if a client is in removal proceedings.[40] To request expedited processing, a practitioner must submit proof the client is in removal proceedings, such as a Notice of Hearing listing the client's next court date. The FOIA request process varies for each government agency. For more details on the FOIA process, *see* ILRC, *Practice Advisory: A Step By Step Guide To Completing FOIA Requests With DHS* (December 14, 2021).[41]

4. Speaking with Family and Friends

A client's family and friends may help identify and locate medical information, especially when a client's mental illness prevents them from providing this information themselves. However, a client's diminished capacity does not absolve a practitioner from their duty of confidentiality[42] and a practitioner can only share information explicitly authorized by the client. Therefore, before contacting an individual, a practitioner should ensure they know what information they can and cannot share (e.g., medical diagnosis, criminal history, substance abuse) with the relative or friend. If the client provides consent, a practitioner should establish communication with friends

and relatives who can help obtain medical information and letters of support that detail their knowledge of the client's medical history and manifestations of the client's mental illness. These letters can be an advocacy tool to support requests for safeguards or release from detention.

IV. Legal Protections for Individuals with Mental Illness

Immigration proceedings must be fundamentally fair for all individuals.[43] Legal authority has provided some limited guidance on ensuring proceedings are fundamentally fair when a client is experiencing mental illness. For example, pursuant to the Immigration and Nationality Act (INA) if a noncitizen has a mental illness and the symptoms of the mental illness make it "impracticable" for the individual "to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the [noncitizen]."[44] However, the INA does not address situations in which no prescribed safeguards will sufficiently "protect the rights and privileges" of the noncitizen. In addition to the INA, Section 504 of the Rehabilitation Act compels all executive agencies to provide "reasonable accommodations"[45] for individuals with disabilities.[46] Under the Rehabilitation Act, the IJ has an affirmative obligation to make "reasonable accommodations" in "policies, practices, and procedures"[47] to ensure people with disabilities have meaningful access to services and programs.[48]

Although the courts have also provided some guidance on protecting the rights of individuals with mental illness in removal proceedings, IJs are still left with significant discretion to make rulings regarding these complex issues. While the absence of clarity is concerning, practitioners should try to utilize the lack of clear guidelines and the IJ's broad discretion to craft persuasive arguments to implement safeguards and, when appropriate, move the court to administratively close or terminate proceedings to fully protect their client's due process rights.

A. *Franco-Gonzalez v. Holder*

Franco-Gonzalez v. Holder is a federal district court decision that ruled individuals detained in Arizona, California, and Washington who are deemed mentally incompetent have a right to legal representation and a bond hearing in immigration removal proceedings.[49] *Franco-Gonzalez v. Holder* was a class-action lawsuit brought by several plaintiffs who argued that the government violated the INA, Section 504 of the Rehabilitation Act, and the Fifth Amendment to the U.S. Constitution when it failed to provide sufficient procedural and due process protections for individuals deemed mentally incompetent.[50]

The court held the appointment of counsel is required under Section 504 of the Rehabilitation Act, which forbids federally funded agencies from excluding or denying individuals with disabilities an equal opportunity to access program benefits and services.[51] Under the settlement

agreement, the court identified one main class and two sub-classes entitled to either pre-or post-removal remedies.[52]

If a Franco class member was in removal proceedings, unrepresented, and deemed mentally incompetent, they were entitled to a "Qualified Representative." [53] If a class member had received an order of removal, the individual could move the court to reopen their immigration case, even if the individual was outside of the United States.[54] Under the settlement agreement, DHS agreed to exercise its discretion to join or file motions to reopen for qualifying class members who had been removed.[55] However, DHS stated it would not exercise prosecutorial discretion if an individual were inadmissible or deportable due to security or terrorist grounds[56] or if the individual had received the required safeguards before a removal order.[57]

After the *Franco-Gonzalez v. Holder* ruling, EOIR created a nationwide policy to increase protections for all individuals with competency issues, who were non-Franco class members.[58] EOIR also created the National Qualified Representative Program (NQRP), which remains active and is available to non-Franco class members.[59] Under the NQRP, the IJ assigns a Qualified Representative (legal representative) to individuals who are unrepresented and deemed incompetent by the IJ or the BIA. There are nearly fifty NQRP service providers throughout the country. Practitioners can check the VERA Institute of Justice NQRP website for a complete list of NQRP providers.[60] If NQRP is active in a practitioner's jurisdiction, a Qualified Representative can be an excellent resource for practice tips and court templates.

B. Notice to Appear – Service and Pleadings

If a person has a mental illness, the symptoms of their mental condition may affect their ability to fully understand the information contained in the Notice to Appear (NTA), including their duty to attend future immigration hearings. Under *Matter of E-S-I-*, 26 I&N Dec. 136 (BIA 2013), the BIA ruled if an individual presents an indicia of incompetency, DHS must serve the NTA to the following individuals who can assist the noncitizen in reporting to the scheduled hearing:

> "(1) a person with whom the respondent resides, who, when the respondent is detained in a penal or mental institution, will be someone in a position of demonstrated authority in the institution or his or her delegate and, when the respondent is not detained, will be a responsible party in the household, if available;
>
> (2) whenever applicable or possible, a relative, guardian, or person similarly close to the respondent; and
>
> (3) in most cases, the respondent."[61]

The IJ may grant a continuance to allow DHS time to properly serve the NTA to the above-identified individuals.[62] If an indicia of incompetency manifests after the initial service of the NTA, the IJ may also grant a continuance to allow DHS time to re-serve the NTA.[63]

The BIA stated that although DHS is not required to make a competency assessment before serving the NTA, DHS will likely have evidence in its possession that may demonstrate an indicia of incompetency.[64] For example, a person may have been transferred from a psychiatric facility to ICE custody. In these situations, “the case should be treated as one of ‘mental incompetency’ for purposes of service”[65] even when an IJ has not made a formal ruling on the matter and DHS should serve the NTA to the individuals listed above.[66]

In addition to modifying the service of the NTA, the regulations state that an IJ should not accept “an admission of removability from an unrepresented respondent who is incompetent …. and is not accompanied by an attorney or legal representative, a near relative, legal guardian, or friend.”[67] Therefore, if DHS failed to properly serve the individuals mentioned above, and a practitioner contracts a case after service and pleadings occur, a practitioner may request DHS re-serve the NTA and allow the client to replead to the NTA.[68]

C. *Matter of M-A-M-*

Individuals in immigration proceedings are presumed to be competent, and absent signs of incompetency, an IJ is not required to conduct a competency inquiry.[69] However, under *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011), the BIA held when an individual exhibits “indicia of incompetency,” an IJ must “take measures to determine whether a respondent is competent to participate in proceedings.”[70] Although the BIA listed potential “measures” an IJ can take, including conducting a competency hearing, the court ruled the approach can “vary based on the circumstances of the case.”[71] However, when conducting an inquiry, the IJ must articulate the reasoning and basis for the competency finding.[72] If an IJ finds an individual lacks competency, the proceedings may continue, but the IJ must implement appropriate safeguards to protect the client’s due process rights.[73]

1. Assessing Competency

Although *Matter of M-A-M-* does not require an IJ to conduct a formal competency hearing, the IJ should make the following inquiries to reach a competency ruling:

1) Whether the individual has a “rational and factual understanding of the nature and object of the proceedings,”
2) Whether the individual “can consult with the attorney or representative if one is available,” and

3) Whether the individual has "a reasonable opportunity to examine and present evidence and cross-examine witnesses."[74]

Additionally, the BIA has emphasized the IJ's duty to aid in developing the record.[75] To fully assess the issues mentioned above, the IJ and the legal representative can ask questions such as the following:

- Do you know why you are in court today?
- Do you know why you are in immigration detention?
- Do you know what is the role of your attorney (if represented)?
- Do you know what is the role of the judge in court?
- Do you know what is the role of DHS in court?
- Have you ever been hospitalized? If so, do you know the reason for the hospitalization?
- Are you currently taking any medication? If so, are you experiencing any side effects from the medications?

Although not required, a practitioner should move the court to conduct a formal competency hearing. A formal hearing can help ensure a client's mental health is fully assessed and the practitioner has an opportunity to present all relevant evidence on the record. Additionally, because mental competency can be fluid, when evidence of incompetency is present, an IJ must assess an individual's competency throughout the course of the removal proceedings.[76] Therefore, if a client's medical condition declines, a practitioner should move for a competency hearing even if the IJ previously ruled the client was competent.

The IJ can rely on various types of evidence to analyze an individual's mental competency. Therefore, a practitioner should explore a wide range of sources of evidence to aid the court. The following is a non-exhaustive list of evidence that a practitioner may submit on behalf of a client:

- client testimony;
- medical records;
- mental health evaluations;
- school records;

- testimony or letters from family or friends that detail the client's past hospitalizations or any known history of mental illness or mental incompetency;
- criminal records; and
- court records.[77]

DHS is also required to affirmatively provide any information to the court that would aid the court in making a competency finding.[78] However, in practice, DHS may not provide relevant information to the court. Therefore, legal practitioners should make written requests to DHS to provide any information regarding a client's competency to the practitioner. A practitioner should also utilize the recently released ICE Directive, 11063.2 *Identification, Communication, Recordkeeping, and Safe Release Planning for Detained Individuals with Serious Mental Disorders or Conditions*[79] to support any records request. A practitioner should inform the court about requests made to DHS on the record. If DHS fails to timely provide medical documents, a practitioner can move the court to issue a subpoena.[80] A practitioner can also move to continue proceedings[81] if DHS delayed providing medical records to a practitioner.

2. Potential Safeguards

If an IJ rules an individual lacks mental competency, the IJ must ensure that adequate safeguards are in place to protect the individual's due process rights.[82] Additionally, the BIA has held safeguards may still be appropriate even if the client's mental illness does not rise to the level of incompetency.[83] Since *Matter of M-A-M-*, the BIA has emphasized that IJs have board discretion to impose safeguards. In *Matter of M-J-K-,* 26 I&N Dec. 773, 776 (BIA 2016), the BIA emphasized the IJ's discretion to implement safeguards and stated that "the ultimate determination of which safeguards to implement and whether they are adequate to ensure the fairness of proceedings is discretionary."[84]

In *Matter of M-A-M-*, the BIA provided a *non-exhaustive* list of potential safeguards that can be requested on behalf of a client:

- "refusal to accept an admission of removability from an unrepresented respondent;
- 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 shown;

- closing the hearing to the public;
- waiving the respondent's appearance;
- actively aiding in the development of the record, including the examination and cross-examination of witnesses; and
- reserving appeal rights for the respondent."[85]

In addition to the safeguards listed in *Matter of M-A-M-*, practitioners should put forth any safeguards they believe will protect their client's due process rights.[86] Other safeguards could include taking breaks during the hearing or asking leading questions. The practitioner can also move the court to waive the client's testimony and request the IJ not make an adverse inference from the client's inability to testify.

Although the appointment of counsel can be a safeguard, representation does not cure all due process concerns. The symptoms of a client's mental illness may be so significant that it may affect their ability to consult with their legal representative. Sometimes a practitioner can overcome the challenge of being unable to obtain case information from their client by speaking with family or friends. However, a client's family members may not have the needed case information, or the client may not have any known relatives or friends to contact. In situations where due process and ethical concerns prevent a practitioner from moving forward with the case, a practitioner can move that the court either administratively close or terminate the proceedings.[87]

D. Credibility Determinations

Credibility determinations are a vital aspect of a client's immigration case. However, the symptoms of a client's mental illness may prevent them from being an accurate historian. For example, in fear-based claims (i.e., asylum or withholding of removal), a person must demonstrate a subjective and objective fear of returning to their home country. The BIA, in *Matter of J-R-R-A-*, 26 I&N Dec. 609 (BIA 2015), addressed the safeguard of accepting an asylum applicant's fear of harm as subjectively genuine where competency issues affect the reliability of the applicant's testimony. The BIA acknowledged a client with mental illness may not intend to fabricate information, yet their mental illness may cause them to present a disorganized or fragmented memory that impedes their ability to offer reliable information.[88]

A client's ability to recall information can be especially hindered during stressful situations such as a court hearing. An individual with mental illness may testify about the information they believe to be accurate, but this testimony may not be plausible based on evidence in the record. In such cases, the IJ should, as a safeguard, "generally accept that the applicant

believes what he has presented, even though his account may not be believable to others or otherwise sufficient to support the claim."[89] The IJ should then rely on objective evidence in the record (letters from family, friends, country condition reports, etc.) to determine if the client meets the burden for relief.[90] In certain situations, a client's mental illness may prevent them from providing any testimony. In these cases, a practitioner can move the court to waive their client's testimony as a safeguard and request the IJ not make an adverse inference from the client's lack of testimony.

E. Mental Illness-Based Asylum Claims

Individuals with mental illness may experience persecution or torture in their home country on account of a misunderstanding or stigma against mental illness. The harm a client may suffer may give rise to a claim for asylum, withholding of removal, or relief under the Convention Against Torture.

Under the INA, a person may qualify for asylum if they can demonstrate they are "unable or unwilling" to return to their country "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."[91] An individual seeking protection based on their membership in a "particular social group" must establish that the group is: composed of members who share a common "immutable characteristic"; defined with "particularity" and not solely by the claimed persecution; and "socially distinct" within the society in question.[92] The regulations provide "two routes" by which an individual can establish an objective risk of future persecution: (1) the individual may show they will be singled out based on their protected category; or (2) there is a systematic pattern or practice of persecution against people "similarly situated to the applicant."[93]

Courts have held that individuals with disabilities and individuals with severe mental illness may constitute a cognizable "particular social group" under the asylum or withholding of removal framework. The Fourth Circuit ruled individuals with bipolar disorder who exhibit erratic behavior in Tanzania meet the immutability, particularity, and social distinction requirements to qualify as a particular social group.[94] The Ninth Circuit has also recognized mental health-based particular social groups.[95] Often, to prevail on a mental illness-based claim, the practitioner will need to present country conditions evidence showing how individuals with the specified mental diagnosis exhibit symptoms stemming from their mental illness that cause them to be singled out and harmed. Therefore, in these types of claims, a practitioner should put forth evidence showing the manifestations of the client's mental illness and put forth country conditions evidence that demonstrates how people with this diagnosis and symptoms may be harmed in their home country. If possible, a practitioner should secure a country condition expert to help demonstrate that the client will suffer the type and level of harm required to meet the legal threshold under asylum, withholding of removal, or relief under the Convention Against Torture.[96]

Additionally, a person with mental illness may qualify for an exception to the one-year filing deadline if they can demonstrate the symptoms of their mental illness were an “extraordinary circumstance” that prevented the timely filing of their asylum application.[97] For more information on litigating asylum claims, *see Essentials of Asylum Law* (ILRC 2020).[98]

V. Advocating for Release

Due to the harmful environments in detention facilities, practitioners should strongly advocate for their client’s release. If supported by evidence in the record or evidence the practitioner could gather, practitioners should demonstrate how a client’s criminal history is rooted in the client’s mental illness rather than reflective of any danger concerns. A practitioner should utilize any recent litigation, ICE’s enforcement priorities,[99] directives,[100] and detention standards[101] to advocate on their client’s behalf. Although this advisory does not discuss this topic, practitioners can also use the authority discussed below to advocate for precautionary measures to be put in place when a person is ordered removed.[102]

A. Release under *Fraihat v. ICE*

In *Fraihat v. ICE*, a federal district court issued a preliminary injunction that required ICE to affirmatively identify individuals (class members) who are especially vulnerable to contracting COVID-19 in immigration detention facilities and conduct custody determinations.[103] Under the court order, ICE is required to make this custody determination even if ICE previously denied release. The court in *Fraihat* identified two classes who are especially vulnerable to contracting COVID-19. Under both classes, “severe psychiatric illness” is listed as a diagnosis that places people at risk of contracting COVID-19.[104] Although the Ninth Circuit reversed the court’s preliminary injunction,[105] the case continues to be litigated, and the preliminary injunction remains in effect as of the date of this practice advisory. As the injunction remains in effect, practitioners should utilize *Fraihat* to advocate for the release of clients diagnosed with severe mental illness. Practitioners should also use evidence, such as the client’s medical records, mental health assessments, and letters from family or friends, to support their release request.[106]

B. ICE Directive

ICE recently released an ICE Directive *Identification, Communication, Recordkeeping, and Safe Release Planning for Detained Individuals with Serious Mental Disorders or Conditions*, that requires ICE officials to “establis[h] policies and procedures relating to the safe release of individuals” with mental illness.[107] The directive lists factors weighing in favor of release, including whether an individual with mental illness has secured legal counsel, has been deemed incompetent in prior proceedings (criminal or civil), or has previously been hospitalized or confined due to their mental illness. When ICE grants release, they must create a safety plan

that ensures *prior to release*, an individual receives a supply of their prescribed medication, commissary funds (if applicable), and medical records. ICE must provide advance notice to the individual's family, friends, and legal counsel to coordinate release.

C. DHS Enforcement Priorities

Under the DHS memorandum, *Guidelines for the Enforcement of Civil Immigration Law* ("Mayorkas Memo"), DHS details the Biden Administration's "permanent priorities" for immigration enforcement and removal.[108] Under these final priorities, ICE is instructed to consider the "totality of circumstances" when deciding whether or not to take enforcement action.[109] The Mayorkas Memo also provides a non-exhaustive list of mitigating factors ICE should consider when determining whether an individual is a threat to public safety. One of the listed mitigating factors includes a noncitizen's "mental condition that may have contributed to the criminal conduct, or a physical or mental condition requiring care or treatment."[110] Therefore, practitioners should use this language to help advocate for their client's release and point to evidence, when possible, that shows their client's behavior is rooted in their mental illness. If ICE denies a request for release, a practitioner should elevate the request to a senior ERO official, via the ICE Case Review Process.[111]

D. Release Planning

Before a practitioner submits a custody redetermination request to ICE or the IJ, a practitioner can create a detailed release plan to ensure their client has the necessary mental health resources and support if they are released from detention. For a client with mental illness, release planning requires more than securing a sponsor to provide basic food and shelter. Release planning should include ensuring the client's immediate and long-term needs are met. This includes helping the client successfully navigate life outside the detention facility. The level of support a client needs will depend on their case details and medical diagnosis. Below are some critical components of a release plan:

- **Supply of medication:** ICE must provide "a minimum 30-day supply of necessary medication"[112] to an individual before their release. However, in practice, ICE often fails to provide individuals with any supply of medications, even if the client was receiving medication while detained. Therefore, practitioners should speak with ICE to ensure their client receives at minimum the required 30-day supply of medication. Additionally, a client may not be eligible for medical benefits due to their immigration status. Even if a client is eligible, applying for benefits may be a lengthy process. For this reason, practitioners can also assist their clients in connecting with medical resources at their destination town to obtain and cover the costs of future medications.

- **Mental health support:** In addition to helping a client obtain the necessary medications to treat their mental health symptoms, practitioners can also help their client connect with other mental health resources. This includes connecting their client with mental health practitioners, addiction services (if applicable), and organizations that support immigrants.

- **Legal support:** If a practitioner does not continue case representation after a client's release from the detention facility, a practitioner can connect their client with legal service providers who can provide a consult to assess for representation. If a practitioner has their client's permission, they can share all the relevant case information, including information regarding the client's mental health background.

- **Coordinating date and time of release:** Practitioners have reported a frequent and troubling pattern of ICE releasing clients with mental illness or other cognitive issues without notifying their attorney, family, or support system.[113] This results in a client being released at a bus station or parking lot without the ability to contact anyone. Releasing a client without the necessary resources is concerning for any client, but the harm a client with mental illness can encounter is even more significant and troubling. Considering this harm, practitioners should speak with ICE to schedule and confirm their client's release date and time. Under the recently issued ICE directive, ICE must notify a client's legal representative and family members at least 72 hours in advance when a client is scheduled to be released from the detention center. ICE is also required to provide 72-hour notice to the client's legal representative and family if any changes are made to the release date and time. Under the ICE directive, ICE should also ensure any commissary funds are given to the client, so the client has money with them if they need to contact friends or family upon release.

VI. Conclusion

Clients with mental illness have needs and vulnerabilities that present unique challenges. However, practitioners can continue to provide zealous advocacy if they appreciate the special needs of clients with mental illness and utilize case law and mental health resources to advocate on their client's behalf. A zealous advocate can help protect their client's due process rights and ensure the client's agency is respected and they have a meaningful opportunity to present their case.

End Notes

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[1] M. Von Werthern, K. Robjant, Z. Chui, et al., *The impact of immigration detention on mental health: a systematic review,* BMC Psychiatry 18, 382 (2018), https://doi.org/10.1186/s12888-018-1945-y. (examining the prevalence of mental illness in detention facilities globally, including in the United States and finding "there was consistent evidence that immigration detention had adverse effects on mental health.").

[2] American Civil Liberties Union (ACLU), *DETENTION, DEPORTATION AND MENTAL DISABILITIES*, https://www.aclu.org/other/detention-deportation-and-mental-disabilities (last visited June 8, 2022).

[3] Politico, *Migrant mental health crisis spirals in ICE detention facilities* (June 21, 2019), https://www.politico.com/story/2019/07/21/migrant-health-detention-border-camps-1424114.

[4] Von Werthern, *supra* note 1.

[5] *See Matter of M-A-M-*, 25 I&N Dec. 474, 479 (BIA 2011) (stating that "[u]nlike in criminal proceedings, a lack of competency in civil immigration proceedings does not mean that the hearing cannot go forward; rather, procedural fairness is required.").

[6] This practice advisory is not legal advice and is not a substitute for individualized case consultation and research. The law referenced in this advisory may change after publication. Many thanks to attorneys Andrew Craycroft, Corinne Waite, Kelly Anderson, Tatiana Obando, Dr. Laurie Cook Heffron and the VERA Institute of Justice National Qualified Representative Program (NQRP) team for their review and comment.

[7]For additional resources and sample materials related to representing individuals with mental illness in removal proceedings, *see* CLINIC, *Representing Noncitizens with Mental Illness,* https://cliniclegal.org/resources/removal-proceedings/representing-noncitizens-mental-illness (last updated May 12, 2020).

[8] For an in-depth discussion on ethical concerns regarding representing a client with mental illness in removal proceedings, *see* American Bar Association (ABA): Commission on Immigration, *Representing Detained Immigration Respondents of Diminished Capacity: Ethical Challenges and Best Practices,* (July 2015), https://www.americanbar.org/content/dam/aba/administrative/immigration/representing_detained_respondents_of_diminished_capacity.pdf.

[9] MODEL RULES OF PRO. CONDUCT r. 1.14 (Am Bar Ass'n 2020), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_14_client_with_diminished_capacity/.

[10] MODEL RULES OF PRO. CONDUCT r. 1.4 (Am Bar Ass'n 2020), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_4_communications/.

[11] VERA Institute of Justice, *De-Escalation and Suicidal Ideation Part I: How QRs Can Best Support Clients With Significant Mental Health Issues,* webinar (March 5, 2021), https://www.vera.org/knowledge-bank/2020-De-escalation-and-Suicideal-Ideation-Part-1.pptx

[12] National Institute for the Clinical Application of Behavioral Medicine, *How to Help Your Clients Understand Their Window of Tolerance*, https://www.nicabm.com/trauma-how-to-help-your-clients-understand-their-window-of-tolerance/ (last visited June 9, 2022).

[13] *Matter of M-A-M-*, 25 I&N Dec. at 483 ("Examples of appropriate safeguards include, but are not limited to … identification and appearance of a family member or close friend who can assist the respondent and provide the court with information.").

[14] The word "incompetent" in this advisory refers to a legal standard. However, the author recognizes and condemns the derogatory connotations of the word "incompetent."

[15] In the criminal context, a defendant must be competent to stand trial. *See Dusky v. United States* 362, U.S. 402 (1960) (per curiam); *Drope v. Missouri*, 420 U.S. 162, 171 (1975).

[16] *Matter of M-A-M-*, 25 I&N Dec. at 479.

[17] *See* Advocacy Network on Disabilities, *People First Language*, https://www.advocacynetwork.org/resources/people-first/ (last visited May 16, 2022).

[18] Project on Government Oversight, *ISOLATED: ICE Confines Some Detainees with Mental Illness in Solitary for Months*, (August 14, 2019), https://www.pogo.org/investigation/2019/08/isolated-ice-confines-some-detainees-with-mental-illness-in-solitary-for-months/.

[19] 8 C.F.R. § 212.5(b) (ICE may release an individual on parole for "urgent humanitarian reasons" or a "significant public benefit," if the person does not present a security risk or a flight risk). To advocate for release on parole, practitioners can argue a client's mental health condition constitutes a "serious medical condition" and "continued detention would not be appropriate." *See id*.

[20] Department of Homeland Security (DHS), *Requesting Assistance from the Office of the Immigration Detention Ombudsman (OIDO)*, https://www.dhs.gov/requesting-assistance-oido (last updated May 9, 2022).

[21] DHS, *Make a Civil Rights Complaint*, https://www.dhs.gov/file-civil-rights-complaint (last updated March 3, 2022).

[22] *Matter of M-A-M-*, 25 I&N Dec. at 480 (stating "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.").

[23] *ICE Directive 11063.2 Identification, Communication, Recordkeeping, and Safe Release Planning for Detained Individuals with Serious Mental Disorders or Conditions* (April 5, 2022), https://www.ice.gov/doclib/news/releases/2022/11063-2.pdf. [hereinafter "ICE Directive on Mental Illness"].

[24]ICE, *National Detention Standards-4.3 Medical Care*, at 277 (2016), https://www.ice.gov/doclib/detention-standards/2011/4-3.pdf

[25] *Id*.

[26] *Id*. at 276-277.

[27]*Id*.

[28] 8 C.F.R. § 1003.29 ("The immigration judge may grant a motion for continuance for good cause shown.").

[29] Los Angeles Times, *ICE rushed to release a sick woman, avoiding responsibility for her death. She isn't alone* (May 13, 2022), https://www.latimes.com/world-nation/story/2022-05-13/ice-immigration-detention-deaths-sick-detainees; American Immigration Council, *ICE to Close or Scale Back Use of Four Immigration Detention Facilities, Citing Concerns over Conditions, Treatment of Detained Individuals (*March 25, 2022), https://www.americanimmigrationcouncil.org/news/us-immigration-and-customs-enforcement-close-or-scale-back-use-four-immigration-detention.

[30] Human Rights Watch, *Systemic Indifference Dangerous & Substandard Medical Care in US Immigration Detention* (May 2017), https://static1.squarespace.com/static/5a33042eb078691c386e7bce/t/5a9da33f0d9297a1f84f60f2/1520280385430/HRW_Report.pdf.

[31] 8 U.S.C. § 1158(b)(2)(A)(ii); § 1231(b)(3)(B)(ii).

[32] https://www.ilrc.org/sites/default/files/resources/practice_advisory_-_background_checks_final.pdf

[33] Department of Justice (DOJ), *EOIR COURTS & APPEALS SYSTEM (ECAS) – ONLINE FILING*, https://www.justice.gov/eoir/ECAS (last updated February 11, 2022).

[34] DOJ, *Frequently Asked Questions*, https://www.justice.gov/eoir/ecas/attorney-and-ar-FAQs (last updated February 14, 2022).

[35] USCIS, *REQUEST RECORDS THROUGH THE FREEDOM OF INFORMATION ACT OR PRIVACY ACT,* https://www.uscis.gov/records/request-records-through-the-freedom-of-information-act-or-privacy-act (last updated February 1, 2022).

[36] EOIR, *Freedom of Information Act*, https://www.justice.gov/eoir/freedom-information-act-foia (last updated April 7, 2022).

[37] U.S. Customs and Border Protection, *How do I submit a FOIA request?* (May 3, 2021), https://help.cbp.gov/s/article/Article-1729?language=en_US.

[38] ICE, *Submitting FOIA Request*, https://www.ice.gov/foia/request (last updated January 27, 2021).

[39] DHS, *Office of Biometric Identity Management*, https://www.dhs.gov/obim (last updated June 7, 2022).

[40] USCIS, *How to Make an Expedite Request*, https://www.uscis.gov/forms/filing-guidance/how-to-make-an-expedite-request (last updated March 21, 2022).

[41] https://www.ilrc.org/step-step-guide-completing-foia-requests-dhs.

[42] *See* MODEL RULES OF PRO. CONDUCT r. 1.14 (Am Bar Ass'n 2020) (stating when an attorney is representing a client with diminished capacity "the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.") https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_14_client_with_diminished_capacity/; MODEL RULES OF PRO. CONDUCT r. 1.6, (Am Bar Ass'n 2020) (stating "[a] fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation.") https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/comment_on_rule_1_6/.

[43] *Matter of M-A-M-*, 25 I&N Dec. at 479 (citing *Matter of Beckford*, 22 I&N Dec. 1216, 1225 (BIA 2000) and *Shaughnessey v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953)).

[44] INA § 240(b)(3).

[45] 28 C.F.R. § 35.130(b)(7).

[46] 29 U.S.C. § 794(a); 28 C.F.R. § 39.130 (applying the Rehabilitation Act to the Department of Justice).

[47] 28 C.F.R. § 35.130(b)(7).

[48] *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034, 1051 (C.D. Cal. 2010) (granting safeguards for mentally ill detainees in immigration court pursuant to the Rehabilitation Act).

[49] *Franco-Gonzalez v. Holder*, CV 10–02211 DMG (DTBx), 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013); *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034, 1051-58 (C.D. Cal. 2010).

[50] *Id*.

[51] *Id*.

[52] *Franco-Gonzalez v. Holder*, CV 10–02211 DMG (DTBx), 2013 WL 3674492 at *2 (C.D. Cal. Apr. 23, 2013).

[53] *Agreement Regarding Procedures for Notifying and Reopening Cases of Franco Class Members Who Have Received Final Orders of Removal*, *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG (DTBx), 2-3 (C.D. Cal February 27, 2015), http://www.ice.gov/sites/default/files/documents/Document/2015/Settlement%20Agreement.pdf

[54] *Id.* at 12-13.

[55] *Id*. at 14-15.

[56] *See* 8 U.S.C. §§ 1182(a)(3); 8 USC 1227(a)(4).

[57] *Agreement Regarding Procedures for Notifying and Reopening Cases of Franco Class Members Who Have Received Final Orders of Removal*, *supra* note 53, at 15.

[58] Department of Justice (DOJ), *Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions* (April 22, 2013), https://www.justice.gov/eoir/pages/attachments/2015/04/21/safeguards-unrepresented-immigration-detainees.pdf

[59] Executive Office for Immigration Review (EOIR), *NATIONAL QUALIFIED REPRESENTATIVE PROGRAM (NQRP)*, https://www.justice.gov/eoir/national-qualified-representative-program-nqrp (last updated February 18, 2020).

[60] VERA, *National Qualified Representative Program*, https://www.vera.org/projects/national-qualified-representative-program (last visited June 10, 2022).

[61] *Matter of E-S-I-,* 26 I&N Dec. 136 (BIA 2013) *(*interpreting regulations under 8 C.F.R. § 103.8(c)(2)(i) and (ii).

[62] *Id*.

[63] *Id*.

[64] *Id.* at 144.

[65] *Id*.

[66] *Id*. at 145.

[67] 8 C.F.R. § 1240.10(c) (When the IJ "does not accept an admission of removability, he or she shall direct a hearing on the issues.").

[68] *Matter of E-S-I-,* 26 I&N Dec. at 144.

[69] *Matter of M-A-M-*, 25 I&N Dec. at 477.

[70] *Id*. at 480.

[71] *Id*.

[72] *Id*. at 481.

[73] *Id*.

[74] *Id*. at 479.

[75] *Matter of J-F-F-*, 23 I&N Dec. 912, 922 (A.G. 2006).

[76] *Matter of M-A-M-*, 25 I&N Dec. at 480.

[77] *Id.* at 479-480.

[78] *Id.* at 480.

[79] https://www.ice.gov/news/releases/ice-announces-new-policies-strengthening-protections-detained-noncitizens-mental

[80] *See* INA § 240(b)(1); 8 C.F.R. § 1003.35(b); 8 C.F.R. § 1287.4.

[81] 8 C.F.R. § 1003.29.

[82] *Matter of M-A-M-*, 25 I&N Dec. at 481.

[83] *Id.* at 480.

[84] *Matter of M-J-K-*, 26 I&N Dec. 773, 776 (BIA 2016) (emphasis added).

[85] *Matter of M-A-M-*, 25 I&N Dec. at 483.

[86] *See*, e.g., *Matter of J-R-R-A-*, 26 I&N Dec. 609, 612 (BIA 2015) (finding when an asylum applicant's mental illness affects their ability to provide reliable testimony, the IJ should, as a safeguard, "generally accept that the applicant believes what he has presented, even though his account may not be believable to others" in order to "enhance the fairness of the proceedings.").

[87] *Matter of M-A-M-*, 25 I&N Dec. at 483 (stating administrative closure may be an appropriate remedy in certain situations involving incompetency); *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (A.G. 2021) (restoring the IJ's ability to administratively close immigration proceedings); *Compare Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018) (ruling IJ's may dismiss or terminate removal proceedings only under the circumstances expressly identified in the regulations.) *with Chavez Gonzalez v. Garland*, 16 F.4th 131 (4th Cir. Oct. 20, 2021)(abrogating *Matter of S-O-G- & F-D-B-*, and holding "that the IJs and BIA possess the inherent authority to terminate removal proceedings.").

[88] *Matter of J-R-R-A-*, 26 I&N Dec. 609, 611 (BIA 2015).

[89] *Id.* at 612.

[90] *Id*.

[91] 8 U.S.C. § 1101(a)(42)(A).

[92] *See generally Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014); *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014) (providing an overview of the "particular social group" criteria with a specific focus on the social distinction element.).

[93] 8 C.F.R. §§ 1208.13(b)(2)(iii)(A)-(B), 208.13(b)(2)(i)(ii).

[94] *Temu v. Holder*, 740 F.3d 887 (4th Cir. 2014).

[95] *Acevedo Granados v. Garland*, 992 F. 3d 755, 762 (9th Cir. 2021) (ruling noncitizen's proposed social group of "El Salvadoran men with intellectual disabilities who exhibited erratic behavior" was sufficiently particular).

[96] For an example of deficient corroborating evidence, *see Matter of J-F-F-*, 23 I&N Dec. 912, 917 (A.G. 2006) (finding the respondent's contradictory testimony and one statement in a Department of State report was insufficient to demonstrate the respondent would be tortured and that "each step in the hypothetical chain of events is more likely than not to happen.").

[97] 8 C.F.R. §208.4(a)(5).

[98] https://www.ilrc.org/essentials-of-asylum-law

[99] Alejandro Mayorkas, *Guidelines for the Enforcement of Civil Immigration Law* (September 30, 2021), https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf. [hereinafter "Mayorkas Memo"].On June 10, 2022, a Texas federal judge issued an order vacating the Mayorkas Memo, and the decision is scheduled to take effect on June 24, 2022. *Texas v. United States*, No. 6:21-cv-0016, 2022 WL 2109204 (S.D. Tex. June 10, 2022).

[100] *ICE Directive on Mental Illness*, *supra* note 23.

[101] *ICE Detention Standards* (November 9, 2021), https://www.ice.gov/factsheets/facilities-pbnds.

[102] *See generally* Inter-American Commission on Human Rights, *About Precautionary Measures*, https://www.oas.org/en/IACHR/jsForm/?File=/en/IACHR/decisions/MC/about-precautionary.asp (last visited June 10, 2022).

[103] *Fraihat v. U.S. Immigration and Customs Enf't,* 445 F. Supp. 3d 709 (C.D. Cal 2020).

[104] *Fraihat v. ICE*, No. EDCV 19-1546 JGB (SHKx), 2020 WL 1932393 (C.D. Cal. Apr. 20, 2020), https://www.splcenter.org/sites/default/files/dkt_133.pdf.

[105] *Fraihat v. ICE*, 16 F.4th 613, 645 (9th Cir. 2021).

[106] *See generally* Southern Poverty Law Center, *Fraihat v. ICE Community Resources,* https://www.splcenter.org/fraihat-v-ice-community-resources (last visited June 10, 2022).

[107] *ICE Directive on Mental Illness*, *supra* note 23.

[108] *Mayorkas Memo*, *supra* note 99.

[109] *Id*. at 3.

[110] *Id*.

[111] DHS, *Contact ICE About an Immigration/Detention Case*, https://www.ice.gov/ICEcasereview (last updated June 24, 2022).

[112] *ICE Directive on Mental Illness*, *supra* note 23, at 13.

[113] VERA Institute of Justice, *ICE's Deadly Practice of Abandoning Immigrants with Disabilities and Mental Illnesses on the Street* (September 2021), https://www.vera.org/ices-deadly-practice-of-abandoning-immigrants-with-disabilities-and-mental-illnesses-on-the-street.

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About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of immigrant families and communities.