



# CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

## Practice Advisory

### Representing Noncitizens with Mental Illness<sup>1</sup>

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## I. Introduction

Due process requires that proceedings be fundamentally fair<sup>3</sup> and the Immigration and Nationality Act (INA) guarantees that noncitizens in removal proceedings “have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien’s own behalf, and to cross-examine witnesses presented by the Government.”<sup>4</sup> Unfortunately, mental illness can impede a noncitizen’s ability to obtain due process protections and meaningfully present their case in immigration court.<sup>5</sup>

Following the Board of Immigration Appeals’ landmark decision in *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011), much was written concerning safeguards available to noncitizens in removal proceedings.<sup>6</sup> However, as much time has passed since the *Matter of M-A-M-* decision, many of these resources have become outdated. This practice advisory is intended to supplement previously released resources and provide needed updates in light of newer case law concerning mental competency in immigration proceedings.

This practice advisory begins with the legal protections available to mentally ill noncitizens facing removal proceedings under section 240 of the INA. Part III of the practice advisory considers protections for noncitizens facing fast track removal proceedings, including expedited removal, reinstatement, and administrative removal proceedings. The practice advisory then concludes with an overview of some of the practical challenges in working with noncitizens living with mental illness.

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<sup>3</sup> *Matter of Beckford*, 22 I&N Dec. 1216, 1225 (BIA 2000); see also *Shaughnessey v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (stating that immigration proceedings must conform “to traditional standards of fairness encompassed in due process of law”).

<sup>4</sup> INA § 240(b)(4)(B); accord 8 CFR § 1240.10(a)(4).

<sup>5</sup> Sarah Sherman-Stokes, *Sufficiently Safeguarded?: Competency Evaluations of Mentally Ill Respondents in Removal Proceedings*, 67 HASTINGS L.J., 1023, 1041 (2016), [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2777655](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2777655); see also Molly Bowen, Note, *Avoiding an “Unavoidably Imperfect Situation”: Searching for Strategies to Divert Mentally Ill People Out of Immigration Removal Proceedings*, 90 WASH. U. L. REV. 473, 480 (2012), [openscholarship.wustl.edu/law\\_lawreview/vol90/iss2/5/](https://openscholarship.wustl.edu/law_lawreview/vol90/iss2/5/) (discussing multiple cases in which U.S. citizens with serious mental illnesses were unlawfully removed from the United States); Helen Eisner, *Disabled, Defenseless, and Still Deportable: Why Deportation without Representation Undermines Due Process Rights of Mentally Disabled Immigrants*, 14 U. PA. J. CONST. L. 511, 511 (2011), [scholarship.law.upenn.edu/jcl/vol14/iss2/5/](https://scholarship.law.upenn.edu/jcl/vol14/iss2/5/) (discussing cases in which the respondents did not have the wherewithal to communicate with the IJ or were so catatonic during immigration proceedings that they were unable to answer basic questions).

<sup>6</sup> See, e.g., Legal Action Center and the University of Houston Law Center Immigration Clinic, *Practice Advisory: Representing Clients with Mental Competency Issues Under Matter of M-A-M-* (November 30, 2011), [www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/Mental-Competency-Issues.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/Mental-Competency-Issues.pdf), [hereinafter “Legal Action Center Practice Advisory”]; Capital Area Immigrant Rights (“CAIR”) Coal. & Cooley, Godward, Kronish, LLP, *Practice Manual for Pro Bono Attorneys Representing Detained Clients with Mental Disabilities in the Immigration Detention & Removal System* (2d Ed.) (2009), [www.caircoalition.org/pro-bono-resources/pro-bono-mental-health-manual/](https://www.caircoalition.org/pro-bono-resources/pro-bono-mental-health-manual/), [hereinafter “CAIR Coalition Practice Manual”].

## II. Removal Proceedings under INA § 240

Noncitizens with mental health diagnoses, including cognitive and intellectual disabilities and mental illnesses, may be unable to understand and meaningfully participate in removal proceedings.<sup>7</sup> They are less likely to challenge their removability and less likely to demonstrate eligibility for relief.<sup>8</sup> As a result, additional procedural protections are available to certain noncitizens with mental illnesses, and practitioners should zealously argue for these additional protections. In particular, noncitizens whom the Immigration Judge (IJ) finds are mentally incompetent<sup>9</sup> are entitled to additional safeguards. Only some noncitizens with mental illnesses and other mental health diagnoses<sup>10</sup> will satisfy the legal standard for mental incompetency discussed at section II.C, *infra*. However, practitioners should still argue for safeguards and accommodations even where the noncitizen is not determined to be incompetent to ensure that the noncitizen can fully and fairly participate in proceedings.<sup>11</sup>

### A. Notice Safeguards for Noncitizens Determined to be Incompetent<sup>12</sup>

Special provisions exist to ensure that noncitizens receive adequate notice of the removal proceedings against them. These notice provisions are intended to protect the due process rights of

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<sup>7</sup> E.g. Aimee Mayer-Salins, *Fast Track to Injustice: Rapidly Deporting the Mentally Ill*, 14 CARDOZO PUB. L. POL'Y & ETHICS J. 545, 562-63 (2016) [hereinafter "Fast Track to Injustice"].

<sup>8</sup> *Id.* (citing First Amended Complaint at 30, *Franco-Gonzalez v. Holder*, No. CV 10-02211, 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013)).

<sup>9</sup> The term "mentally incompetent" is a legal term used in the case law and regulations discussed in this practice advisory. It refers to an individual's inability to meaningfully participate in immigration proceedings due to a mental illness or disability. The author recognizes that the term lacks appropriate cultural and linguistic sensitivity and may further stigmatize those who have mental illnesses. See, e.g., Aimee Mayer-Salins, Post-Deportation Human Rights Project, *Practice Advisory, Mentally Incompetent But Deported Anyway: Strategies for Helping a Mentally Ill Client Return to the United States* (September 2015) at n.5, [www.bc.edu/content/dam/files/centers/humanrights/pdf/PracticeAdvisory-MentallyIncompetentDeportees.pdf](http://www.bc.edu/content/dam/files/centers/humanrights/pdf/PracticeAdvisory-MentallyIncompetentDeportees.pdf) (citing Bruce J. Winnick, *The Side Effects of Incompetency Labeling and the Implications for Mental Health Law*, 1 PSYCHOL. PUB. POL'Y & L. 6 (1995)). The use of the term in this practice advisory is not intended to further stigmatize those who have mental illness; rather, it is used to avoid confusion where this term describes the applicable legal standard.

<sup>10</sup> For ease of reference, this practice advisory will generally use the term mental illness to refer inclusively to mental illnesses as well as other mental health diagnoses, including cognitive and intellectual disabilities. The term mental illness will be used except where it is necessary to specifically reference mental incompetency because that is the relevant legal standard.

<sup>11</sup> Even where a noncitizen is deemed competent, it still may be appropriate to request safeguards or reasonable accommodations to ensure that the noncitizen can fully and fairly participate in proceedings. Indeed, the BIA has recognized that safeguards may be useful without a formal finding of incompetency. *Matter of M-A-M-*, 25 I&N Dec. at 480 ("Even if an alien has been deemed medically competent, there may be cases in which an IJ has good cause for concern about the ability to proceed, such as where the respondent has a long history of mental illness, has an acute illness, or was restored to competency, but there is reason to believe that the condition has changed. In such cases, IJs should apply appropriate safeguards."); accord *Matter of J-R-R-A*, 26 I. & N. Dec. 609, 611-12 (BIA 2015). The practitioner might request extra breaks during the presentation of testimony or might ask to be permitted to ask leading questions. An attorney might frame arguments for such accommodations under the framework of INA § 240(b)(4)(B) (stating that the noncitizen "shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government . . .").

<sup>12</sup> Even where a noncitizen is found to be competent, it still may be appropriate to request safeguards or reasonable accommodations to ensure that the noncitizen can fully and fairly participate in proceedings. See note 11 *supra*.

individuals who may not sufficiently comprehend the proceedings against them, and apply even at the outset of proceedings.

## 1. Regulations on Notice

Under 8 CFR § 103.8(c)(2), Department of Homeland Security (DHS) must personally serve a Notice to Appear (NTA) upon a noncitizen who is mentally incompetent. Moreover, if a noncitizen is confined in a penal or mental institution or a hospital, DHS generally must serve the noncitizen and the person in charge of the institution. However, if the noncitizen is deemed mentally incompetent, DHS may serve only the person in charge of the institution where the individual is confined.<sup>13</sup> If the person is not confined, service must be made upon the person with whom the incompetent person resides, and whenever possible, service must also be made on the near relative, guardian, committee, or friend.<sup>14</sup>

## 2. *Matter of E-S-I*

The BIA interpreted these notice regulations in *Matter of E-S-I*, 26 I&N Dec. 136 (BIA 2013). The BIA explained that where there are manifest indicia of incompetency,<sup>15</sup> DHS generally should serve the NTA on three people: 1) the noncitizen,<sup>16</sup> 2) a person with whom the noncitizen resides, and 3) a relative, guardian, or person similarly close to the noncitizen.<sup>17</sup> The BIA further stated that where the noncitizen is confined in a custodial setting of any type, then “a person with whom the incompetent . . . resides” means someone who is in a position of demonstrated authority in the institution or their delegate.<sup>18</sup> Where the noncitizen is not confined, then the statutory language refers to a responsible person in the household.<sup>19</sup> Moreover, the BIA stressed that service on the legal representative is not a substitute for adhering to these notice rules.<sup>20</sup>

Although these notice safeguards are intended to benefit noncitizens with mental illness, practitioners should carefully consider whether it benefits the noncitizen to file a motion to terminate where DHS

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<sup>13</sup> 8 CFR § 103.8(c)(2)(i).

<sup>14</sup> 8 CFR § 103.8(c)(2)(ii).

<sup>15</sup> Although service generally will occur before an IJ makes a competency determination, DHS should serve the noncitizen in accordance with 8 CFR §§ 103.8(c)(2)(i) and (ii) where DHS is aware of *indicia* of incompetency at the time it serves the NTA. *Matter of E-S-I*, 26 I&N Dec. 136, 144 (BIA 2013).

<sup>16</sup> *Matter of E-S-I*, 26 I&N Dec. 136, 140 (BIA 2013) (noting that “although the regulation indicates that a person who is ‘not competent to understand’ need not be served, in most cases it will be difficult to ascertain whether the respondent is competent to understand the notice to appear until an attempt is made to serve it, or frequently later . . . Therefore, in nearly all cases the prudent course of action will be for the DHS to serve the respondent along with the head of the institution.”).

<sup>17</sup> *Matter of E-S-I*, 26 I&N Dec. 136, 136 (BIA 2013).

<sup>18</sup> *Id.* at 141-42 (explaining that DHS cannot comply with the regulations through serving a fellow detainee or the ICE Field Office Director).

<sup>19</sup> *Id.* at 143.

<sup>20</sup> *Id.* (“Nonetheless, while notice to counsel ordinarily constitutes notice to the alien, the regulation governing service on aliens who lack competency requires service on a responsible party with whom the respondent resides. 8 C.F.R. § 103.8(c)(2)(ii). Therefore, in these cases, service on counsel does not obviate the need to also serve a responsible person with whom the respondent resides.”)

did not properly effectuate service. If DHS did not comply with the regulations at 8 CFR § 103.8(c), and indicia of mental incompetency arise or are manifest at the master calendar hearing, the BIA instructs that the IJ should grant a continuance so that DHS may serve the noncitizen properly.<sup>21</sup> Similarly, if indicia of incompetency become apparent later in the proceedings, *Matter of E-S-I* states that the IJ should evaluate whether re-serving the NTA in compliance with 8 CFR § 103.8(c) would be an appropriate safeguard, and if so, grant a continuance for DHS to re-serve the NTA.<sup>22</sup> Hence, improper service is easy to cure, and filing a motion to terminate may simply prolong proceedings without providing the noncitizen with a meaningful benefit.<sup>23</sup> However, if practitioners are filing motions to terminate on other grounds, the issue should be preserved as an additional ground for termination.

## B. Procedural Protections During Hearings Before the Immigration Judge

Noncitizens with mental illnesses are also entitled to additional procedural protections during their immigration hearings. The statutes, regulations, and case law that delineate these protections are explained below.

### 1. Regulations on Procedural Protections During the Hearing

In cases where the noncitizen is mentally incompetent, the INA directs the Attorney General to “prescribe safeguards to protect the rights and privileges of the alien.”<sup>24</sup> By regulation, these safeguards include allowing an attorney, legal representative, legal guardian, near relative or friend to appear on the noncitizen’s behalf if it is impracticable for the noncitizen to be present at the hearing because of mental incompetency.<sup>25</sup> If such a person cannot be found or will not appear on the noncitizen’s behalf, then the IJ may request that the noncitizen’s custodian appear on their behalf.<sup>26</sup>

Additionally, an IJ cannot accept an admission of removability from a noncitizen who is mentally incompetent and not accompanied by an attorney or legal representative, a near relative, legal

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<sup>21</sup> *Id.* at 144.

<sup>22</sup> *Id.* at 146; accord *Matter of W-A-F-C*, 26 I&N Dec. 880 (BIA 2016) (stressing that DHS should get another opportunity to properly effectuate service where it did not properly serve the noncitizen initially).

<sup>23</sup> In some situations, re-serving the NTA can provide a meaningful benefit. For example, practitioners should object to improper service of the NTA where re-serving the NTA would make the noncitizen eligible for cancellation of removal because the noncitizen’s accrual of continuous physical presence would not be stopped under the stop-time rule until the later date when the NTA is re-served.

<sup>24</sup> INA § 240(b)(3)

<sup>25</sup> 8 CFR §§ 1240.4, 1240.43.

<sup>26</sup> *Id.* The custodian is the entity or individual who is holding the noncitizen in custody. Thus, a custodian could be a prison warden or the head of an institution where the noncitizen has been committed. In many cases, the noncitizen is held in DHS custody. These regulations therefore raise serious conflict of interest concerns. If the noncitizen is detained by DHS, then presumably a DHS employee could appear on the noncitizen’s behalf as their “custodian,” even though DHS also prosecutes removal cases. See Alice Clapman, *Hearing Difficult Voices: The Due Process Rights of Mentally Disabled Individuals in Removal Proceedings*, 45 NEW ENG. L. REV. 373, 381 (2011).

guardian, or friend.<sup>27</sup> Similarly, an IJ cannot accept an admission of removability “from an officer of an institution in which a respondent is an inmate or patient.”<sup>28</sup> Where an IJ cannot accept an admission of removability, the IJ will direct a hearing on issues related to removability.<sup>29</sup>

## 2. Safeguards Stemming from *Matter of M-A-M-* and Its Progeny

If an IJ concludes that a noncitizen lacks sufficient competency to proceed with their immigration hearing, the INA dictates that the IJ “shall prescribe safeguards to protect the rights and privileges of the alien.”<sup>30</sup> The BIA has clarified that this means that the IJ has “discretion to determine which safeguards are appropriate, given the particular circumstances in a case before them.”<sup>31</sup> The BIA went on to provide the following non-exhaustive list of safeguards that may be appropriate:

- 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<sup>32</sup>
- 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.<sup>33</sup>

*Matter of M-A-M-* accordingly provides practitioners with considerable leverage and flexibility in asking for appropriate safeguards.

Practitioners should be prepared to present the IJ with a list of safeguards that would allow the proceedings to move forward fairly, and should be prepared to argue why these safeguards are necessary for a fair hearing.<sup>34</sup> The requested safeguards should be tailored to the noncitizen’s needs, and need not be specifically enumerated in *Matter of M-A-M-*, as the BIA stressed that its list of

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<sup>27</sup> 8 CFR § 1240.10(c).

<sup>28</sup> *Id.* The regulatory language concerning pleadings does not include custodians in the list of individuals who may admit removability on behalf of a mentally incompetent noncitizen.

<sup>29</sup> *Id.*

<sup>30</sup> INA § 240(b)(3).

<sup>31</sup> *Matter of M-A-M-*, 25 I&N Dec. at 481-82.

<sup>32</sup> These two safeguards closely track the regulations discussed in section II.B.1, *supra*.

<sup>33</sup> *Matter of M-A-M-*, 25 I&N Dec. at 483.

<sup>34</sup> For further explanation of how to present such arguments to the IJ, see sections II.D and E, *infra*.

possible safeguards was non-exhaustive.<sup>35</sup> For example, the practitioner could request safeguards such as:

- limiting or excusing the respondent's testimony
- requiring a non-adversarial cross-examination
- allowing counsel to proffer statements on the applications
- allowing the respondent to leave the courtroom during any discussions of mental health, or
- requiring the government to bring the respondent to the courtroom rather than proceed via video-conferencing.

Testimony or a written declaration from a mental health professional may be useful in explaining the necessity of such safeguards.

Moreover, the BIA subsequently supplemented its guidance in *Matter of M-A-M-* with its decision in *Matter of J-R-R-A-*, 26 I&N Dec. 609 (BIA 2015), which addressed safeguards where competency issues affect the reliability of the noncitizen's testimony. Even though the IJ did not find that the respondent was incompetent, the BIA held that:

[W]here a mental health concern may be affecting the reliability of the applicant's testimony, the Immigration Judge 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.<sup>36</sup>

The BIA explained that when assessing credibility, the adjudicator is concerned with "whether an individual is presenting false information in an attempt to bolster or fabricate an application for relief," but a mental health condition may result in delusions or an otherwise unreliable account of events, even where there is no deliberate fabrication.<sup>37</sup> In these scenarios, "inconsistencies, implausibility, inaccuracy of details, inappropriate demeanor, and nonresponsiveness—may be reflective of a mental illness or disability, rather than an attempt to deceive the Immigration Judge."<sup>38</sup>

Practitioners can rely on this case to argue that the IJ should not apply any adverse inference if a client does not testify and should be flexible in assessing credibility. Moreover, *Matter of J-R-R-A-* lends support to arguments for safeguards related to the nature of questioning, such as allowing for leading questions or requiring an appropriate tone to questioning. Importantly, since the respondent in *Matter of J-R-R-A-* was not found incompetent,<sup>39</sup> this case also supports the argument that

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<sup>35</sup> *Id.*

<sup>36</sup> *Matter of J-R-R-A-*, 26 I&N Dec. 609, 611-12 (BIA 2015).

<sup>37</sup> *Id.* at 611.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 610.

safeguards should be applied even when a person is deemed competent to proceed under *Matter of M-A-M*.<sup>40</sup>

### 3. Where Sufficient Safeguards Are Not Available

In some cases, there are no safeguards available that will allow for a fundamentally fair hearing for a noncitizen who has a particularly severe mental disability. In the context of removal proceedings, there are no procedures currently in place to seek restoration of competency<sup>41</sup> like those that exist in the criminal law setting.<sup>42</sup> Immigration practitioners should therefore advance due process arguments for administrative closure or termination. Indeed, *Matter of M-A-M* suggests administrative closure as a temporary solution in such instances.<sup>43</sup>

However, practitioners should be prepared for opposition to requests for administrative closure or termination in light of the Attorney General's decisions in *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018) and *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018). *Matter of Castro-Tum* held that IJs and the BIA do not have the general authority to suspend indefinitely immigration proceedings by administrative closure, and instead, may only administratively close a case where a regulation or a judicially approved settlement expressly authorizes such an action.<sup>44</sup> *Matter of S-O-G-* similarly held that IJs have no inherent authority to terminate or dismiss removal proceedings, and thus, may dismiss or terminate removal proceedings only under the circumstances expressly identified in the regulations, or where DHS fails to sustain the charges of removability.<sup>45</sup>

Arguably, there is no clear statutory or regulatory authority for an IJ to grant administrative closure where there are no safeguards that would allow for a fundamentally fair hearing. Similarly, IJs lack clear authority for terminating the proceedings in situations where competency is unlikely to be

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<sup>40</sup> Safeguards and accommodations may even be appropriate for noncitizens who have a mental illness caused by traumatic experiences, such as Post-Traumatic Stress Disorder. The practitioner might request extra breaks during the presentation of testimony or might ask to be permitted to ask leading questions. An attorney might frame arguments for such accommodations under the framework of INA § 240(b)(4)(B) (stating that the noncitizen "shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government . . .").

<sup>41</sup> In *Jackson v. Indiana*, 406 U.S. 715 (1972), the Supreme Court held that a person charged with a criminal offense who is committed solely because they have been deemed incompetent to stand trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain the capacity to stand trial in the foreseeable future. Thereafter, states were incentivized to provide treatment services designed to restore the individual to a mental state that would allow them to stand trial.

<sup>42</sup> Sarah Sherman-Stokes, *No Restoration, No Rehabilitation: Shadow Detention of Mentally Incompetent Noncitizens*, 62 VILLANOVA L. REV. 787, 790 (2017), [scholarship.law.bu.edu/faculty\\_scholarship/256](http://scholarship.law.bu.edu/faculty_scholarship/256).

<sup>43</sup> *Matter of M-A-M*, 25 I&N Dec. at 483.

<sup>44</sup> *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018). Unfortunately, *Franco-Gonzalez v. Holder*, discussed at Part II.F., *infra*, does not expressly authorize administrative closure.

<sup>45</sup> *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018).

restored and where no safeguards can adequately protect the noncitizen's rights.<sup>46</sup> The lack of clear statutory and regulatory authority for termination or administrative closure in cases involving noncitizens who do not understand the proceedings against them is particularly problematic in light of *Matter of Castro-Tum* and *Matter of S-O-G-*.

Moreover, even before the Attorney General issued these two decisions, the BIA had indicated that it disfavored termination even in circumstances where the IJ saw no way to move forward with proceedings in a way that would ensure that the hearing would fair. In *Matter of M-J-K-*, 26 I&N Dec. 773 (BIA 2016), the BIA reversed an IJ's decision to terminate removal proceedings without prejudice based on the finding that the noncitizen was not competent and that adequate procedural safeguards were not available. In so concluding, the BIA reviewed the selection and implementation of safeguards *de novo*,<sup>47</sup> and determined that the provision of counsel was likely an adequate safeguard.<sup>48</sup>

Practitioners should accordingly be prepared to go forward with a hearing, even in situations where it seems that there are no adequate safeguards that would allow proceedings to be fair.<sup>49</sup> In such circumstances, in addition to arguing for all possible safeguards that might help their client, to preserve the record for appeal, practitioners should continue to argue that due process requires administrative closure or termination.

### C. The Immigration Court's Competency Assessment

Although the INA and the accompanying regulations provide some instructions for handling cases in which competency is an issue, they do not describe the process that an IJ should use to evaluate a noncitizen's mental competency.<sup>50</sup> The BIA's decision in *Matter of M-A-M-* established a framework for IJs to use in conducting this assessment. In particular, *Matter of M-A-M-* examined: 1) when an IJ should make a competency determination, 2) what factors an IJ should consider and what

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<sup>46</sup> Sarah Sherman-Stokes, *No Restoration, No Rehabilitation: Shadow Detention of Mentally Incompetent Noncitizens*, 62 VILLANOVA L. REV. 787 (2017), [scholarship.law.bu.edu/faculty\\_scholarship/256](https://scholarship.law.bu.edu/faculty_scholarship/256) (arguing for a change to the regulations to give IJs clearer authority to terminate proceedings and even order noncitizens to be released from detention in such circumstances).

<sup>47</sup> *Matter of M-J-K-*, 26 I&N Dec. 773 (BIA 2016).

<sup>48</sup> *Id.* at 778. This case demonstrates a fundamental misunderstanding of the role of a lawyer. The BIA concluded that legal representation could be an adequate safeguard even where the noncitizen completely refused to cooperate with the attorney or even appear for his hearing. See, e.g., American Bar Association Commission on Immigration, *Practice Advisory, Representing Detained Immigration Respondents of Diminished Capacity: Ethical Challenges and Best Practices* (July 2015), at 7, [www.americanbar.org/content/dam/aba/administrative/immigration/MentalHealthPaper\\_authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/immigration/MentalHealthPaper_authcheckdam.pdf) (explaining that Model Rule 1.14 states that the lawyer should "as far as reasonably possible, maintain a normal client-lawyer relationship," meaning that the nature of the attorney-client relationship— including the requirement that a lawyer respect the client's autonomy and act at the client's direction — remains the same.).

<sup>49</sup> Such situations raise thorny ethical issues regarding how an attorney can carry out a client's wishes in the absence of effective communication. For further discussion of these issues, see section IV.E, *infra*.

<sup>50</sup> *Matter of M-A-M-*, 25 I&N Dec. 474, 478 (BIA 2011); see also Section II.B., *supra*.

procedures to use in making a competency determination, and 3) what safeguards to apply to ensure that the proceedings are fair when a noncitizen is not competent.<sup>51</sup>

In answering the first question presented, the BIA acknowledged that mental competency is fluid and may need to be reassessed at multiple points over the course of the removal proceedings.<sup>52</sup>

However, the BIA also established a presumption of competency: noncitizens in immigration proceedings are presumed to be competent and, if there are no indicia of incompetency in a case, “no further inquiry regarding competency is required.”<sup>53</sup>

Indicia of mental incompetency may include behavioral observations, such as the inability to understand and respond to questions, the inability to stay on topic, or a high level of distraction. Additionally, the record may contain evidence of mental illness or incompetency, including:

- mental health assessments or medical reports from past medical treatment or from criminal proceedings
- testimony from medical health professionals
- school records regarding special education classes or individualized education plans;
- reports or letters from teachers, counselors, or social workers
- evidence of participation in programs for persons with mental illness, and
- evidence of applications for disability benefits; and affidavits or testimony from friends or family members.<sup>54</sup>

Importantly, DHS frequently will be in possession of relevant evidence, especially where the noncitizen is detained. DHS has a duty “to provide the court with relevant materials in its possession that would inform the court about the respondent’s mental competency.”<sup>55</sup>

If there are indicia of incompetency, then the IJ must conduct a competency assessment. Specifically, the IJ must “consider whether there is good cause to believe that the alien lacks sufficient competency to proceed without safeguards.”<sup>56</sup> If there is such “good cause,” the IJ must “take measures to determine whether [the] respondent is competent to participate in proceedings.”<sup>57</sup> Per *Matter of M-A-M-*:

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<sup>51</sup> *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011).

<sup>52</sup> *Id.* at 480 (“Mental competency is not a static condition. ‘It varies in degree. It can vary over time. It interferes with an individual’s functioning at different times in different ways.’ *Indiana v. Edwards*, 554 U.S. 164, 175 (2008). As a result, Immigration Judges need to consider indicia of incompetency throughout the course of proceedings to determine whether an alien’s condition has deteriorated or, on the other hand, whether competency has been restored.”).

<sup>53</sup> *Id.* at 484.

<sup>54</sup> *Id.* at 479-80

<sup>55</sup> *Id.* at 480 (citing 8 CFR § 1240.2(a) (“[DHS] counsel shall present on behalf of the government evidence material to the issues of deportability or inadmissibility and any other issues that may require disposition by the immigration judge.”) and *Matter of S-M-J-*, 21 I&N Dec. 722, 726-27 (BIA 1997) (discussing generally DHS’ role in introducing evidence)).

<sup>56</sup> *Matter of M-A-M-*, 25 I&N Dec. at 479.

<sup>57</sup> *Id.* at 480.

The test for determining whether an alien is competent to participate in immigration proceedings is whether he or 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 examine and present evidence and cross-examine witnesses.<sup>58</sup>

To find the noncitizen competent, the IJ must find that the respondent satisfies each prong of this three-part test by a preponderance of the evidence. Accordingly, the IJ should find the noncitizen is not competent to proceed without safeguards if they are unable to meet even one of the three prongs by a preponderance of the evidence.<sup>59</sup>

Neither party bears the burden of proving whether the noncitizen is competent.<sup>60</sup> Instead, the BIA has instructed that a “collaborative approach enables both parties to work with the Immigration Judge to fully develop the record regarding a respondent’s competency.”<sup>61</sup> Moreover, the IJ has an independent duty to develop the record.<sup>62</sup>

#### D. Preparing for a Competency Hearing

Where a practitioner believes a noncitizen may lack competency, the practitioner should begin by asking the noncitizen about any:

- prior diagnoses, hospitalizations and/or treatment for mental health issues
- psychiatric evaluations conducted as a part of past criminal proceedings
- medications
- head injuries
- current or past substance use
- exposure to violence/trauma
- self-injurious behavior
- difficulty concentrating
- learning disabilities or any difficulties with comprehension,<sup>63</sup> or
- any auditory disabilities.

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<sup>58</sup> *Id.* at 484. Interestingly, the BIA has concluded that an IJ’s determination regarding competency is a finding of fact that the BIA reviews to for clear error. *Matter of J-S-S-*, 26 I&N Dec. 679, 684 (BIA 2015); 8 CFR § 1003.1(d)(3)(i) (2015) (providing that the Board reviews findings of fact to determine if they are clearly erroneous).

<sup>59</sup> *Matter of J-S-S-*, 26 I&N Dec. 679 (BIA 2015).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 682 (noting that DHS has an obligation to provide the IJ with materials in its possession that are relevant to the noncitizen’s mental competence).

<sup>62</sup> See INA § 240(b)(1) (requiring IJs to “interrogate, examine, and cross-examine the alien and any witnesses”); see generally *Matter of S-M-J-*, 21 I&N Dec. 722, 727-29 (BIA 1997).

<sup>63</sup> It may be helpful to inquire if the noncitizen was ever enrolled in special education courses or placed on an individualized education plan (“IEP”).

Where the noncitizen has already had court hearings, it may be helpful to ask the noncitizen to describe their experience in court and to describe what symptoms they are currently experiencing. Practitioners should be aware that some people may minimize their symptoms.<sup>64</sup>

Next, the practitioner should gather as much evidence as possible to show that the client may not be competent. Relevant evidence might include:

- mental health assessments
- testimony from mental health professionals
- prescriptions for psychotropic medication
- medical or hospital records
- records of inpatient commitment or outpatient treatment
- school records about special education classes or individualized education programs
- reports or letters from teachers, counselors, or social workers
- evidence of services received by a state department for the developmentally disabled
- applications for disability benefits
- letters or testimony from friends, family members or defense counsel in prior criminal proceedings
- criminal records showing that the noncitizen was found incompetent to stand trial or not guilty by reason of insanity; and
- any detention incident reports indicating that the noncitizen was put in isolation because of mental illness.<sup>65</sup>

Practitioners should also ensure that DHS provides evidence relevant to competency. Although DHS has a duty to provide the court with any evidence in its possession bearing on the respondent's mental competency,<sup>66</sup> the practitioner should submit a written request to DHS for such evidence with a reminder of DHS' obligation in this regard, with a copy to the court.<sup>67</sup> Where DHS (or a DHS contractor in the case of a noncitizen detained at a private detention facility) ignores, denies, or partially complies with a records request, the practitioner can file a motion for a subpoena.<sup>68</sup> IJs have authority to subpoena records from DHS and other sources, such as private detention facilities. See INA § 240(b)(1); 8 CFR § 1003.35(b); 8 CFR § 1287.4. Additionally, practitioners in some circuits can file a Motion to Terminate based on DHS' failure to comply with its own regulations designed to protect a fundamental right during proceedings.<sup>69</sup>

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<sup>64</sup> People may minimize their symptoms for a variety of reasons, including the cultural stigmas surrounding mental illness.

<sup>65</sup> Legal Action Center Practice Advisory, *supra* note 6, at 6-7.

<sup>66</sup> *Matter of M-A-M-*, 25 I&N Dec. at 480.

<sup>67</sup> Legal Action Center Practice Advisory, *supra* note 6, at 7.

<sup>68</sup> *Id.* at 8 (explaining that the motion should document your efforts to obtain the documents and DHS' response, and should explain why the documents are essential to a fair hearing).

<sup>69</sup> See, e.g., *Leslie v. Att'y Gen.*, 611 F.3d 171 (3d Cir. 2020); *Rajah v. Mukasey*, 544 F.3d 427, 446-47 (2d Cir. 2008); *Waldron v. INS*, 17 F.3d 511 (2d Cir. 1993); *Montilla v. INS*, 926 F.2d 162 (2d Cir. 1991).

Where there are indicia of incompetency, the representative should move for a competency hearing. The practitioner should submit the relevant evidence concerning the noncitizen's mental illness but should be careful to review all records to ensure that none of the evidence submitted for the competency hearing would be prejudicial to the client in the underlying removal or custody proceedings.

The practitioner should also simultaneously submit a written motion for termination or administrative closure or for specific safeguards and accommodations for the noncitizen.<sup>70</sup> The requested safeguards need not be the safeguards explicitly listed in *Matter of M-A-M-*; instead, the practitioner should request any safeguards that the client requires.<sup>71</sup> Additionally, the practitioner should request safeguards even if the noncitizen is deemed competent.<sup>72</sup> The practitioner should explain why such safeguards and accommodations are necessary for a fundamentally fair hearing and should reference the regulations and case law on safeguards outlined in Part II.B, *infra*.

### E. During the Competency Hearing

The competency hearing can occur at different points during the proceedings. Because competency is often fluid<sup>73</sup> and because indicia of incompetency may not become apparent right away, a competency hearing may happen right after the NTA is filed, after any of the master calendar hearings, or even after the individual hearing has begun.<sup>74</sup>

The IJ has broad discretion to decide which measures to use during the hearing in coming to a determination regarding the noncitizen's competency.<sup>75</sup> Depending on the circumstances of the case, the IJ may:

- pose simple questions to the noncitizen, such as asking if the noncitizen knows where the hearing is taking place, asking if they know what the purpose of the proceeding is, or asking whether the noncitizen is taking any medications
- allow a family member or friend to provide relevant information to the court

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<sup>70</sup> The Rehabilitation Act, 29 USC § 701 et seq., provides a helpful framework for arguments for accommodations.

<sup>71</sup> The *M-A-M-* decision makes clear that the list of safeguards that appears in the decision is non-exhaustive. *Matter of M-A-M-*, 25 I&N Dec. at 483.

<sup>72</sup> See *Matter of J-R-R-A-*, 26 I&N Dec. 609 (BIA 2015) (applying safeguards even absent a finding that the respondent was not competent).

<sup>73</sup> Competency is not always fluid. There are some cognitive or intellectual disabilities and mental illnesses that cannot be effectively treated through medication or other therapies that may manifest in a relatively static manner.

<sup>74</sup> *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011) ("Mental competency is not a static condition. 'It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways.' . . . As a result, Immigration Judges need to consider indicia of incompetency throughout the course of proceedings . . .").

<sup>75</sup> *Id.* (stating 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").

- request that the parties submit additional evidence regarding the noncitizen’s mental health, such as medical records or documentation from any prior criminal proceedings in which a competency evaluation was conducted
- continue the proceedings to determine whether the noncitizen’s condition may change over time; and/or
- order that a mental competency evaluation be performed by a medical professional.<sup>76</sup>

Practitioners should be prepared to elicit testimony about the noncitizen’s understanding of the nature and purpose of the proceedings, memory and ability to assist with representation.<sup>77</sup> Often, the best person to provide such testimony will be an expert witness who has completed a mental health evaluation of the noncitizen.<sup>78</sup> Where the IJ wants to hear testimony directly from the noncitizen, practitioners may decline to call their own client as a witness, arguing that they do not want to call a witness who they believe to be incompetent. This strategy forces DHS or the IJ to call the witness, and then allows the practitioner to ask leading questions on cross-examination and to object to DHS’ leading questions.

The practitioner should also be prepared to argue for a competency finding that will be most advantageous for the noncitizen client. During the competency hearing, the practitioner should also move the IJ to apply specific safeguards. The practitioner should argue that even if the IJ finds the noncitizen competent, safeguards are still necessary to comport with due process. An overview of possible safeguards, and the legal justification for these safeguards, is provided above.

#### F. *Franco-Gonzalez v. Holder* Implementation

Some individuals who have been, are, or will be, detained in California, Washington, or Arizona may benefit from the settlement agreement reached in *Franco-Gonzalez v. Holder*, CV 10–02211 DMG (DTBx), 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013). The Plaintiff, a detained noncitizen, alleged various violations of the INA, the Fifth Amendment of the U.S. Constitution, and Section 504 of the Rehabilitation Act.<sup>79</sup>

Specifically, the plaintiff alleged that, first, “the government’s failure to adopt procedures to deal with the needs of people with mental disabilities in immigration proceedings”<sup>80</sup> violated INA §§

<sup>76</sup> See CAIR Coalition Practice Manual, *supra* note 6, at 46.

<sup>77</sup> Legal Action Center Practice Advisory, *supra* note 6, at 10 (suggesting questions like: Who am I? Where are we? What is your understanding of why we are here? Are you willing to help me with your case? Who is opposing you in this case? What is the IJ’s role? What could happen to you if you do not win your case? Why are you in detention? Do you take any medications? Which ones?). Practitioners should limit their questions to matters relevant to the three-part test from *Matter of M-A-M-* to avoid potentially prejudicing the relief stage of the case.

<sup>78</sup> For a discussion of working with mental health professionals, see section IV.B., *infra*.

<sup>79</sup> *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG DTBX, 2013 WL 3674492, at \* 1 (C.D. Cal. Apr. 23, 2013).

<sup>80</sup> Third Amended Class-Action Complaint at 40, *Franco-Gonzalez v. Holder*, No. 2:10-cv-02211-DMG-DTB (C.D. Cal. Oct. 25, 2011), [www.clearinghouse.net/chDocs/public/IM-CA-0067-0002.pdf](http://www.clearinghouse.net/chDocs/public/IM-CA-0067-0002.pdf).

240(b)(3)–(4)<sup>81</sup> and the Due Process Clause in the Fifth Amendment of the U.S. Constitution.<sup>82</sup> The plaintiff maintained, “people with a serious mental disorder or defect [must] receive an adequate competency evaluation” as an initial step to ensure compliance with the statute and the Due Process Clause.<sup>83</sup>

The plaintiff also argued that the government’s failure to prescribe safeguards violated the Administrative Procedures Act, 5 USC § 702, *et seq.*<sup>84</sup> Next, the plaintiff contended that the Due Process Clause, INA § 240(b)(4), and Section 504 of the Rehabilitation Act require that the court appoint counsel for unrepresented detained noncitizens who are found to be incompetent to represent themselves in immigration court.<sup>85</sup>

Finally, the plaintiff argued that under Section 504 of the Rehabilitation Act, the INA, and the Due Process Clause, noncitizens subject to prolonged detention on account of their disabilities are entitled to bond hearings where the government bears the burden to prove that prolonged detention remains justified.<sup>86</sup>

ICE released Mr. Franco from custody and thereafter, his representatives filed a class action complaint, adding several mentally disabled noncitizens held in custody without counsel. The court certified a Main Class and two Sub-Classes:

All individuals who are or will be in DHS custody for removal proceedings in California, Arizona, and Washington who have been identified by or to medical personnel, DHS, or an Immigration Judge, as having a serious mental disorder or defect that may render them incompetent to represent themselves in detention or removal proceedings, and who presently lack counsel in their detention or removal proceedings.

Sub–Class 1: Individuals in the above-named Plaintiff Class who have a serious mental disorder or defect that renders them incompetent to represent themselves in detention or removal proceedings.

Sub–Class 2: Individuals in the above-named Plaintiff Class who have been detained for more than six months.<sup>87</sup>

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<sup>81</sup> Section 240(b)(3) provides that “the Attorney General shall prescribe safeguards to protect the rights and privileges” of the mentally ill noncitizen. Meanwhile, Section 240(b)(4) require that noncitizens in removal proceedings have a “reasonable opportunity” to present, examine and object to evidence and the “privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing.”

<sup>82</sup> Third Amended Class-Action Complaint at 40, *Franco-Gonzalez v. Holder*, No. 2:10-cv-02211-DMG-DTB (C.D. Cal. Oct. 25, 2011), at 46–47, [www.clearinghouse.net/chDocs/public/IM-CA-0067-0002.pdf](http://www.clearinghouse.net/chDocs/public/IM-CA-0067-0002.pdf).

<sup>83</sup> *Id.* at 40.

<sup>84</sup> *Id.* at 51.

<sup>85</sup> *Id.* at 40–42, 47–48.

<sup>86</sup> *Id.* at 42–43, 49–51.

<sup>87</sup> *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG DTBX, 2013 WL 3674492, at \*2 (C.D. Cal. Apr. 23, 2013).

On April 23, 2013, the court held that Section 504 of the Rehabilitation Act requires the government to “provide Qualified Representatives to represent Sub–Class One members in all aspects of their removal and detention proceedings.”<sup>88</sup> The court further found that the INA requires the “provision of a custody redetermination hearing for individuals in Sub–Class Two who have been detained for a prolonged period of time greater than 180 days.”<sup>89</sup>

Following this court order, the parties continued negotiations on the remedy that should be afforded to *Franco* class members who had been ordered removed. On Feb. 27, 2015, the court entered an order of full settlement of claims concerning these Class members.<sup>90</sup> Per the agreement, DHS agreed to join or file a motion to reopen for all Class members who had been ordered removed during the pendency of the *Franco* litigation.<sup>91</sup>

Additionally, in the aftermath of the *Franco* litigation, the Executive Office for Immigration Review (EOIR) expanded many of *Franco*’s protections to noncitizens detained throughout the United States. EOIR initiated a “Nationwide Policy to provide enhanced procedural protections, including competency inquiries, mental health examinations, and bond hearings to certain unrepresented and detained respondents with serious mental disorders or conditions that may render them incompetent to represent themselves in immigration proceedings.”<sup>92</sup> As part of that policy, EOIR launched the National Qualified Representative Program (NQRP), a nationwide program to provide legal representation to unrepresented and detained noncitizens determined to be mentally incompetent to represent themselves in immigration proceedings.<sup>93</sup> Through this program, the IJ can appoint a qualified representative (QR) to represent a detained noncitizen once the noncitizen has been determined to be mentally incompetent. The program also provides funding for certain expenses connected with the representation, such as for forensic mental health evaluations.

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<sup>88</sup> *Id.* at \*20. A Qualified Representative may be “1) an attorney, 2) a law student or law graduate directly supervised by a retained attorney, or 3) an accredited representative,” all as defined under 8 CFR § 1292.1.1.1. See *Franco-Gonzales v. Holder*, 828 F. Supp. 2d 1133, 1147 (C.D. Cal. 2011).

<sup>89</sup> *Id.*

<sup>90</sup> See Tahirah Dean & Dan Kanstroom, Post-Deportation Human Rights Project, Boston College, *Practice Advisory: Reopening a Case for the Mentally Incompetent in Light of Franco-Gonzalez v. Holder* (November 2015), [www.bc.edu/content/dam/files/centers/humanrights/pdf/FINAL-FrancoPracticeAdvisory.pdf](http://www.bc.edu/content/dam/files/centers/humanrights/pdf/FINAL-FrancoPracticeAdvisory.pdf).

<sup>91</sup> 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), [www.ice.gov/sites/default/files/documents/Document/2015/Settlement%20Agreement.pdf](http://www.ice.gov/sites/default/files/documents/Document/2015/Settlement%20Agreement.pdf). Counsel representing a noncitizen who has been, is, or will be detained in California, Washington, or Arizona should ascertain whether the settlement agreement reached in *Franco-Gonzalez v. Holder* may provide benefits or protections to their client. For a detailed explanation, see Tahirah Dean & Dan Kanstroom, Post-Deportation Human Rights Project, Boston College, *Practice Advisory: Reopening a Case for the Mentally Incompetent in Light of Franco-Gonzalez v. Holder* (November 2015), [www.bc.edu/content/dam/files/centers/humanrights/pdf/FINAL-FrancoPracticeAdvisory.pdf](http://www.bc.edu/content/dam/files/centers/humanrights/pdf/FINAL-FrancoPracticeAdvisory.pdf).

<sup>92</sup> Department of Justice, Executive Office for Immigration Review, “National Qualified Representative Program (NQRP),” [www.justice.gov/eoir/national-qualified-representative-program-nqrp](http://www.justice.gov/eoir/national-qualified-representative-program-nqrp).

<sup>93</sup> *Id.* Practitioners acting as qualified representatives may need to account for additional considerations related to funding for forensic mental health evaluations and legal representation provided through the NQRP in developing their case strategy.

## G. Representing Mentally Ill Noncitizens After the Immigration Court Enters a Removal Order

Where a noncitizen with mental illness has already been ordered removed, it may be appropriate to file a motion to reopen or reconsider. A motion to reopen is an “important safeguard” intended “to ensure a proper and lawful disposition” of immigration proceedings.<sup>94</sup> At its core, a motion to reopen is a request that the IJ or BIA reopen proceedings after an IJ has entered a final order.<sup>95</sup> A motion to reopen is based on factual grounds and seeks a fresh determination based on newly discovered facts or a change in circumstances since the time of the hearing.<sup>96</sup> A motion to reopen may be appropriate where, for example, country conditions for individuals with mental illness have worsened or where there was ineffective assistance of counsel because counsel failed to call attention to indicia of incompetency or argue for safeguards.

A motion to reconsider, in contrast, seeks a new determination based on errors of fact or law.<sup>97</sup> A motion to reconsider requests that an IJ or the BIA reexamine a decision “in light of additional legal arguments, a change of law, or perhaps an argument or aspect of the case that was overlooked earlier,”<sup>98</sup> including errors of law or fact in the previous order.<sup>99</sup> A motion to reconsider may be appropriate where an IJ did not apply the correct legal standard when conducting a competency hearing, failed to apply appropriate safeguards, or overlooked indicia of incompetency.

There are time, number and content requirements for both motions to reopen and motions to reconsider.<sup>100</sup> In general, a noncitizen who has been ordered removed may file only one motion to reconsider, and it must be filed within 30 days of the date of entry of a final administrative order.<sup>101</sup> Similarly, a noncitizen generally may only file one motion to reopen, and it must be filed within 90

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<sup>94</sup> *Dada v. Mukasey*, 554 U. S. 1, 18 (2008).

<sup>95</sup> CLINIC has a wide variety of resources to assist practitioners with motions to reopen. See, e.g., Aimee Mayer-Salins, CLINIC & Boston College Post-Deportation Human Rights Project, *Practice Advisory: Post-Departure Motions to Reopen and Reconsider* (November 2019), [cliniclegal.org/resources/removal-proceedings/practice-advisory-post-departure-motions-reopen-and-reconsider](https://www.cliniclegal.org/resources/removal-proceedings/practice-advisory-post-departure-motions-reopen-and-reconsider); Conchita Cruz, Katy Lewis, Michelle Mendez, Swapna Reddy, Dorothy Tegeler and Liz Willis, CLINIC and ASAP, *A Guide to Assisting Asylum-Seekers with In Absentia Removal Orders* (July 2019), [cliniclegal.org/sites/default/files/resources/defending-vulnerable-populations/2019-07-10-ASAP-CLINIC-Motion-to-Reopen-Guide.pdf](https://www.cliniclegal.org/sites/default/files/resources/defending-vulnerable-populations/2019-07-10-ASAP-CLINIC-Motion-to-Reopen-Guide.pdf); Michelle Mendez and Rebecca Scholtz, CLINIC, *Practice Advisory: Motions to Reopen for DACA Recipients with Removal Orders* (2018), [cliniclegal.org/resources/removal-proceedings/practice-advisory-motions-reopen-daca-recipients-removal-orders](https://www.cliniclegal.org/resources/removal-proceedings/practice-advisory-motions-reopen-daca-recipients-removal-orders).

<sup>96</sup> See INA § 240(c)(7)(B); 8 CFR §§ 1003.2(c), 1003.23(b).

<sup>97</sup> See INA § 240(c)(6)(C); 8 CFR § 1003.2(b)(1).

<sup>98</sup> *Matter of Ramos*, 23 I&N Dec. 336, 338 (BIA 2002).

<sup>99</sup> See INA § 240(c)(6)(C); 8 CFR §§ 1003.2(b)(1) (proceedings before the BIA), 1003.23(b)(2) (proceedings before the immigration court).

<sup>100</sup> See INA § 240(c)(6)(A)-(C) (reconsideration); INA §§ 240(c)(7)(A)-(C), 240(b)(5)(C) (reopening); 8 CFR §§ 1003.23 (immigration court), 1003.2 (BIA).

<sup>101</sup> See INA § 240(c)(6)(A), (B). The Eleventh Circuit has held that 8 C.F.R. § 1003.2(b)(2) imposes a limit of one motion to reconsider per decision, rather than per case. See *Calle v. U.S. Atty Gen.*, 504 F.3d 1324, 1328-30 (11th Cir. 2007).

days of the date of entry of a final administrative order.<sup>102</sup> However, most circuit courts have recognized that the filing deadlines, and in some instances the numerical limitations, are subject to equitable tolling.<sup>103</sup> Moreover, the regulations state that the BIA and IJs have *sua sponte* authority to reopen or reconsider their own decisions “at any time,” without regard to the time and number limitations.<sup>104</sup>

## 1. Equitable Tolling and Mental Illness

Equitable tolling is available where (1) some extraordinary circumstance prevented timely filing, and (2) the individual has been diligently pursuing their rights.<sup>105</sup> Many cases outside the immigration context have held that mental illness may be a basis for equitable tolling.<sup>106</sup> Many of these cases conclude that mental illness may, itself, amount to an extraordinary circumstance, depending on the

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<sup>102</sup> See INA § 240(c)(7)(A), (c)(7)(C)(i). Importantly, there are statutory exceptions to these time and numerical limitations if the noncitizen is seeking asylum or related relief based on changed country conditions; is a battered spouse or child seeking certain forms of relief under the Violence Against Women Act; or was ordered removed *in absentia*.

<sup>103</sup> See *Lugo-Resendez v. Lynch*, 831 F.3d 337 (5th Cir. 2016); *Kuusk v. Holder*, 732 F.3d 302, 305 (4th Cir. 2013); *Avila-Santoyo v. U.S. Att’y Gen.*, 713 F.3d 1357, 1364 (11th Cir. 2013) (en banc) (per curiam) (90-day time limitation is a non-jurisdictional claim processing rule subject to equitable tolling); *Alzaarir v. Att’y Gen.*, 639 F.3d 86, 90 (3d Cir. 2011) (per curiam); *Neves v. Holder*, 613 F.3d 30 (1st Cir. 2010) (assuming, but not deciding, that time and number limitations are subject to equitable tolling); *Barry v. Mukasey*, 524 F.3d 721, 724 (6th Cir. 2008); *Yuan Goa v. Mukasey*, 519 F.3d 376, 377 (7th Cir. 2008); *Pervaiz v. Gonzales*, 405 F.3d 488, 490 (7th Cir. 2005) (time limitation subject to equitable tolling); *Hernandez-Moran v. Gonzales*, 408 F.3d 496, 499-500 (8th Cir. 2005); *Borges v. Gonzales*, 402 F.3d 398 (3d Cir. 2005) (180-day time limitation to reopen *in absentia* order subject to equitable tolling); *Harchenko v. INS*, 379 F.3d 405 (6th Cir. 2004) (time limitation subject to equitable tolling); *Riley v. INS*, 310 F.3d 1253, 1257-58 (10th Cir. 2002); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1190-93 (9th Cir. 2001) (en banc); *Javorski v. INS*, 232 F.3d 124, 129-33 (2d Cir. 2000) (Sotomayor, J.); *Iturribaria v. INS*, 321 F.3d 889 (9th Cir. 2003) (number limitation subject to equitable tolling).

<sup>104</sup> 8 CFR §§ 1003.2(a) (BIA), 1003.23(b)(1) (IJ). The BIA has stated that it generally will only exercise *sua sponte* authority in exceptional situations. See *Matter of X-G-W-*, 22 I&N Dec. 71, 73 (BIA 1998); *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997).

<sup>105</sup> See *Holland v. Florida*, 560 U.S. 631, 649 (2010); *accord Jobe v. INS*, 238 F.3d 96, 100 (1st Cir. 2001) (“The fundamental principle is that equitable tolling is appropriate only when the circumstances that cause a [party] to miss a filing deadline are out of his hands ... For this reason, equitable tolling is unavailable where a party fails to exercise due diligence.”) (internal quotations and citations omitted). Importantly, where an IJ declines to toll a filing deadline, federal courts have jurisdiction to review whether the IJ properly applied the law to undisputed facts. *Guerrero-Lasprilla v. Barr*, 2020 U.S. LEXIS 1907, 2020 WL 1325822 (U.S. Mar. 23, 2020).

<sup>106</sup> Aimee Mayer-Salins, Boston College Center for Human Rights and International Justice, Post-Deportation Human Rights Project, *Practice Advisory, Mentally Incompetent But Deported Anyway: Strategies for Helping a Mentally Ill Client Return to the United States* (September 2015), [www.bc.edu/content/dam/files/centers/humanrights/pdf/PracticeAdvisory-MentallyIncompetentDeportees.pdf](http://www.bc.edu/content/dam/files/centers/humanrights/pdf/PracticeAdvisory-MentallyIncompetentDeportees.pdf) (citing *Davis v. Humphreys*, 747 F.3d 497 (7th Cir. 2014); *Ata v. Scutt*, 662 F.3d 736, 742 (6th Cir. 2011); *Zerilli-Edelglass v. New York City Transit Auth.*, 333 F.3d 74, 80 (2d Cir. 2003) (“Equitable tolling is generally considered appropriate where . . . a plaintiff’s medical condition or mental impairment prevented her from proceeding in a timely fashion.”) (citations omitted); *Brown v. Parkchester S. Condos.*, 287 F.3d 58, 60 (2d Cir. 2002) (concluding that plaintiff proffered sufficient evidence to warrant a hearing on whether her mental incapacity required tolling); *Meléndez-Arroyo v. Cutler-Hammer de P.R., Co.*, 273 F.3d 30, 39 (1st Cir. 2001) (remanding for factual inquiry into whether plaintiff’s mental state warranted equitable tolling); *Miller v. Runyon*, 77 F.3d 189, 191 (7th Cir. 1996) (stating that equitable tolling lies “if the plaintiff because of disability, irremediable lack of information, or other circumstances beyond his control just cannot reasonably be expected to sue in time”); *Nunnally v. MacCausland*, 996 F.2d 1, 5 (1st Cir. 1993) (holding that 5 U.S.C. § 7703(b)(2) can be tolled due to mental incapacity)).

severity of the mental illness.<sup>107</sup> Likewise, the mental illness may affect the due diligence analysis. Courts have explained that while the individual “must diligently seek assistance and exploit whatever assistance is reasonably available,” the adjudicator should evaluate whether the person’s mental illness prevented them from finding assistance, communicating with, or sufficiently supervising any assistance actually found.<sup>108</sup> Mental health professionals may be helpful in explaining why a mental illness prevented an individual from seeking legal assistance or working effectively with the legal representative, and explaining the barriers that an individual with mental illnesses may face in accessing treatment that would allow them to more effectively or diligently pursue the legal claim.<sup>109</sup>

## 2. *Sua Sponte* Reopening or Reconsideration and Mental Illness

Mental illness may also provide a basis for *sua sponte* reopening where a motion would otherwise be time- or number-barred.<sup>110</sup> *Sua sponte* reopening is appropriate where there are exceptional circumstances.<sup>111</sup> Depending on the severity of the mental illness, counsel may argue that the mental illness constitutes an exceptional circumstance warranting *sua sponte* reopening.<sup>112</sup>

## 3. Joint Motions to Reopen

Where DHS joins a motion to reopen, the motion is not subject to any time or number bars.<sup>113</sup> Accordingly, it may be advantageous to contact DHS to see if it will agree to join a motion to reopen in a case involving competency issues.<sup>114</sup>

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<sup>107</sup> See, e.g., *Forbess v. Franke*, 749 F.3d 837 (9th Cir. 2014); *Bills v. Clark*, 628 F.3d 1092 (9th Cir. 2010); *Stoll v. Runyan*, 165 F.3d 1238, 1242 (9th Cir. 1999); see also *Ata v. Scutt*, 662 F.3d 736, 742 (6th Cir. 2011).

<sup>108</sup> *Bills v. Clark*, 628 F.3d 1092, 1101 (9th Cir. 2010).

<sup>109</sup> Aimee Mayer-Salins, Boston College Center for Human Rights and International Justice, Post-Deportation Human Rights Project, *Practice Advisory, Mentally Incompetent But Deported Anyway: Strategies for Helping a Mentally Ill Client Return to the United States* (September 2015), [www.bc.edu/content/dam/files/centers/humanrights/pdf/PracticeAdvisory-MentallyIncompetentDeportees.pdf](http://www.bc.edu/content/dam/files/centers/humanrights/pdf/PracticeAdvisory-MentallyIncompetentDeportees.pdf); see also Section IV, *infra*.

<sup>110</sup> 8 CFR § 1003.23(b)(1) (providing that IJs have *sua sponte* authority to reopen their own decisions “at any time,” without regard to the time and number limitations).

<sup>111</sup> *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997) (“The Board’s power to reopen or reconsider cases *sua sponte* is limited to exceptional circumstances”); see also *Matter of Yewondwosen*, 21 I&N Dec. 1025, 1027 (BIA 1997) (explaining that the “Board has the ability to reopen or remand proceedings when appropriate, such as for good cause, fairness, or reasons of administrative economy.”).

<sup>112</sup> See *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997); accord *B-A-D-N-*, AXXX XXX 139 (BIA March 8, 2019)(unpublished) (reopening proceedings *sua sponte* for respondent to apply for adjustment of status in light of her residence in the United States for more than 30 years, her diminished mental capacity, abuse inflicted by former partners, and U.S. citizen daughter with anxiety disorder). Practitioners may obtain this and other unpublished decisions through the IRAC Index of Unpublished Decisions of the Board of Immigration Appeals, [www.iraac.net/unpublished/index-2/](http://www.iraac.net/unpublished/index-2/).

<sup>113</sup> 8 CFR § 1003.23(b)(4)(iv).

<sup>114</sup> See section II.F, *supra*. The *Franco-Gonzalez* settlement agreement included an agreement by DHS to file joint motions to reopen for certain class members and to facilitate the return of certain class members who had been removed from the United States. Counsel representing a noncitizen who has been, is, or will be detained in California, Washington, or Arizona should ascertain whether the settlement agreement reached in *Franco-Gonzalez v. Holder*, CV 10–02211 DMG (DTBx), 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013) may provide benefits or protections to their client. For a detailed explanation, see Tahirah Dean & Dan Kanström, Post-Deportation Human Rights Project, Boston College, *Practice Advisory: Reopening a Case for the Mentally Incompetent in Light of*

### III. Fast Track Proceedings

The INA provides for three types of removal proceedings in which a noncitizen may be removed from the United States by DHS without ever appearing before an IJ: administrative removal proceedings,<sup>115</sup> expedited removal proceedings<sup>116</sup> and reinstatement of removal proceedings.<sup>117</sup> This practice advisory collectively refers to these three types of proceedings using the term “fast track” proceedings.

Fast track removal proceedings happen quickly, and lack robust procedural protections.<sup>118</sup> Fast track proceedings are accordingly especially challenging for those who have a mental illness.

#### A. Fast Track Removal Proceedings Provide Extremely Limited Procedural Protections

By way of background, administrative removal under INA § 238(b) is a summary process in which a person may be removed if a “low-level DHS officer decides that the respondent is a noncitizen, is not a lawful permanent resident, and has an aggravated felony conviction.”<sup>119</sup> The alleged noncitizen, who may have spent significant time in the United States and may have close family ties to the United States, lacks many basic procedural rights. For example, the noncitizen does not have a right to call witnesses, cross-examine DHS’ witnesses, or make any kind of in-person argument challenging DHS’ allegations or evidence.<sup>120</sup> Moreover, once DHS issues the Final Administrative Removal Order, the noncitizen has no statutory right to file an administrative appeal.<sup>121</sup> The few rights that the noncitizen in administrative removal proceedings does enjoy are: a right to be represented by counsel at the

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Franco-Gonzalez v. Holder (November 2015), [www.bc.edu/content/dam/files/centers/humanrights/pdf/FINAL-FrancoPracticeAdvisory.pdf](http://www.bc.edu/content/dam/files/centers/humanrights/pdf/FINAL-FrancoPracticeAdvisory.pdf).

<sup>115</sup> INA § 238; 8 CFR § 238.1; see also National Immigration Project of the National Lawyers Guild & Immigrant Defense Project, *Practice Advisory: Administrative Removal under 238(b): Questions and Answers* (Feb. 16, 2017), [immigrantdefenseproject.org/wp-content/uploads/practice-advisory-administrative-removal-under-238b.pdf](http://immigrantdefenseproject.org/wp-content/uploads/practice-advisory-administrative-removal-under-238b.pdf).

<sup>116</sup> INA § 235; 8 CFR § 235.3; see also American Immigration Council, National Immigration Project of the National Lawyers Guild, & American Civil Liberties Union, *Practice Advisory, Expedited Removal: What Has Changed Since Executive Order No. 13767, Border Security and Immigration Enforcement Improvements (Issued on January 25, 2017)* (Feb. 20, 2017), [www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/final\\_expedited\\_removal\\_advisory\\_updated\\_2-21-17.pdf](http://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/final_expedited_removal_advisory_updated_2-21-17.pdf).

<sup>117</sup> INA § 241(a)(5); 8 CFR § 241.8; see also American Immigration Council & National Immigration Project of the National Lawyers Guild, *Practice Advisory: Reinstatement of Removal* (May 23, 2019), [www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/reinstatement\\_of\\_removal.pdf](http://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/reinstatement_of_removal.pdf).

<sup>118</sup> E.g. *Fast Track to Injustice*, *supra* note 7, at 564.

<sup>119</sup> National Immigration Project of the National Lawyers Guild & Immigrant Defense Project, *Practice Advisory, Administrative Removal under 238(b): Questions and Answers* (Feb. 16, 2017), at 1, [immigrantdefenseproject.org/wp-content/uploads/practice-advisory-administrative-removal-under-238b.pdf](http://immigrantdefenseproject.org/wp-content/uploads/practice-advisory-administrative-removal-under-238b.pdf).

<sup>120</sup> *Id.*

<sup>121</sup> INA § 238(b)(3).

noncitizen's own expense,<sup>122</sup> a right to inspect the evidence against him,<sup>123</sup> a right to translation or interpretation,<sup>124</sup> and a right to file a petition for review.<sup>125</sup>

Expedited removal proceedings similarly provide for few procedural protections. Expedited removal is a summary process used against arriving noncitizens who allegedly have attempted to obtain admission through fraud or misrepresentation or who lack valid travel documents.<sup>126</sup> A person facing expedited removal proceedings generally has only three defenses available: 1) a claim of status as an asylee, refugee, lawful permanent resident, or U.S. citizen; 2) a claim that they were actually admitted or paroled; or 3) a claim that they fear persecution or torture if returned to their home country.<sup>127</sup> There is no right to representation by counsel,<sup>128</sup> nor any right to review by an IJ or the Board of Immigration Appeals.<sup>129</sup> Judicial review of expedited removal orders is also extremely limited. Federal courts lack jurisdiction over nearly all issues related to expedited removal proceedings, with the narrow exception that in the context of a habeas corpus proceeding, a district court may review 1) whether the individual is a citizen, lawful permanent resident, asylee or refugee and 2) whether the person was ordered removed through the expedited removal process.<sup>130</sup>

Reinstatement of removal is a summary removal procedure that applies to most noncitizens who unlawfully return to the United States after having been removed under a prior order of deportation, exclusion, or removal.<sup>131</sup> Noncitizens facing reinstatement have few procedural rights. DHS is supposed to consider all relevant evidence in an attempt to verify the noncitizen's claim that they have been lawfully admitted, including by checking government databases.<sup>132</sup> DHS is also supposed to provide the noncitizen with written notice of its determination that they are subject to reinstatement, and advise the noncitizen that they have the right to contest the reinstatement finding and request

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<sup>122</sup> INA § 238(b)(4)(B).

<sup>123</sup> INA § 238(b)(4)(C); 8 CFR § 238.1(c)(2)(ii).

<sup>124</sup> 8 CFR § 238.1(b)(2)(v).

<sup>125</sup> INA § 238(b)(3); INA § 242(a)(1), (b)(1). DHS cannot remove a noncitizen who has a Final Administrative Removal Order for 14 days after the order is issued so that the noncitizen has an opportunity to seek judicial review. INA § 238(b)(3); 8 CFR § 238.1(f)(1).

<sup>126</sup> INA § 235(b).

<sup>127</sup> 8 CFR § 235.3(b)(4), (5), (6); see also *Fast Track to Injustice*, *supra* note 7, at 548 (detailing what happens when an individual raises one of these defenses).

<sup>128</sup> See, e.g., *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 497 (9th Cir. 2007) ("Any such right [to counsel] is statutory and the INA extends the right to representation by counsel only to aliens in proceedings before an Immigration Judge.")

<sup>129</sup> *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1085-87 (9th Cir. 2011); 8 CFR § 235.3(b)(2)(ii).

<sup>130</sup> INA § 242(a)(2)(A), (e)(2); but see *Thuraissigiam v. Department of Homeland Security*, 917 F.3d 1097 (9th Cir. 2018) (holding that the jurisdiction stripping provision of INA § 242 violates the Constitution's Suspension Clause, and stating that the district court does have jurisdiction to review the noncitizen's claim that federal government failed to follow the required procedures and apply the correct legal standards when evaluating his fear-based claim during expedited removal proceedings), *cert. granted* 140 S.Ct. 427 (U.S. Oct. 18, 2019) (No. 19-161).

<sup>131</sup> INA § 241(a)(5); 8 CFR § 241.8; see also American Immigration Council & National Immigration Project of the National Lawyers Guild, *Practice Advisory: Reinstatement of Removal* (May 23, 2019),

[www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/reinstatement\\_of\\_removal.pdf](http://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/reinstatement_of_removal.pdf).

<sup>132</sup> 8 CFR § 241.8(a)(3).

reconsideration of the decision.<sup>133</sup> Finally, noncitizens who express a fear of persecution must be referred to an asylum officer for a reasonable fear interview.<sup>134</sup>

Fast track removal proceedings thus offer extremely limited procedural protections and can be particularly difficult for noncitizens who have mental illness. As discussed above, mental illness can prevent a noncitizen from effectively presenting their case even in proceedings under section 240 of the INA.<sup>135</sup> The setting of a fast track removal proceeding further compounds a noncitizen's inability to present their case effectively because of mental illness.<sup>136</sup> Fast track removal proceedings happen quickly and there is no neutral arbiter with an obligation to develop the record.<sup>137</sup>

## **B. Advocating for a Mentally Ill Noncitizen Placed in Fast Track Removal Proceeding**

Currently, DHS does not conduct competency determinations for noncitizens in fast track removal proceedings, and no policies exist to provide protections, safeguards, or reasonable accommodations to noncitizens in these proceedings.<sup>138</sup> These fast track proceedings are accordingly particularly treacherous for noncitizens with mental illness.

To the extent possible, practitioners should ask DHS to exercise its discretion to place the noncitizen in proceedings under section 240 of the INA.<sup>139</sup> Practitioners should consider advancing arguments that placing the noncitizen with a mental illness in a fast track proceeding violates section 504 of the Rehabilitation Act and violates the noncitizen's due process rights.<sup>140</sup>

The Rehabilitation Act prohibits federal agencies from discriminating against individuals based on their disabilities, providing that:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency. . .<sup>141</sup>

The regulations further specify that it is unlawful for a public entity to “[p]rovide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that

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<sup>133</sup> 8 CFR § 241.8(b).

<sup>134</sup> 8 CFR § 241.8(e).

<sup>135</sup> *Supra* Part III.

<sup>136</sup> *E.g.* Fast Track to Injustice, *supra* note 7, at 563.

<sup>137</sup> *Id.* at 564.

<sup>138</sup> *Id.* at 558.

<sup>139</sup> Unfortunately, federal courts lack jurisdiction to review nearly all challenges to a person's placement in fast track removal proceedings or to the fairness of the procedures for fast track removal proceedings. See INA § 242. Consequently, these arguments will need to be advanced to DHS.

<sup>140</sup> Fast Track to Injustice, *supra* note 7.

<sup>141</sup> 29 USC § 794.

provided to others.”<sup>142</sup> DHS regulations also require all DHS components to provide reasonable accommodations to people with disabilities.<sup>143</sup> Fast track proceedings often simply are not conducive to providing the necessary accommodations, so practitioners should encourage DHS officials to exercise their discretion to terminate such proceedings and instead put the mentally ill individual in 240 proceedings, allow the noncitizen to withdraw the application for admission, or decline to prosecute.

Likewise, immigration practitioners should advance due process arguments to persuade DHS officials to terminate fast track removal proceedings against the noncitizen where there are indicia of incompetency.<sup>144</sup> Immigration proceedings must meet traditional standards of fundamental fairness, which the Supreme Court has specified means that noncitizens must at least be afforded the specific rights and privileges provided in the INA.<sup>145</sup> However, procedural rights are only real and sufficient if a person can exercise them.<sup>146</sup> Many noncitizens with mental illness will not be able to effectively exercise their rights in fast track removal proceedings. Indeed, they may lack a basic understanding of the nature and purpose of the proceeding, may have trouble processing necessary information, and may not be able to effectively communicate.<sup>147</sup> Due process therefore requires that DHS afford noncitizens with mental illness more procedural protections than those available in fast track removal proceedings. DHS should accordingly exercise its discretion to instead place noncitizens with mental illnesses into 240 proceedings, allow the noncitizen to withdraw the application for admission, or decline to prosecute at all.

### C. After DHS Enters a Removal Order: Motions under 8 CFR § 103.5(A)(1)

Where a person with a mental illness already has an administrative, expedited, or reinstated order of removal, a practitioner can seek reopening or reconsideration.<sup>148</sup> A motion to reopen a proceeding before DHS can be filed with the official who made the last decision in the proceeding.<sup>149</sup> The motion must be filed within 30 days, unless the noncitizen can demonstrate that the delay was reasonable and beyond their control.<sup>150</sup> Practitioners can argue that a noncitizen’s mental illness caused the delay and was beyond their control.

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<sup>142</sup> 28 CFR § 35.130(b)(1)(iii).

<sup>143</sup> 6 CFR §§ 15.1-15.70.

<sup>144</sup> Because there often is not enough time to obtain a mental health evaluation and noncitizens in fast track proceedings usually do not present with medical records, the practitioner may not know that the noncitizen has a mental illness or a mental disability.

<sup>145</sup> *Schaughnessey v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *United States ex rel. Knauff v. Schaughnessey*, 388 U.S. 537, 544 (1950) (“Whatever the procedure authorized by Congress is, it is due process as far as the alien denied entry is concerned.”).

<sup>146</sup> See *Cooper v. Oklahoma*, 517 U.S. 348, 364 (1996).

<sup>147</sup> Fast Track to Injustice, *supra* note 7, at 560.

<sup>148</sup> For sample motions to reopen orders issued by DHS, see National Immigration Project of the National Lawyers Guild, “Select Motions to Reopen DHS-Issued Removal Orders” [www.nationalimmigrationproject.org/our\\_lit/impact/2016\\_Sep\\_motions-dhs-removal.html](http://www.nationalimmigrationproject.org/our_lit/impact/2016_Sep_motions-dhs-removal.html).

<sup>149</sup> 8 CFR § 103.5(A)(1)(ii).

<sup>150</sup> *Id.* (noting that the decision to excuse the delay is entirely within DHS’ discretion).

To file a motion to reopen before DHS, it is prudent to include a cover letter, Form I-290B, Form G-28, and a motion supported by documentary evidence.<sup>151</sup> The motion should explain why DHS should vacate the expedited removal order on legal or equitable grounds. Counsel may consider advancing many of the same arguments about due process and the Rehabilitation Act outlined above, Parts II.F and G, *supra*, in arguing that the proceedings should be reopened, and the order rescinded. Where the motion is filed beyond the 30-day deadline, counsel should consider including arguments similar to those found in Part II.G *supra*, concerning equitable tolling and *sua sponte* reopening.

## IV. Challenges in Working with Clients with Mental Illness

It is often quite challenging to provide effective representation to noncitizens suffering from mental illness. The mental illness may raise thorny ethical questions about the client's capacity to make decisions related to the representation and may significantly affect attorney-client communication. Additionally, people with mental illnesses often also deal with homelessness, poverty, substance abuse issues, and isolation from family or friends.<sup>152</sup> These issues, together with the mental illness itself, may make working with an attorney or practitioner very difficult.<sup>153</sup> Moreover, practitioners must deal with these mental-health issues<sup>154</sup> while simultaneously navigating cultural differences and an already challenging legal landscape. This section provides a discussion of some of the challenges in creating an effective attorney-client relationship with a noncitizen with mental illness.

### A. Cultural Competency and Working Cross-Culturally with Noncitizens with Mental Illness

Practitioners working with clients who may come from a different cultural background from their own should be aware of cultural differences, and should pay particular attention to how such cultural

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<sup>151</sup> AIC, NLG & ACLU, *Practice Advisory: Expedited Removal: What Has Changed Since Executive Order No. 13767, Border Security and Immigration Enforcement Improvements (Issued on January 25, 2017)* (February 20, 2017) at 7, [www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/final\\_expedited\\_removal\\_advisory\\_updated\\_2-21-17.pdf](http://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/final_expedited_removal_advisory_updated_2-21-17.pdf) (also noting that some DHS officers may initially think they lack authority to reopen or reconsider an expedited removal order, and thus encouraging attorneys to include copies of decisions granting reopening).

<sup>152</sup> Amelia Wilson & Natalie H. Prokopa, *Applying Method to Madness: The Right to Court Appointed Guardians Ad Litem and Counsel for the Mentally Ill in Immigration Proceedings*, 16 U. PA. J. L. & SOC. CHANGE 1, 6 (2013); see also Kalina Brabeck, Katherine Porterfield, & Maryanne Loughry, *Immigrants Facing Detention and Deportation: Psychosocial and Mental Health Issues, Assessment, and Intervention for Individuals and Families* in *THE NEW DEPORTATIONS DELIRIUM: INTERDISCIPLINARY RESPONSES* (Daniel Kanstroom and M. Brinton Lykes, eds., 2015).

<sup>153</sup> See CAIR Coalition Practice Manual, *supra* note 6, at 21-26 (discussing challenges facing attorneys working with noncitizens with mental illnesses and surveying an attorney's ethical obligations in this situation).

<sup>154</sup> Non-profits that provide clients with holistic services, including by having a social worker on staff, may be better equipped to assist clients with mental illness. Social workers may be better positioned to assist clients in obtaining social services and mental health treatment.

differences affect their evaluation of a client’s mental competence.<sup>155</sup> Culture informs values, attitudes, patterns of thinking, reactions, and behavioral norms.<sup>156</sup> Culture can also have a profound effect on the way people evaluate human behavior — behaviors that may be indicative of mental illness in one culture might be normal in another culture.<sup>157</sup> Additionally, a lack of cultural competency might lead a practitioner to miss a possible mental competency issue; if for example, the practitioner misattributes comprehension problems to lack of education or a cultural difference, rather than recognizing that the noncitizen might have a mental illness that is impacting their comprehension abilities. Moreover, culture can influence the manner in which a mental illness manifests, which sometimes can even lead to a misdiagnosis.<sup>158</sup> For example, a Nigerian person experiencing anxiety might report symptoms such as a crawling sensation on the skin or noises in the ears. This presentation of anxiety is not typical in the American cultural context, so many American mental health professionals may incorrectly interpret these symptoms as indicative of schizophrenia or a related psychotic disorder, and thus prescribe treatments that are inappropriate for anxiety.<sup>159</sup> Practitioners (and the mental health professionals with whom they may collaborate) should be careful to avoid jumping to conclusions, and instead should be sure to account for how cultural differences might explain certain behaviors.

## B. Working with Therapists and Other Mental Health Professionals

It is often important to work collaboratively with mental health professionals to represent noncitizens with mental illness successfully.<sup>160</sup> Mental health professionals can be helpful in providing a

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<sup>155</sup> See, e.g., Helen Y. Kim, *Do I Really Understand? Cultural Concerns in Determining Diminished Competency*, 15 ELDER L.J. 265, 266 (2007), [publish.illinois.edu/elderlawjournal/files/2015/02/Kim.pdf](https://publish.illinois.edu/elderlawjournal/files/2015/02/Kim.pdf).

<sup>156</sup> *Id.* at 270-71; Linda Rodriguez McRobbie, *How culture shapes your mind — and your mental illness*, BOSTON GLOBE, Nov. 28, 2018, [www.bostonglobe.com/ideas/2018/11/28/how-culture-shapes-your-mind-and-your-mental-illness/sMlhWP5LGSOvQAFd83I3qN/story.html](https://www.bostonglobe.com/ideas/2018/11/28/how-culture-shapes-your-mind-and-your-mental-illness/sMlhWP5LGSOvQAFd83I3qN/story.html) (explaining that “culture” isn’t the “strict ethnographic, religious, or nationalist background that we come from, but rather a subtle and complex landscape of all of those things, plus affiliations, gender, sexual orientation, age, profession, region, social class, and education — even technological immersion. Culture . . . is ‘the process by which a person makes sense of their experiences and the way that process is anchored or based in that person’s participation in particular social groups. . . anything that is in some way affecting, contributing to their understanding of the world.’”).

<sup>157</sup> Helen Y. Kim, *Do I Really Understand? Cultural Concerns in Determining Diminished Competency*, 15 ELDER L.J. 265, 271 (2007), [publish.illinois.edu/elderlawjournal/files/2015/02/Kim.pdf](https://publish.illinois.edu/elderlawjournal/files/2015/02/Kim.pdf).

<sup>158</sup> Linda Rodriguez McRobbie, *How culture shapes your mind — and your mental illness*, BOSTON GLOBE, Nov. 28, 2018, [www.bostonglobe.com/ideas/2018/11/28/how-culture-shapes-your-mind-and-your-mental-illness/sMlhWP5LGSOvQAFd83I3qN/story.html](https://www.bostonglobe.com/ideas/2018/11/28/how-culture-shapes-your-mind-and-your-mental-illness/sMlhWP5LGSOvQAFd83I3qN/story.html).

<sup>159</sup> *Id.* (describing the case of a Nigerian man with an anxiety disorder that manifested in ways that most Westerners would characterize as more akin to schizophrenia or related psychotic disorders).

<sup>160</sup> Many resources on the topic of successful collaboration with mental health professionals, particularly in the context of developing an asylum claim, already exist. E.g. Neela O. Chakravartula, Christine Lin, Stuart L. Lustig, & Katherine McKenzie, *Working with Medical and Mental Health Experts in Asylum and Related Fear-of-Return Claims*, 24-7 BENDER’S IMMIGR. BULL. 01 (2019); HealTorture.org, *Collaborating with Mental Health Professionals: Assessments of Torture Survivors Seeking Asylum*, [www.healtorture.org/sites/healtorture.org/files/Collaborating%20With%20Mental%20Health%20Professionals.pdf](https://www.healtorture.org/sites/healtorture.org/files/Collaborating%20With%20Mental%20Health%20Professionals.pdf). This practice advisory accordingly will not provide an in-depth discussion of this topic, but instead will highlight a few points specifically relevant to working with clients who struggle with severe mental illness.

competency evaluation of the noncitizen or providing treatment, but also may assist practitioners by explaining certain client behaviors and providing guidance on communication strategies.

Ideally, the practitioner should find a psychiatrist or psychologist with expertise in forensic practice to provide an evaluation.<sup>161</sup> Additionally, to ensure that such a partnership is as fruitful as possible, before retaining a mental health professional to conduct an evaluation or provide other assistance during the course of representation, it is important to:

- ascertain whether the mental health professional has the necessary expertise to competently assess the client<sup>162</sup>
- explain the scope and focus of the forensic evaluation to the mental health professional<sup>163</sup>
- determine whether an interpreter is required and whether the clinician is comfortable working with an interpreter
- inquire whether any psychological testing will take place and whether such instruments are available in the noncitizen's native language
- communicate whether telephonic or in-person testimony before the Immigration Court will be expected<sup>164</sup>
- provide relevant filing and hearing dates
- establish expectations and due dates for reviewing, editing, and finalizing any expert evaluation<sup>165</sup>
- set expectations around the frequency and means (email, in-person, or telephone) of communication<sup>166</sup>
- discuss compensation<sup>167</sup>
- discuss framing the evaluation in a way that assists with adjudication of the immigration case and gauge the mental health professional's comfort level with making edits after receiving the practitioner's feedback,<sup>168</sup> and

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<sup>161</sup> For assistance in finding a qualified mental health professional to assist with an immigration case, practitioners can reach out to Physicians for Human Rights using their forensic evaluation request form: [phr.org/get-involved/participate/request-a-forensic-evaluation/](https://phr.org/get-involved/participate/request-a-forensic-evaluation/).

<sup>162</sup> If possible, the mental health professional providing the evaluation should be a psychiatrist or psychologist with expertise in forensic practice. The evaluator's curriculum vitae should be submitted to the court with the evaluation. See Legal Action Center Practice Advisory, *supra* note 6, at 8; see also Kelcey Baker, Katherine Freeman, Gigi Warner, & Professor Deborah M. Weissman, University of North Carolina at Chapel Hill School of Law, *Expert Witnesses in U.S. Asylum Cases: A Handbook*, [law.unc.edu/wp-content/uploads/2019/10/expertwitnesshandbook.pdf](https://law.unc.edu/wp-content/uploads/2019/10/expertwitnesshandbook.pdf).

<sup>163</sup> The mental health professional should address the three prongs of the M-A-M- competency test, discussed at Part II.C. *infra*, along with any issues necessary to establish the noncitizen's eligibility for specific relief. See Legal Action Center Practice Advisory, *supra* note 6, at 8.

<sup>164</sup> Neela O. Chakravartula, Christine Lin, Stuart L. Lustig, & Katherine McKenzie, *Working with Medical and Mental Health Experts in Asylum and Related Fear-of-Return Claims*, 24-7 BENDER'S IMMIGR. BULL. 01 (2019).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> For example, if the mental health professional includes a section in the evaluation about how the noncitizen may respond to cross examination or questions from the judge, this might significantly bolster the practitioner's arguments about credibility.

- decide what documents the mental health professional should review in preparing the evaluation.<sup>169</sup>

Practitioners should use a written retainer with mental health professionals outlining expectations and make efforts to comply with Health Insurance Portability and Accountability Act (HIPAA) guidelines in the sending of any medical records to and from a mental health professional’s office. Once the practitioner retains<sup>170</sup> a mental health professional and the mental health professional drafts the evaluation, the practitioner should review the evaluation carefully before submitting it to the Immigration Court. The practitioner should also properly prepare mental health professionals to testify and anticipate and prepare for potential challenges to their qualifications or testimony concerning the noncitizen’s mental health.<sup>171</sup> Common areas subject to challenge by DHS counsel or Immigration Judges include:

- any language suggesting that a client may be “malingering”
- a clinician’s conclusions regarding a noncitizen’s need for medication or the need for psychotropic treatment if the clinician is not a licensed psychiatrist
- a clinician’s ability to render a fair and accurate assessment where the mental health professional has been engaged in advocacy work in the past or even based on their posts on social media
- statements regarding the prospective likelihood of an individual’s ability to function, hold a job, obtain treatment, and take care of themselves if deported; and
- statements made regarding any country conditions or possibility of treatment in the noncitizen’s country of origin.

Statements that go beyond the scope of the mental health professional’s expertise are likely to trigger an objection from DHS. If the mental health professional makes conclusions outside the scope of their expertise, they may risk disqualification as an expert.

### C. Special Considerations for Representing Detained Noncitizens

Some noncitizens with mental illness face additional obstacles beyond those already discussed. This section provides tips for working with noncitizens with mental illness who are detained.

#### 1. Strategies for Release

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<sup>169</sup> Many practitioners provide the client’s declaration as well as prior medical or mental health records. However, practitioners must think strategically about what documents to give to the expert, as the expert may be questioned about these documents in court.

<sup>170</sup> As a matter of best practices, the practitioner should ensure that the mental health professional signs a written retainer agreement that specifies deadlines for written work product, availability for testimony preparation, and availability for the hearing(s).

<sup>171</sup> Center for Refugee and Gender Studies (CRGS), *Practice Advisory, Strategies for Success: Responding to Challenges to Expert Witnesses in Defensive Asylum Proceedings* (Dec. 2018). This resource is available by request from the CRGS website.

Many noncitizens with mental illness are held in Immigration and Customs Enforcement (ICE) detention in conditions that exacerbate their mental issues, but practitioners can and should seek release of their mentally incompetent clients.<sup>172</sup> Often detention facilities are in isolated areas, far from mental health professionals and far from relatives or other social safety nets that were available to the noncitizen outside of detention. Moreover, transfers between detention facilities are common for noncitizens with mental illness, especially if their symptoms result in behaviors that facilities view as problematic (suicidal ideation, violence, yelling, refusal to take medications, etc).<sup>173</sup> While ICE is supposed to provide healthcare, including psychological and psychiatric treatment to people in its custody, the agency continues to provide substandard care.<sup>174</sup> In particular, ICE continues to provide very poor mental health treatment because it does not adequately staff its facilities with psychiatrists, nurses, and other mental health professionals.<sup>175</sup> Moreover, ICE detention facilities are not designed to treat people who have suffered intense trauma and acute mental health crises.<sup>176</sup> Often, noncitizens are held in “punitive, prison-like” conditions and are punished when they are having a mental health crisis.<sup>177</sup> Indeed, guards frequently put mentally ill detainees in solitary confinement for prolonged periods of time.<sup>178</sup> Solitary confinement greatly exacerbates mental illness, and numerous noncitizens in ICE custody who have been held in solitary confinement have committed suicide.<sup>179</sup> For these reasons, practitioners should consider various release strategies,<sup>180</sup> including requesting release as a safeguard, bond redeterminations, release on parole, and habeas corpus petitions.<sup>181</sup>

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<sup>172</sup> Renuka Rayasam, *Migrant mental health crisis spirals in ICE detention facilities*, POLITICO, July 21, 2019 (estimating that 3,000-6,000 ICE detainees have a mental illness, but noting that practitioners think the number is much larger than that, possibly as high as 30% of the total detainee population).

<sup>173</sup> Practitioners should be in touch with their client frequently and should consult the ICE detainee locator ([locator.ice.gov/odls/#/index](https://locator.ice.gov/odls/#/index)) if the client cannot communicate with the attorney concerning an abrupt transfer.

<sup>174</sup> Renuka Rayasam, *Migrant mental health crisis spirals in ICE detention facilities*, POLITICO, July 21, 2019 (stating that as of 2016, only 21 of the 230 ICE detention facilities offered any kind of in-person mental health services); see also *Fraihat v. U.S. Immigration and Customs Enforcement*, Case No. 19-cv-01546 (C.D. Cal.), Complaint, [creelaw.org/wp-content/uploads/2019/08/E-filed-Fraihat v ICE Complaint to file 8 19.pdf](https://creelaw.org/wp-content/uploads/2019/08/E-filed-Fraihat-v-ICE-Complaint-to-file-8-19.pdf).

<sup>175</sup> Office of the Inspector General, Department of Homeland Security, OIG-16-113-VR, *ICE Still Struggles to Hire and Retain Staff for Mental Health Cases in Immigration Detention* (July 21, 2016), [www.oig.dhs.gov/assets/VR/FY16/OIG-16-113-VR-Jul16.pdf](https://www.oig.dhs.gov/assets/VR/FY16/OIG-16-113-VR-Jul16.pdf); see also *Fraihat v. U.S. Immigration and Customs Enforcement*, Case No. 19-cv-01546 (C.D. Cal.), Complaint, [creelaw.org/wp-content/uploads/2019/08/E-filed-Fraihat v ICE Complaint to file 8 19.pdf](https://creelaw.org/wp-content/uploads/2019/08/E-filed-Fraihat-v-ICE-Complaint-to-file-8-19.pdf).

<sup>176</sup> Although ICE operates a few mental health inpatient facilities, very few detainees are served by these facilities. Moreover, once a detainee has been stabilized, the detainee is generally returned to a regular ICE detention facility. See Renuka Rayasam, *Migrant mental health crisis spirals in ICE detention facilities*, POLITICO, July 21, 2019.

<sup>177</sup> *Id.* (documenting a case at the Adelanto facility in which guards pepper sprayed a detainee who was attempting suicide); see also *Fraihat v. U.S. Immigration and Customs Enforcement*, Case No. 19-cv-01546 (C.D. Cal.), Complaint, [creelaw.org/wp-content/uploads/2019/08/E-filed-Fraihat v ICE Complaint to file 8 19.pdf](https://creelaw.org/wp-content/uploads/2019/08/E-filed-Fraihat-v-ICE-Complaint-to-file-8-19.pdf).

<sup>178</sup> Project on Government Oversight, *Isolated: ICE Confines Some Detainees with Mental Illness in Solitary for Months* (Aug. 14, 2019), [www.pogo.org/investigation/2019/08/isolated-ice-confines-some-detainees-with-mental-illness-in-solitary-for-months/](https://www.pogo.org/investigation/2019/08/isolated-ice-confines-some-detainees-with-mental-illness-in-solitary-for-months/) (Attorney Azadeh Shahshahani explained that “Solitary is the modus operandi when someone is experiencing mental health care problems rather than giving them the help they need”).

<sup>179</sup> *Id.*

<sup>180</sup> CLINIC has a comprehensive Practitioner’s Guide to Obtaining Release from Immigration Detention as well as numerous sample filings available here: [cliniclegal.org/resources/enforcement-and-detention/practitioners-guide-obtaining-release-immigration-detention](https://cliniclegal.org/resources/enforcement-and-detention/practitioners-guide-obtaining-release-immigration-detention).

<sup>181</sup> Practitioners should also consider whether their client may be eligible for release in light of litigation surrounding vulnerability to COVID-19. See, e.g., *Fraihat v. ICE*, Case No. 5:19-cv-01546-JGB-SHK, at 38 (C.D. Cal. Apr. 20, 2020), ECF No. 132 (issuing a

### a) Requesting Release as a Safeguard

Because ICE detention can be especially traumatic and dangerous for noncitizens with mental illness, practitioners should aim to get their mentally ill clients released. There are several pathways for obtaining release from detention. Practitioners can request release as a safeguard where an IJ has concluded that a noncitizen lacks sufficient competency to proceed with their immigration hearing without safeguards. The practitioner should demonstrate that release is required for the noncitizen to have a full and fair hearing, and stress that the IJ has the authority to order release as a safeguard because the IJ has the “discretion to determine which safeguards are appropriate, given the particular circumstances in a case before them.”<sup>182</sup>

### b) Bond Redetermination

Another option is to request that an IJ conduct a bond redetermination hearing. This option is available to noncitizens who are not subject to mandatory detention under INA 236(c) and are not “arriving aliens.”<sup>183</sup> Additionally, noncitizens determined to be mentally incompetent may be eligible for a custody redetermination hearing after 6 months of detention.<sup>184</sup> To obtain bond from the IJ, the noncitizen must prove that the noncitizen is neither a danger to the community nor a flight risk.<sup>185</sup> In conducting this analysis, the IJ will likely consider how the noncitizen’s mental health is relevant to past criminal justice contact or their future likelihood of reoffending or attending future court hearings. It therefore may be advisable to present the IJ with a plan for the noncitizen’s transition into the community that includes “coordination with local social services and mental health agencies for

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nationwide preliminary injunction ordering ICE to (1) immediately identify and track individuals in its custody with certain defined factors that makes them especially vulnerable to COVID-19 and (2) make timely custody redeterminations for all class members, including for people whose custody has already been reviewed).

<sup>182</sup> *Matter of M-A-M-*, 25 I&N Dec. at 481-82.

<sup>183</sup> See *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018) (concluding that a noncitizen subject to mandatory detention is not entitled to periodic bond hearings); *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019) (holding that a noncitizen who is transferred from expedited removal proceedings to full removal proceedings after establishing a credible fear of persecution or torture is ineligible for release on bond, and must be detained until removal proceedings conclude, unless he is granted parole).

<sup>184</sup> Memorandum from Chief Immigration Judge Brian O’Leary, EOIR, Nationwide Policy to Provide Enhanced Procedural Protections to Unrepresented Detained Aliens with Serious Mental Disorders or Conditions, (Apr. 22, 2013), [nwirp.org/Documents/ImpactLitigation/EOIRDirective04-22-2013.pdf](http://nwirp.org/Documents/ImpactLitigation/EOIRDirective04-22-2013.pdf) (hereinafter “EOIR Policy Memo”) (“...detained aliens who were initially identified as having serious mental disorder or condition that may render them incompetent to represent themselves and who have been held in detention by DHS for six months or longer will be afforded a bond hearing.”); Memorandum of John Morton, Director, ICE, Civil Immigration Detention: Guidance for New Identification and Information-Sharing Procedures Related to Unrepresented Detainees With Serious Mental Disorders or Conditions, (April 22, 2013), [www.ice.gov/doclib/detention-reform/pdf/11063.1\\_current\\_id\\_and\\_infosharing\\_detainees\\_mental\\_disorders.pdf](http://www.ice.gov/doclib/detention-reform/pdf/11063.1_current_id_and_infosharing_detainees_mental_disorders.pdf) (hereinafter “ICE Policy Memo”) (“EOIR’s new policy also provides custody hearings to unrepresented detained aliens who were identified as having a serious mental disorder or condition that may render them incompetent to represent themselves and have been detained in ICE custody for six months or longer. ICE trial counsel shall participate in these custody hearings.”).

<sup>185</sup> *Matter of Urena*, 25 I&N Dec. 140 (BIA 2009); *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006). CLINIC has numerous resources available for practitioners representing noncitizens in bond proceedings, including the *Practitioners’ Guide to Obtaining Release From Immigration Detention* (2018), checklists, sample filings, and sample court documents. To access these resources, practitioners should visit: [cliniclegal.org/resources/enforcement-and-detention/practitioners-guide-obtaining-release-immigration-detention](http://cliniclegal.org/resources/enforcement-and-detention/practitioners-guide-obtaining-release-immigration-detention).

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.”<sup>186</sup> Such a plan can help convince an IJ that the noncitizen can be safely released in the community and will attend all future hearings.

### c) Release on Parole

For noncitizens who are ineligible for bond because they are subject to mandatory detention<sup>187</sup> or are properly classified as “arriving aliens,”<sup>188</sup> practitioners should advocate for release on parole. DHS may grant release on parole in cases where it is justified by “urgent humanitarian reasons” or a “significant public benefit” and the noncitizen does not present a security risk or a flight risk.<sup>189</sup> The regulations specify that such cases include ones in which “continued detention would not be appropriate” because the detainee has a “serious medical condition.”<sup>190</sup> To obtain parole, the noncitizen must establish their identity, prove that they will appear when required, and show that they do not pose a threat to the community.<sup>191</sup> As with bond redetermination hearings, it is wise to present a plan for the detainee’s transition to the community and submit evidence showing the harm that continued detention would cause to the noncitizen.<sup>192</sup>

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<sup>186</sup> CAIR Coalition Practice Manual, *supra* note 6, at 10.

<sup>187</sup> See INA § 236(c).

<sup>188</sup> See INA § 235(b)(2)(A). Practitioners should ensure that the arriving alien designation is correct. For more information on how to determine whether the noncitizen is properly classified as an arriving alien, see American Immigration Council, *Practice Advisory: “Arriving Aliens” and Adjustment of Status* (November 2015), [www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/ar\\_alien.pdf](http://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/ar_alien.pdf).

<sup>189</sup> 8 CFR § 212.5(b).

<sup>190</sup> 8 CFR § 212.5(b)(1).

<sup>191</sup> See ICE Directive 11002.1: Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Jan. 4, 2010), [www.ice.gov/doclib/dro/pdf/11002.1-hd-parole\\_of\\_arriving\\_alien\\_found\\_credible\\_fear.pdf](http://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf). CLINIC has numerous resources and samples available for practitioners representing noncitizens on parole requests, including the *Practitioners’ Guide to Obtaining Release From Immigration Detention* (2018). To access these resources, practitioners should visit: [cliniclegal.org/resources/enforcement-and-detention/practitioners-guide-obtaining-release-immigration-detention](http://cliniclegal.org/resources/enforcement-and-detention/practitioners-guide-obtaining-release-immigration-detention).

<sup>192</sup> CAIR Coalition Practice Manual, *supra* note 6, at 11.

#### d) Habeas Corpus

Filing a habeas corpus petition may also be appropriate where there is a legal theory that a noncitizen's detention violates the Constitution, the Rehabilitation Act, the Administrative Procedures Act, or the INA.<sup>193</sup> To obtain relief through a habeas petition, the attorney must establish that the noncitizen is in custody.<sup>194</sup> Once that is established, a lawyer can use a habeas claim to put forward statutory or constitutional claims, including that the detention is:

- Arbitrary – meaning that it lacks a substantive basis, does not serve its stated purpose, and lacks procedural safeguards<sup>195</sup>
- Prolonged – meaning that it is disproportionate in time to its stated purpose and lacks procedural safeguards<sup>196</sup>
- Indefinite – meaning that it has no known or knowable end;<sup>197</sup> or
- Punitive – meaning that its purpose is to punish, which is incompatible with civil detention<sup>198</sup>

While such arguments are pertinent in many contexts, they can be particularly compelling where the detained noncitizen suffers from severe mental illness.

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<sup>193</sup> *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (explaining that historically the writ of habeas corpus has “served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.”). It is often prudent to exhaust administrative remedies by making a bond or parole request before filing a habeas petition so that there is a strong argument that these other avenues for obtaining release were futile.

<sup>194</sup> 28 U.S.C. § 2241(c) (stating that the person must show “(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or (5) It is necessary to bring him into court to testify or for trial”).

<sup>195</sup> Procedural defects that violate Due Process include, for example, placing the burden on noncitizens detained pursuant to 236(a) to prove that they should not be detained. See, e.g., *Brito v. Barr*, 395 F.Supp.3d 135 (D. Mass. 2019) (shifting the burden to the Government to establish that the noncitizen is a danger to the community or a flight risk.); *Darko v. Sessions*, 342 F.Supp.3d 429 (S.D.N.Y. 2018) (shifting the burden to the Government to prove by clear and convincing evidence, that the noncitizen is a danger to the community or a flight risk).

<sup>196</sup> See, e.g., *Banda v. McAleenan*, 385 F.Supp.3d 1099 (W.D. Wa. 2019); *Bourguignon v. MacDonald*, 667 F. Supp. 2d 175 (D. Mass. 2009); see also Kate Melloy Goettel, National Immigrant Justice Center; Ranjana Natarajan, Civil Rights Clinic, University of Texas School of Law; Claudia Valenzuela, American Immigration Council; Anam Rahman, Calderon Seguin PLC, Panel at the Federal Bar Association's Immigration Law Conference: Habeas Corpus and Prolonged Detention (May 17, 2019), slides available at [www.fedbar.org/wp-content/uploads/2019/12/FBA-2019-Habeas-Prolonged-Detention-PPT-pdf.pdf](http://www.fedbar.org/wp-content/uploads/2019/12/FBA-2019-Habeas-Prolonged-Detention-PPT-pdf.pdf).

<sup>197</sup> *Id.*; *Zavydas v. Davis*, 533 U.S. 678 (2001).

<sup>198</sup> Kate Melloy Goettel, National Immigrant Justice Center; Ranjana Natarajan, Civil Rights Clinic, University of Texas School of Law; Claudia Valenzuela, American Immigration Council; Anam Rahman, Calderon Seguin PLC, Panel at the Federal Bar Association's Immigration Law Conference: Habeas Corpus and Prolonged Detention (May 17, 2019), slides available at [www.fedbar.org/wp-content/uploads/2019/12/FBA-2019-Habeas-Prolonged-Detention-PPT-pdf.pdf](http://www.fedbar.org/wp-content/uploads/2019/12/FBA-2019-Habeas-Prolonged-Detention-PPT-pdf.pdf).

## 2. Advocacy to Improve Detention Conditions

While seeking release from detention, and especially if it is not possible to obtain release from detention, practitioners should advocate for appropriate medical care in detention and advocate for better conditions of detention. If a practitioner is representing a noncitizen who is not receiving appropriate medical or psychiatric care in detention, the practitioner should first request documentation from ICE and the detention facility of the intake screening, the comprehensive health appraisal, and any mental health evaluations that have been performed.<sup>199</sup> If those records show that mental health services or medications are needed, but they are not being provided, the practitioner should inform the detention facility's mental health provider and the client's ICE deportation officer (and if necessary, escalate to the appropriate supervisor, which may lead to the ICE Field Office Director). On the other hand, if the health records from detention do not indicate that the noncitizen needs mental health services or medications, the practitioner should obtain outside evidence showing treatment is needed.<sup>200</sup> Similarly, if the healthcare regimen being provided is inconsistent with prior (and more effective) treatment, practitioners should consider contacting the mental health providers who treated the noncitizen before they were detained, obtaining a letter or affidavit that includes the prior providers' medical opinions as to the appropriate treatment; and sharing those mental health providers' opinions with ICE and the detention facility's medical decision-makers.<sup>201</sup>

Similarly, if the facility is inappropriately placing the noncitizen in solitary confinement (also known as "segregation"), rather than providing treatment for the mental illness, the practitioner should advocate for proper treatment, rather than continued placement in solitary confinement.<sup>202</sup> First, the practitioner should request documentation of the reason or need for segregation and of the health care personnel's daily assessments of the noncitizen (which are required under the detention standards.)<sup>203</sup> If those records show that placement in solitary is not in compliance with the ICE detention standards that govern the facility where the noncitizen is being held,<sup>204</sup> the practitioner

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<sup>199</sup> CAIR Coalition Practice Manual, *supra* note 6, at 30; see also *id.* at 37 (providing an overview of how to obtain medical records for a detained noncitizen).

<sup>200</sup> *Id.* (noting that evidence may be available in mental health records from periods of criminal incarceration or from periods of prior inpatient or outpatient treatment, or the attorney may need to obtain an independent evaluation of the client's treatment needs).

<sup>201</sup> *Id.* at 32.

<sup>202</sup> If the noncitizen is being placed in solitary confinement because DHS is unable to provide effective treatment, this placement in solitary may provide a strong basis for arguing for release as an accommodation. If placement in solitary confinement is punitive and related to behavioral health issues, this would also provide a clear path to raise a Rehabilitation Act claim and a due process claim.

<sup>203</sup> CAIR Coalition Practice Manual, *supra* note 6, at 31.

<sup>204</sup> To determine which detention standards apply to a particular facility, the practitioner will need to determine what the facility's contract with ICE mandates. See National Immigrant Justice Center, Immigration Detention Oversight and Accountability Toolkit: A Guide for Members of Congress Visiting ICE Jails (May 2019), [immigrantjustice.org/research-items/toolkit-immigration-detention-oversight-and-accountability](https://immigrantjustice.org/research-items/toolkit-immigration-detention-oversight-and-accountability) ("There are no formally binding regulations or statutory provisions governing the standards of care at ICE detention facilities. ICE has adopted three sets of detention standards that serve as guidance, but does not require contractors to adopt the most recent standards when it enters into new contracts or contract extensions. The result is a patchwork system in which facilities are subject to differing standards and some are subject to no standards at all."). Moreover, the ICE detention standards provide only weak protections, and have been further watered down under the Trump Administration. See, e.g., Eunice Cho, ACLU, "The Trump

should inform detention facility staff and the ICE deportation officer (and if necessary, escalate to the ICE Field Office Director).

The practitioner can also advocate with the local Office of Chief Counsel to press ICE Enforcement and Removal Operations (ERO) to comply with detention standards or make accommodations, especially where such accommodations are necessary to implement safeguards ordered by the IJ.

Additionally, the practitioner should regularly contact the detention facility's medical provider to ensure that the facility is complying with the detention standards regarding segregation of detainees with mental health needs.<sup>205</sup> If the facility is not complying with the applicable ICE detention standards, the practitioner should inform the ICE deportation officer (and if necessary, escalate to the ICE Field Office Director). After consulting with the client,<sup>206</sup> the practitioner may also consider advocating for a transfer to another facility where the noncitizen's mental health needs can be met without resorting to using the segregation unit.<sup>207</sup> ICE has facilities where a noncitizen can be sent for in-patient psychiatric treatment, including one at Columbia Regional Care Center in South Carolina, but ICE will often resist transferring a noncitizen to such a facility.<sup>208</sup> Practitioners should also consider advocating for transferring the client to a facility outside the ICE detention system that may provide better treatment, such as local treatment centers or supportive housing programs. Where the noncitizen is not subject to mandatory detention, in some jurisdictions, ICE may be amenable to such a transfer.<sup>209</sup>

If these strategies are unsuccessful and ICE and the detention facility still do not take appropriate action, the practitioner may want to consider filing a complaint with the Office for Civil Rights and Civil Liberties (CRCL)<sup>210</sup> or the Office of the Inspector General (OIG).<sup>211</sup> Such complaints will force the agency to investigate and may prompt the agency to take appropriate action to resolve the

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Administration Weakens Standards for ICE Detention Facilities," [www.aclu.org/news/immigrants-rights/the-trump-administration-weakens-standards-for-ice-detention-facilities/](https://www.aclu.org/news/immigrants-rights/the-trump-administration-weakens-standards-for-ice-detention-facilities/) (last reviewed/updated January 14, 2020).

<sup>205</sup> CAIR Coalition Practice Manual, *supra* note 6, at 31.

<sup>206</sup> It is important to consult with the client before advocating for transfer because the transfer could result in the noncitizen being moved farther away from counsel.

<sup>207</sup> CAIR Coalition Practice Manual, *supra* note 6, at 31 (noting that there is no guarantee that a transferred detainee will go to a better facility or to a facility nearby).

<sup>208</sup> Practitioners should be aware that advocacy for individuals to be transferred to one of these facilities may result in forced medication or other treatments against a client's will, and should consider the ethical consequences of their advocacy before making such a request.

<sup>209</sup> CAIR Coalition Practice Manual, *supra* note 6, at 31.

<sup>210</sup> To make a complaint to CRCL, visit: [www.dhs.gov/file-civil-rights-complaint](https://www.dhs.gov/file-civil-rights-complaint). Practitioners should understand that complaints to CRCL, particularly under this administration, may have limited efficacy. See, e.g., NPR, *Homeland Security's Civil Rights Unit Lacks Power To Protect Migrant Kids* (Aug. 2, 2019) [www.npr.org/sections/health-shots/2019/08/02/746982152/homeland-securitys-civil-rights-unit-lacks-power-to-protect-migrant-kids](https://www.npr.org/sections/health-shots/2019/08/02/746982152/homeland-securitys-civil-rights-unit-lacks-power-to-protect-migrant-kids). Notably, CRCL has no enforcement power. See 6 U.S.C. § 345.

<sup>211</sup> To make a complaint to OIG, visit: [hotline.oig.dhs.gov/#step-1](https://hotline.oig.dhs.gov/#step-1).

complaint. In egregious cases,<sup>212</sup> the practitioner may also consider filing a Federal Tort Claims Act (FTCA) claim<sup>213</sup> or a *Bivens* claim so that the noncitizen can obtain compensation for the harm.<sup>214</sup>

#### D. Special Considerations for Deported Noncitizens

Noncitizens removed or deported from the United States face significant practical barriers to successfully reopening their cases and returning to the United States.<sup>215</sup> These obstacles are magnified where the individual also has a mental illness.<sup>216</sup> The deported noncitizen may lack friends, relatives, or other social safety nets that were available in the United States. Psychiatric treatment may also be difficult to obtain and/or unaffordable abroad.<sup>217</sup> Additionally, there are few legal services providers with the capacity to provide representation to people outside the United States.<sup>218</sup> Practitioners must be sensitive to the impediments that may prevent a noncitizen who has been removed from the United States from accessing the protections they are due. Practitioners should create clear expectations with the client concerning communication and emphasize that maintaining contact is essential to supporting the noncitizen while they are outside the United States. Practitioners should also work cooperatively with mental health professionals, social workers,<sup>219</sup>

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<sup>212</sup> For an example of an egregious situation that may merit suing in federal court, see *Charles v. Orange County*, 925 F.3d 73 (2d Cir. 2019) (lack of discharge planning, which caused noncitizen to be hospitalized following release from detention).

<sup>213</sup> There are many resources available to attorneys considering filing an FTCA complaint. See, e.g., Priya Patel National Immigration Project of the National Lawyers' Guild, *Practice Advisory, Federal Tort Claims Act: Frequently Asked Questions for Immigration Attorneys* (January 24, 2013), [nationalimmigrationproject.org/PDFs/practitioners/practice\\_advisories/fed/2013\\_24Jan\\_ftca\\_faq.pdf](http://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/fed/2013_24Jan_ftca_faq.pdf); Asylum Seeker Advocacy Project, *Toolkit: Federal Tort Claims Act Administrative Complaints*, [asylumadvocacy.org/resource/toolkit-federal-tort-claims-act-administrative-complaints/](http://asylumadvocacy.org/resource/toolkit-federal-tort-claims-act-administrative-complaints/).

<sup>214</sup> *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); American Immigration Council, *Practice Advisory, Bivens Basics: An Introductory Guide for Immigration Attorneys* (August 21, 2018), [www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/bivens\\_basics\\_an\\_introduutory\\_guide\\_for\\_immigration\\_attorneys.pdf](http://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/bivens_basics_an_introduutory_guide_for_immigration_attorneys.pdf).

<sup>215</sup> See, e.g., CLINIC, *Practice Advisory: Post-Departure Motions to Reopen and Reconsider* (Nov. 2019), [cliniclegal.org/resources/removal-proceedings/practice-advisory-post-departure-motions-reopen-and-reconsider](http://cliniclegal.org/resources/removal-proceedings/practice-advisory-post-departure-motions-reopen-and-reconsider); National Lawyers Guild, Immigrant Rights Clinic Washington Square Legal Services at NYU School of Law, and American Immigration Council, *Practice Advisory: Return to the United States After Prevailing on a Petition for Review or Motion to Reopen or Reconsider* (Apr. 27, 2015), [nationalimmigrationproject.org/PDFs/practitioners/practice\\_advisories/fed/2015\\_27Apr\\_return-advisory.pdf](http://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/fed/2015_27Apr_return-advisory.pdf).

<sup>216</sup> Aimee Mayer-Salins, Post-Deportation Human Rights Project, *Practice Advisory, Mentally Incompetent But Deported Anyway: Strategies for Helping a Mentally Ill Client Return to the United States* (September 2015), [www.bc.edu/content/dam/files/centers/humanrights/pdf/PracticeAdvisory-MentallyIncompetentDeportees.pdf](http://www.bc.edu/content/dam/files/centers/humanrights/pdf/PracticeAdvisory-MentallyIncompetentDeportees.pdf).

<sup>217</sup> Attorneys may be able to obtain a mental healthcare referral for an individual living outside the United States by using the American Psychological Association's Directory of National Associations of Psychology, which provides contact information for psychology associations in numerous countries around the world. American Psychological Association, *Directory of National Associations of Psychology* (2017), [www.apa.org/international/networks/organizations/national-orgs.aspx](http://www.apa.org/international/networks/organizations/national-orgs.aspx). Where it is impossible to find a mental health care provider in the country of deportation, it may be possible for a psychologist in the United States to provide an assessment and/or care remotely. However, mental healthcare professionals must comply with all ethical guidelines and licensing requirements. See *Guidelines for the Practice of Telepsychology*, American Psychological Association, [www.apa.org/practice/guidelines/telepsychology.aspx](http://www.apa.org/practice/guidelines/telepsychology.aspx).

<sup>218</sup> Al Otro Lado provides legal services to individuals in Mexico, including those who have been deported. [alotrolado.org/](http://alotrolado.org/).

<sup>219</sup> See Jessica Chicco & Elaine Congress, *Legal and Social Work Responses to the Detained and Deported: Interdisciplinary Reflections and Actions* in *THE NEW DEPORTATIONS DELIRIUM: INTERDISCIPLINARY RESPONSES* (Daniel Kanstroom and M. Brinton Lykes, eds., 2015) (discussing models for successful collaborations between attorneys and social workers).

friends, and family members to help the deported noncitizen to both reopen their case and return to the United States.

## E. Ethical Considerations

A lawyer representing a client who with mental illness may face difficult ethical considerations during the course of the representation. There are already many resources available on the topic of ethical considerations for lawyers in this situation.<sup>220</sup> This practice advisory accordingly will not provide an in-depth discussion of the ethical rules.

Even so, it is important to highlight the key ethical rules that govern lawyers' representation of clients with mental illness. In particular, ABA Model Rule of Professional Conduct<sup>221</sup> 1.14 addresses the attorney-client relationship when a "client's capacity to make adequately considered decisions in connection with a representation is diminished."<sup>222</sup> The rule states that the lawyer should "as far as reasonably possible, maintain a normal client-lawyer relationship,"<sup>223</sup> meaning that the nature of the attorney-client relationship — including the requirement that a lawyer respect the client's autonomy and act at the client's direction — remains the same.<sup>224</sup> Nonetheless, "'a lawyer does need a heightened sense of awareness' to the mentally disabled client's needs, and 'may need to be more diligent in assuring effective communications and respecting' the client's objectives."<sup>225</sup>

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<sup>220</sup> See, e.g. American Bar Association Commission on Immigration, *Practice Advisory, Representing Detained Immigration Respondents of Diminished Capacity: Ethical Challenges and Best Practices* (July 2015), [www.americanbar.org/content/dam/aba/administrative/immigration/MentalHealthPaper.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/immigration/MentalHealthPaper.authcheckdam.pdf); American Immigration Council, *Practice Advisory: Representing Clients with Mental Competency Issues Under Matter of M-A-M-* (Nov. 30, 2011), [www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/Mental-Competency-Issues.pdf](http://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/Mental-Competency-Issues.pdf); CAIR Coalition Practice Manual, *supra* note 6, at 21-26 (discussing challenges facing attorneys working with noncitizens with mental illnesses and surveying an attorney's ethical obligations in this situation).

<sup>221</sup> The ABA Model Rules of Professional Conduct ("Model Rules") (which are available here: [www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents/](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/)) provide a standard of ethical rules that is similar to the law governing lawyers' conduct in most states. However, not all states have adopted the Model Rules, and counsel should investigate the relevant law in their jurisdiction. In addition, the State Bar in the jurisdiction where the attorney is licensed may provide helpful guidance on ethical considerations when representing clients with mental illness. See, e.g., Thomas K. Byerley, Regulation Counsel, State Bar of Michigan, "Representing the Incompetent or Disabled Client" (Dec. 1998), [www.michbar.org/opinions/ethics/articles/dec98](http://www.michbar.org/opinions/ethics/articles/dec98).

<sup>222</sup> MODEL RULES OF PROF'L CONDUCT R. 1.14 (2013).

<sup>223</sup> *Id.* This ethical rule is directly at odds with the idea put forward by the BIA, see *Matter of M-J-K-*, 26 I&N Dec. 773 (BIA 2016), that simply appointing an attorney to represent a person who lacks competency is an appropriate safeguard, as attorneys are not supposed to step in and make strategy decisions for the client.

<sup>224</sup> American Bar Association Commission on Immigration, *Practice Advisory, Representing Detained Immigration Respondents of Diminished Capacity: Ethical Challenges and Best Practices* (July 2015), at 7, [www.americanbar.org/content/dam/aba/administrative/immigration/MentalHealthPaper.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/immigration/MentalHealthPaper.authcheckdam.pdf) (explaining that protective measures are permitted only in limited circumstances and that even in these circumstances, lawyers should take the least intrusive protection action possible); accord CAIR Coalition Practice Manual, *supra* note 6, at 21-22.

<sup>225</sup> *Id.* (quoting David A. Green, "I'm Ok-You're Ok": Educating Lawyers to "Maintain a Normal Client-Lawyer Relationship" with a Client with a Mental Disability, 28 J. LEGAL PROF. 65, 81 (2004)).

## F. Vicarious Trauma Prevention for Practitioners Representing Clients with Mental Illnesses

Practitioners who represent noncitizens are at risk of developing secondary trauma or vicarious trauma<sup>226</sup> because many noncitizen clients have suffered trauma in their countries of origin, during their migration journeys, and while relocating in the United States.<sup>227</sup> In addition, noncitizens who have symptoms of serious mental health conditions may also have suffered trauma related to their mental health or may currently be experiencing trauma due to detention conditions or other circumstances during the course of representation.<sup>228</sup>

Given the special vulnerabilities facing noncitizen clients with mental illness, practitioners should be aware of the potential for trauma exposure responses and their increased risk of developing vicarious trauma. Vicarious trauma is “the resulting cognitive shifts in beliefs and thinking that occur . . . in direct practice with victims of trauma.”<sup>229</sup> It may manifest in various ways, such as through minimizing others’ experiences, avoidance and the inability to listen, an inability to empathize, an inability to embrace complexity, decreased creativity, an inflated sense of the importance of one’s work, and feelings of helplessness.<sup>230</sup> Other trauma exposure responses include “cynicism, anger, fear, guilt, hypervigilance, intrusive images, physical ailments and somatic symptoms ranging from headaches and stomachaches to more severe ailments, substance abuse, and chronic exhaustion.”<sup>231</sup> These responses can hamper a practitioner’s ability to establish productive relationships with clients and advocate zealously on their behalf. To fulfill their ethical obligations to their clients, practitioners must be aware of how trauma exposure responses can affect their ability to zealously advocate on behalf of immigrant clients and take proactive steps to mitigate the harmful effects of trauma exposure responses.<sup>232</sup>

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<sup>226</sup> Lauren Markham, *No End in Sight: What Happens when Immigration-Rights Advocates Reach a Breaking Point?* 96 VQR 1 (2020), [www.vqronline.org/reporting-articles/2020/03/no-end-sight](http://www.vqronline.org/reporting-articles/2020/03/no-end-sight).

<sup>227</sup> Hannah C. Cartwright, Lindsay M. Harris, Liana Montecinos, Anam Rahman, *Vicarious Trauma and Ethical Obligations for Attorneys Representing Immigrant Clients: A Call to Build Resilience Among the Immigration Bar*, 2 AILA LJ. 23 (2020) [hereinafter “Vicarious Trauma and Ethical Obligations”] (explaining that this triad is known as the “triple trauma paradigm,” but noting that it does not acknowledge that being undocumented in the United States often also traumatizes clients, nor acknowledge that many immigrants are vulnerable to additional traumas once in the United States, including criminal victimization and re-traumatization through the process of applying for relief before an immigration court or U.S. Citizenship and Immigration Services (USCIS)).

<sup>228</sup> Hannah C. Cartwright, Megan Hope, & Gregory Pleasants, *Self-Care in an Interprofessional Setting Providing Services to Detained Immigrants with Serious Mental Health Conditions*, 65 SOCIAL WORK 82 (2020), [academic.oup.com/sw/advance-article/doi/10.1093/sw/swz048/5679757?guestAccessKey=2ba39055-55ed-4a1b-9b5c-ab7f40f8b313](http://academic.oup.com/sw/advance-article/doi/10.1093/sw/swz048/5679757?guestAccessKey=2ba39055-55ed-4a1b-9b5c-ab7f40f8b313).

<sup>229</sup> Vicarious Trauma and Ethical Obligations, *supra* note 230, at 25.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 25-29.

Practitioners should endeavor to take proactive steps towards preventing vicarious trauma during their client work. Such steps may include:

- self-monitoring for personal trauma exposure responses such as: anger and cynicism, guilt, deliberate avoidance, minimizing of client experiences, inability to embrace complexity, hypervigilance, dissociative moments, numbing and/or inability to empathize, a feeling that “one can never do enough” or feelings of hopelessness related to your work, and abuse of drugs or alcohol<sup>233</sup>
- setting and keeping boundaries with clients
- engaging in ‘trauma time management’ by allowing oneself to time to debrief, process, and de-escalate after long client meetings preparing affidavits, intensive writing that is embedded in a client’s trauma narrative, or testimony preparation<sup>234</sup>
- creating a personal safety plan and cultivating a support team of colleagues or family and friends who can communicate support when you feel overwhelmed
- following a relationship-centered framework by leaning into the relationship with your client in a collaborative manner aimed at building rapport and trust to develop a foundation for responding to challenges during the course of your representation;<sup>235</sup> and
- engaging in breathing or grounding exercises and taking steps to reaffirm meaning in the work when the practitioner begins to feel triggered or overwhelmed.<sup>236</sup>

Through taking these proactive steps, practitioners can foster resilience and an ability to continue in this challenging but important work.

## V. Conclusion

Representing noncitizens with mental illnesses presents challenges that differ from other removal defense work. Practitioners must navigate complex ethical issues, provide culturally competent representation, collaborate with mental health professionals, and often navigate the complexities of detention, all while working in an increasingly hostile and complex legal environment. Despite these challenges, attorneys have many tools in their toolkits to successfully represent noncitizens with mental illness. Practitioners should be prepared to argue for accommodations that will make proceedings fundamentally fair. The ultimate goal is to respond this vulnerable population’s specific needs while ensuring that the immigration system upholds their rights and treats them with dignity and respect.

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<sup>233</sup> *Id.* at 35.

<sup>234</sup> *Id.* at 31-36.

<sup>235</sup> Cartwright, et al, *supra* note 231, at 86-88.

<sup>236</sup> Jean Koh Peters, “Managing Vicarious Traumatization.” *Five Habits of Cross-Cultural Lawyering and More* (Clinical Law Teaching Materials from Sue Bryant and Jean Koh Peters), [fivehabitsandmore.law.yale.edu/jeans-materials/vicarious-trauma/managing-vicarious-trauma/](https://fivehabitsandmore.law.yale.edu/jeans-materials/vicarious-trauma/managing-vicarious-trauma/).



The Catholic Legal Immigration Network, or CLINIC, advocates for humane and just immigration policy. Its network of nonprofit immigration programs—over 375 affiliates in 49 states and the District of Columbia—is the largest in the nation.

Building on the foundation of CLINIC’s BIA Pro Bono Project, CLINIC launched the Defending Vulnerable Populations (DVP) Program in response to growing anti-immigrant sentiment and policy measures that hurt immigrants. DVP’s primary objective is to increase the number of fully accredited representatives and attorneys who are qualified to represent immigrants in immigration court proceedings. To accomplish this, DVP conducts court skills trainings for both nonprofit agency staff (accredited representatives and attorneys) and pro bono attorneys; develops practice materials to assist practitioners; advocates against repressive policy changes; and expands public awareness on issues faced by vulnerable immigrants. By increasing access to competent, affordable representation, the program’s initiatives focus on protecting the most vulnerable immigrants—those at immediate risk of deportation.

DVP offers a variety of written resources including timely practice advisories and guides on removal defense strategies, amicus briefs before the BIA and U.S. courts of appeals, pro se materials to empower the immigrant community, and reports. Examples of these include a series of practice advisories specific to DACA recipients, a practice pointer on the Supreme Court’s decision in *Guerrero-Lasprilla v. Barr*, 140 S.Ct. 1062 (2020), a practice pointer on refreshing recollection in immigration court, a practice advisory on strategies and considerations in light of the Supreme Court’s decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), a guide on how to obtain a client’s release from immigration detention, an article in Spanish and English on how to get back one’s immigration bond money, and a report entitled “Presumed Dangerous: Bond, Representation, and Detention in the Baltimore Immigration Court.” These resources and others are available on the [DVP webpage](#).