LEGAL ACTION CENTER

AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY[1]
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REPRESENTING CLIENTS WITH MENTAL COMPETENCY ISSUES UNDER *MATTER OF M-A-M-*

By The Legal Action Center and
The University of Houston Law Center Immigration Clinic[2]

Until recently, attorneys and immigration judges had limited guidance about safeguards that might be available to ensure a fair hearing in immigration court for noncitizens with mental competency issues. As a result, many such individuals have been ordered deported without access to counsel or any assessment of their abilities. Others have languished in jail indefinitely while immigration judges delayed proceedings in the hope that they would find representation or that their conditions would improve. Extended stays in detention centers, however, have instead caused people's conditions to deteriorate, at times resulting in psychosis and catatonia. The lack of protections has even led to mistaken deportations of U.S. citizens who were unable to prove their nationalities without assistance.

In May 2011, the Board of Immigration Appeals (BIA) issued a precedent decision setting forth a framework for immigration judges to follow when hearing cases involving respondents with mental competency issues. *See Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011).[3] This practice

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[1] This practice advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.

[2] The principal authors of this Practice Advisory were Melissa Crow, Director, Legal Action Center; Janet B. Beck, Clinical Assistant Professor, University of Houston Law Center Immigration Clinic; and Geoffrey A. Hoffman, Director and Clinical Associate Professor, University of Houston Law Center Immigration Clinic. The authors wish to acknowledge the assistance of Ahilan Arulanantham, Laura Belous, Karen Bower, Ira Burnim, R. Mark Frey, Jennifer Mathis, Sarah Mehta, Dr. Kristen Ochoa, Steven Schulman, and Judith Storandt who provided helpful comments on previous drafts. Special thanks go to LAC Law Fellow Kate Voigt for her excellent research assistance and to LAC Consultant Erin Hustings, whose shrewd insights and perseverance ultimately brought this project to fruition.

[3] This practice advisory draws on the experience of Andrea Penedo, a third year law student in the University of Houston Law Center Immigration Clinic, and Catharine Yen, a 2011

advisory provides a detailed analysis of that decision — the first published decision from the BIA in nearly fifty years to provide substantive guidance on hearings involving respondents with mental disorders[4] — and offers strategic advice on how to address issues that may arise in the context of representing such clients.

What statutory protections apply to respondents who lack mental competency?

Under the Immigration and Nationality Act (INA), the Attorney General "shall prescribe safeguards to protect the rights and privileges" of respondents for whom it is "impracticable" to be present at removal proceedings by reason of mental incompetency. INA § 240(b)(3). Some courts have construed this provision to protect incompetent respondents able to make a physical appearance, but unable to meaningfully participate without representation.[5] Because competency issues may stem from both physical and psychological conditions, which give rise to a broad spectrum of capabilities and needs, the procedural safeguards required under INA § 240(b)(3) differ from case to case.

What do the applicable regulations say?

Of the extensive regulations that govern the conduct of removal proceedings, only a handful address the subject of mental competency. These include 8 C.F.R. § 103.5a(c)(2)(ii) (providing for service of a Notice to Appear upon the person with whom a mentally incompetent respondent resides); 8 C.F.R. § 1240.4 (providing that an attorney, legal representative, legal guardian, near relative, or friend may "appear on behalf of" a respondent whose mental incompetency makes it "impracticable" for him or her to "be present" at a hearing); 8 C.F.R. § 1003.25(a) (permitting an immigration judge to waive the presence of a mentally incompetent respondent who is represented by an individual from one of the preceding categories); 8 C.F.R. § 1240.10(c) (prohibiting an immigration judge from accepting an admission of removability from an incompetent respondent unless accompanied by an attorney, legal representative, near relative, legal guardian, or friend, and requiring a "hearing on the issues"). In each case, the regulations require immigration judges to determine whether a respondent is "incompetent" — without defining that term — but do not provide any meaningful guidance either for determining competency for particular purposes or for guaranteeing due process for a respondent who lacks competency to proceed.

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graduate, who ably represented M-A-M- before the Board of Immigration Appeals. Ms. Penedo continues to represent him on remand.

[4] The use of the term "mental disorder" in this practice advisory is consistent with the terminology used in the AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000) and encompasses cognitive, intellectual and psychiatric disabilities.

[5] *See, e.g., Mohamed v. Gonzales*, 477 F.3d 522, 526 (8th Cir. 2007) ("A mentally incompetent person, although physically present, is absent from the hearing for all practical purposes.").

What additional guidance does *Matter of M-A-M-* provide?

In its precedential decision, *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011), the Board of Immigration Appeals, for the first time, set forth a test for immigration judges to assess a respondent's ability to participate in a removal hearing. According to *M-A-M-*, the decisive factors are whether the respondent understands 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 adverse evidence, present favorable evidence, and cross-examine government witnesses. 25 I&N Dec. at 479; *see also* INA § 240(b)(4)(B); 8 C.F.R. § 1240.10(a)(4). By way of example, the Board cited its own decision in *Matter of Sinclitico*, 15 I&N Dec. 320 (BIA 1975), which found the respondent incompetent to voluntarily surrender his U.S. citizenship based on his apparent inability to understand questions, medical evidence of schizophrenia, and testimony from his brother regarding his mental illness. 25 I&N Dec. at 481.

Indicia of Incompetency

Noting that a respondent is presumed to be competent, the Board explained that an immigration judge need not apply the *M-A-M-* test in the absence of any "indicia of mental incompetency."[6] 25 I&N Dec. at 477. Such indicia may derive from observations of the respondent's functioning and behavior by the immigration judge or either party, testimonial evidence, or documentation submitted as part of the record. *Id.* at 479. Potential indicators of serious mental disorders, which may give rise to competency issues, include difficulty communicating thoughts completely or coherently, perseveration, overly simplistic or concrete thinking, words or actions that do not make sense or suggest that the person is experiencing hallucinations or an altered version of reality, memory impairment, disorientation, an altered level of consciousness or wakefulness, or a high level of distraction, inattention or confusion.

Competence is often dynamic and contextual.[7] Some respondents who cannot represent themselves in removal proceedings due to competency issues may still have the ability to consent to representation, to assist in their defense, or to stand trial. Moreover, the fact that an individual

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[6] In prior unpublished decisions, the BIA put the onus on respondents to prove their incompetence. *See, e.g.*, *Matter of S-*, 2007 WL 2463933 (BIA Aug. 6, 2007) (removal proceedings comported with due process where respondent failed to raise past treatment for schizophrenia until after pleadings were taken, declined continuance to seek counsel, and offered no further evidence of incompetence); *Matter of E-*, 2003 WL 23269901 (BIA Dec. 4, 2003) (due process requirements satisfied where represented respondent offered no documentary or testimonial evidence of alleged incompetence); *Matter of V-*, 2006 WL 2008263 (BIA May 24, 2006) (no due process violation where respondent, who submitted detention medical records reflecting treatment for mental health issues for the first time on appeal, did not thereby prove inability to understand nature of proceedings or to participate in his defense). For a more comprehensive discussion of relevant precedent prior to *M-A-M-*, *see* Mimi E. Tsankov, *Incompetent Respondents in Removal Proceedings*, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION LAW ADVISOR, April 2009, at 1, 2-4.

[7] *See Indiana v. Edwards*, 554 U.S. 164, 175 (2008) (noting that "[m]ental illness itself is not a unitary concept" and may manifest itself differently depending on the circumstances and individuals involved).

carries a mental health diagnosis or diagnosis of developmental disability or has been previously labeled "incompetent" does not mean that he or she is currently incompetent. Because mental competency may vary over time,[8] the BIA instructed immigration judges to consider "indicia of incompetency" throughout the duration of removal proceedings. *Id.* at 480 (citing *Indiana v. Edwards*, 554 U.S. 164, 175 (2008)). Given that noncitizens in removal proceeding do not have the right to counsel at government expense, it is important to distinguish the competency standard in criminal proceedings from the competency standard for an unrepresented respondent in immigration court. In this respect, the definition for competency in M-A-M- is incomplete as it does not clearly lay out a standard for those who are unrepresented as opposed to those who have counsel.

Measures to Assess Competency

When indicia of incompetency are present, an immigration judge must determine whether a respondent is sufficiently competent to proceed without safeguards. *Id.* at 479. Even if a respondent has been pronounced mentally competent, procedural safeguards may be necessary to ensure a fair hearing in immigration court if, for example, a respondent has a significant history of mental illness, is experiencing an acute aggravation of mental illness, or if the respondent's condition has changed significantly since competency was determined. *Id.* at 480. By the same token, certain mental impairments would not necessarily preclude meaningful participation in immigration proceedings without safeguards. *Id.*

The BIA emphasized that measures needed to assess competency will vary from case to case. For example, an immigration judge could ask the respondent basic questions to assess his or her ability to understand the nature and object of the proceedings, grant a continuance to enable the parties to collect relevant documentary evidence, solicit testimony from family or close friends, or order a mental competency evaluation. *Id.* at 480-81. When the assessment has been completed, the immigration judge must articulate his or her reasoning and decision regarding the respondent's competency on the record. *Id.* at 481.

Safeguards

If a respondent is not sufficiently competent to proceed with a hearing, immigration judges have discretion to apply appropriate safeguards. *Id.* at 481-82. The BIA listed the following available safeguards as "examples," while noting that the list is not exhaustive:

- Legal representation;
- Identification and appearance of a family member or close friend who can assist the respondent and/or his legal representative;

[8] Not all individuals with mental disorders will experience variations in condition or competency. Some mental conditions, such as intellectual disabilities and brain injuries, tend to produce more static deficits. *See, e.g.*, Patricia A. Zapf and Ronald Roesch, *Future Directions in the Restoration of Competency to Stand Trial*, 20 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 43 (2011) (finding that one of the factors most strongly associated with inability to regain competency was "an irremediable cognitive disorder, such as mental retardation").

- Docketing or managing the case to enable the respondent to obtain legal representation and/or medical treatment intended to restore competency;
- Participation of a guardian in the proceedings;[9]
- Continuance of the case for good cause shown;
- Closing the hearing to the public;
- Waiving the respondent's appearance;
- Assistance with the development of the record,[10] including the examination and cross-examination of witnesses;
- Reserving appeal rights for the respondent.

Id. at 483.

Under what circumstances is administrative closure or termination of proceedings appropriate?

Where no conceivable procedural safeguards would ensure a fair hearing, *M-A-M-* permits administrative closure[11] — in effect, an indefinite stay of proceedings — pending the exploration of other options such as treatment.[12] Pursuant to a recent decision of the Board of Immigration Appeals, immigration judges and the Board may administratively close removal proceedings even if one of the parties opposes this course of action. *Matter of Avetisyan*, 25 I&N Dec. 288 (BIA 2012).

In practice, administrative closure does not lead automatically to release from detention. In some cases, enrollment in a treatment program may be necessary to secure the release of respondents whose removal is not being presently, actively pursued. In other cases, such as where a person has an intellectual disability or brain trauma and may not respond to treatment, ICE may continue to detain an individual whose case has been administratively closed. Under these

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[9] Many disability rights advocates are troubled by the appointment of legal guardians, which may undermine an individual's autonomy. Counsel should explore alternatives that allow the respondent to retain as much autonomy as possible, including whether a power of attorney or appointment of a guardian ad litem would be sufficient, before seeking appointment of a full-fledged legal guardian.

[10] Certain courts in some states, such as Vermont, provide communication support services for parties who have cognitive or intellectual disabilities.

[11] Administrative closure is a procedural convenience used to remove a case temporarily from the immigration court's calendar or from the Board's docket; the removal proceeding remains pending yet inactive. A case cannot be administratively closed if both parties do not agree to the closure. *Matter of Gutierrez*, 21 I&N Dec. 479, 480 (1996). A respondent whose case has been administratively closed remains in removal proceedings. At any time, either party can file a Motion to Recalendar the case.

[12] 25 I&N Dec. at 483. *See also* 8 C.F.R. § 245.1(c)(8)(ii)(D); EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, DEPARTMENT OF JUSTICE, IMMIGRATION JUDGE BENCHBOOK 116 (AILA 2010) (hereinafter, "IMMIGRATION JUDGE BENCHBOOK") (noting that "the Immigration Judge may wish to inquire of counsel whether issues of competency make this an appropriate case for administrative closure until the respondent can receive proper psychiatric care"), *also available at* http://www.justice.gov/eoir/vll/benchbook/tools/MHI.

circumstances, attorneys should consider filing a habeas petition on the grounds that ICE has exceeded its authority under INA § 236(a), which permits detention "pending a decision on whether the alien is to be removed from the United States." By administratively closing a case, ICE has made a provisional decision not to remove the respondent, and the decision is thus no longer "pending."

Although *M-A-M-* does not explicitly mention termination,[13] some immigration judges have terminated proceedings in cases where the severity of the respondent's competency issues precludes a fair hearing under any circumstances.[14] This practice is consistent with the *Immigration Judge Benchbook*, which suggests that immigration judges consider "terminating cases where respondents are unable to proceed in light of mental health issues and a corresponding inability to secure adequate safeguards." IMMIGRATION JUDGE BENCHBOOK at 120. To date, the BIA has not yet issued a published decision affirming or rejecting termination based on the inability to provide a fair hearing for a respondent with mental competency issues.[15]

What steps should an attorney take when the respondent appears to be mentally incompetent but there has been no such finding by the immigration judge?

1) *Gather as much evidence as possible to demonstrate that your client may not be competent. If you do not have enough time to collect this evidence before your next hearing, you should request a continuance.*

Relevant documentary evidence could include mental health reports or assessments; testimony from mental health professionals; prescriptions for psychotropic medication; school records regarding special education classes or individualized education programs; reports or letters from teachers, counselors, or social workers; evidence of participation in certain programs; 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 or court-ordered treatment indicating that your client was found to be incompetent to stand trial or not guilty by reason of insanity; detention center medical records; and any detention incident reports indicating that your client picked up

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[13] Termination means that the case has ended and the respondent is no longer in removal proceedings. Upon termination, the individual will revert to the same status he or she was in prior to commencement of proceedings. To put an individual back into removal proceedings after a case has been terminated without prejudice, the government would have to file a new Notice to Appear.

[14] *See, e.g., Matter of L-T-* (Eloy Imm. Ct. Feb. 26, 2010) (unpublished), BIA appeal dismissed Nov. 8, 2010; *Matter of B-Z-* (Eloy Imm. Ct. Dec. 1, 2010) (unpublished), remanded by BIA June 1, 2011 for consideration of administrative closure as a potential safeguard in accordance with *M-A-M-*.

[15] *But see Matter of Sinclitico*, 15 I&N Dec. 320, 323 (BIA 1975) (terminating deportation proceedings based on Board's conclusion that respondent was incompetent to renounce U.S. citizenship when he had allegedly done so).

additional charges or was put into isolation because of mental illness. *See* 25 I&N Dec. at 479-81.[16]

Be sure to ask your client for a complete list of treating physicians, psychologists and other health professionals whom he or she has consulted over the years, as well as all hospitalizations, and records of any inpatient or outpatient commitment. Assuming your client agrees to let you request his or her medical records, these can be used to demonstrate incompetency.[17] You may also want to inquire about other types of supportive services your client has received.

Where possible, you should try to talk with family members, friends, coworkers, clergy, teachers, neighbors, landlords, facility staff and others about their observations of your client's behavior and any history of head trauma, cognitive impairment or treatment for any mental disorder. For example, a family member who indicates that her detained relative wrote an unintelligible letter or seemed disoriented during a routine phone conversation might be a strong witness, either in person or by declaration.

2) *Request production of records by DHS.*

M-A-M- obligates the Department of Homeland Security (DHS) to provide the court with any evidence in its possession bearing on the respondent's mental competency. *Id.* at 480. A written request to DHS, with a copy to the court, will serve to remind both of the agency's obligation. Given that *M-A-M-* requires DHS to produce only those documents bearing on a respondent's competency, you should also file a Track III Freedom of Information Act (FOIA) request with DHS to ensure that you get copies of all other documents in your client's A-file and medical file.

For clients detained in DHS facilities, you should send a separate FOIA request covering custodial and medical information, along with an ICE Privacy Waiver,[18] to the ICE office responsible for your client's case, with a copy to the medical records office at the detention facility. A follow up call to the detention center can help to ensure that the request gets to the right person and that ICE produces your client's records in a timely manner.

You may be able to follow this procedure even if your client is detained in a facility that is managed by a DHS contractor. In many cases, DHS has custody over detention records that a

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[16] For additional recommendations about potential evidence of incompetency, *see* Tsankov, *Incompetent Respondents in Removal Proceedings, supra* note 6, at 18-19; Maria Baldini-Potermin, *Past Persecution, Mental Illness and Humanitarian Asylum: Creating the Record to Win the Claim*, 86 Interpreter Releases, No. 4, at 261, 265-66 (Jan. 26, 2009).

[17] Federal law prohibits the release of medical records without a signed Health Insurance Portability and Accountability Act (HIPAA) release form. The form should be signed by the respondent if he or she is competent to do so or, alternatively, his or her legal guardian or another individual with a power of attorney that includes such authority. *See* 45 C.F.R. § 164.502(g).

[18] The ICE Privacy Waiver is valid by default for 90 days, but your client or his or her legal guardian can specify a longer period of validity.

contractor creates and maintains on its behalf.[19] If not, you will have to submit your request for records directly to the contractor.

The *Immigration Judge Benchbook* indicates that an immigration judge may ask DHS to take other affirmative steps to gather evidence regarding a respondent's competency, including "contact[ing] those involved in prior criminal, civil, or administrative proceedings at which the respondent's mental health was at issue." IMMIGRATION JUDGE BENCHBOOK at 121. You should carefully consider whether to file a motion requesting these types of interventions, which may reveal information that could ultimately undermine your client's claims for relief.

3) *If necessary, move for a subpoena.*

Immigration judges have authority to subpoena records from DHS and other sources. *See* INA § 240(b)(1); 8 C.F.R. § 1003.35(b); 8 C.F.R. § 1287.4. Because subpoenas are rare in immigration court, you should file a Motion for Subpoena only after DHS, a DHS contractor, or some other entity has ignored, denied, or only partially complied with your request for records. If you file such a motion, you should attach written documentation of prior records requests, explain why the documents you seek are essential for a fair hearing, and reference DHS's burden of production under *M-A-M-*.

Records produced in response to a subpoena must be submitted to the immigration judge, who should then provide copies to the respondent's counsel. If questions arise regarding the completeness of records released by DHS or another entity, you can move to subpoena the custodian of records to testify about relevant recordkeeping practices and to produce relevant documents under his or her control. 8 C.F.R. § 1003.35(b)(1).

Bear in mind that DHS may not have copies of medical records created before a respondent entered DHS custody. Unless your client has copies of these records, you may need to submit HIPAA forms to each place where he or she received treatment.

4) *Arrange for a competency evaluation.*

A competency evaluation by a qualified expert can often constitute the best evidence of whether a given individual is competent to proceed at a removal hearing. *M-A-M-* mentions this possibility, *see* 25 I&N Dec. at 481 ("Another measure available to Immigration Judges is a mental competency evaluation"), but does not specify who should pay for the evaluation.

A mental health professional with the necessary credentials and experience can greatly enhance the credibility of any evaluation. Qualified experts include independent psychiatrists and psychologists, preferably with expertise in forensic practice. You should specifically request that the expert address the three prongs of the *M-A-M-* competency test, along with any issues needed to establish your client's eligibility for specific relief. The expert's current license and curriculum vitae should be submitted to the court with the evaluation.

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[19] The most definitive way to determine whether DHS has custody over detention records in a facility managed by a DHS contractor is to review the terms of the applicable management contract, if available.

If resources permit, you should obtain an independent competency evaluation. If your client is detained and you cannot find an expert with the requisite qualifications who is willing to travel to the detention facility, you can file a motion requesting that DHS transport the respondent to the expert's office.

Alternatively, you can file a motion compelling DHS to secure a competency evaluation by an independent evaluator, who should be provided with all available evidence of incompetency. Because DHS is a party to removal proceedings, any involvement by the agency in securing a competency evaluation creates a conflict of interest that undermines the integrity of the adjudicative process. Despite this conflict, anecdotally, many practitioners report that immigration judges have asked DHS to obtain mental health examinations of detained respondents and in at least one reported case, DHS arranged for a competency evaluation at the immigration judge's request. *Matter of J-F-F*, 23 I&N Dec. 912, 915 (AG 2006). If you have doubts about the adequacy of a competency evaluation conducted by a DHS contractor, you should retain an independent expert to review the evaluation.

An immigration judge also can order that the respondent be evaluated by the U.S. Public Health Service or any contract agency or individual charged with mental health services for detainees. IMMIGRATION JUDGE BENCHBOOK at 123. This arrangement would similarly create a conflict of interest if the Public Health Service employee was affiliated with ICE's Health Service Corps, which provides medical services at ICE field offices and detention centers.

Another possible option is to request that the immigration judge provide funds for and arrange a competency evaluation based on his or her obligation to ensure a fair hearing and the inherent conflict of interest created by any arrangement in which DHS either pays for or performs the evaluation of an individual whom it seeks to deport.

5) *Move for a competency hearing.*

Once you have gathered evidence of incompetency, you can move for a competency hearing. Before filing such a motion, you should confer with ICE's local Office of Chief Counsel to determine how they handle cases involving respondents with mental competency issues. Some offices may want to obtain their own competency evaluations, while others may be content to cross-examine the expert you select. By determining the norms in your jurisdiction as early as possible, you may be able to avoid unnecessary delays in your client's case.

If your motion for a competency hearing is granted and your client is physically able to testify, but is unable to comprehend your role or the nature and purpose of the proceedings, you should ask simple direct examination questions intended to demonstrate your client's lack of competence. For example:

- 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? Why?
- What is the immigration judge's role?
- What could happen to you if you do not win your case?
- Why are you in detention?

Memory may affect a respondent's ability to testify even if he or she is found competent. Thus, you should ask additional questions intended to establish your client's inability to remember key events:

- When was the last time you were in your home country?
- Have you ever been arrested? For what crimes?
- Were you convicted of any of these crimes?
- Are you married? What is your spouse's name?
- Do you have children/siblings? What are their names?
- Do you take any medications? Which ones?
- How long have you been in detention?

Depending on your client's circumstances, you may want to consider asking questions that reveal delusional thinking (which may require use of certain "trigger words"), deficits in intellectual ability, or impaired judgment.

You can also solicit testimony, whether oral or written, from the respondent's family members and/or close friends. Where relevant, you should consider providing a declaration regarding the respondent's inability to assist you with his or her case.

Can a mentally incompetent respondent consent to representation?

Where a respondent has severe competency issues, the process of obtaining his or her consent to representation may be difficult, if not impossible. Even if such a respondent signs a consent form, he or she may not fully understand the implications of doing so.

To make an initial determination regarding your client's ability to consent to representation, you can ask some basic questions. For example:

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

For clients who are not fluent English speakers, you may need to rely on an interpreter who is well-versed in both your client's language and culture.[20] If you conclude that your client lacks competence to consent to representation, you should try to find out from family members or others if a legal guardian[21] has ever been appointed to manage your client's affairs. If your client has a legal guardian, you must obtain the legal guardian's consent before undertaking representation of the client.

Unless applicable state ethical rules require explicit consent to representation, you may still be able to represent a client whose competency issues affect his or her ability to consent to representation. 8 C.F.R. § 1292.1(a)(1) and (a)(4) state, without reference to consent, that attorneys and accredited representatives are entitled to appear in immigration proceedings. By contrast, 8 C.F.R. § 1292.1(a)(3) limits the circumstances under which a "reputable individual" may appear in immigration court and specifies that it must be "at the request of the person entitled to representation." Similarly, 8 C.F.R. § 1292.1(a)(5) permits the appearance of an accredited official "of the government to which an alien owes allegiance, if the official appears solely in his official capacity and with the alien's consent."

The foregoing distinction among different classes of individuals acting in a representative capacity is reasonable because attorneys and accredited representatives have the requisite expertise in immigration law to effectively accommodate and protect the interests of individuals with competency issues and are subject to disciplinary sanctions if they fail to do so. 8 C.F.R. § 1003.101(b), § 292.3(a)(2), § 1292.3(a)(2); BIA Rule 11.1 ("The Board has authority to impose disciplinary sanctions upon attorneys and accredited representatives who violate rules of professional conduct in practice before the Board, the Immigration Courts, and the Department of Homeland Security.").

Notably, governing law in multiple circuits presumes that all detainees want the assistance of counsel, and requires those who wish to proceed without counsel to knowingly and voluntarily waive their right to do so. *See, e.g.*, *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004) (immigration judge's failure to obtain a knowing and voluntary waiver constitutes "an effective denial of the right to counsel, which, 'in the light of the administrative record,' may be an abuse of discretion" rising to the level of a due process violation); *Partible v. INS*, 600 F.2d 1094, 1096 (5th Cir. 1979) (respondent's waiver of right to counsel was not valid, knowing or voluntary where made without understanding of complexity of case or arguments in her favor; case remanded for new hearing since outcome might have been different with assistance of counsel); *Leslie v. Att'y Gen. of the United States*, 611 F.3d 171, 175, 182 (3d Cir. 2010) (finding putative waiver in absence of information about free and low-cost representation to constitute an effective

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[20] Mental health interpreters receive specialized training to optimize communication in mental health settings (e.g. civil competency proceedings) for individuals who lack English proficiency. In addition to providing interpretation between English and the individual's native language, mental health interpreters are trained to be culturally competent in facilitating accurate communication. For more information regarding mental health interpreters, *see* The Center for Health and Health Care in Schools' website.

[21] A "legal guardian" has the authority and obligation to care for the person or property of another individual who is unable to do so, usually because of infancy, incapacity, or disability.

denial of respondent's right to counsel because not knowing or voluntary; case remanded for new hearing).

What if my client's lack of competency prevents effective attorney-client communication?

In some cases, an attorney may, after initiating representation, determine that a client is unable to assist with his or her defense due to severe competency issues. As previously discussed, termination of removal proceedings may be appropriate if no conceivable safeguards would ensure a fair hearing.[22] Alternatively, the attorney may request that the immigration judge appoint a guardian ad litem, who need not be an attorney. Under these circumstances, a guardian ad litem would help the attorney provide effective representation in removal proceedings by representing the respondent's best interests.

Some disability rights advocates have expressed concern that the appointment of a guardian ad litem under these circumstances may compromise the respondent's interests by encouraging an immigration judge to proceed with a case rather than terminating it. However, termination is a relatively infrequent outcome in immigration court. The appointment of a guardian ad litem is consistent with the Model Rules of Professional Conduct. These Rules explain that, when representing a client with diminished capacity who would otherwise be at risk of harm, an attorney "may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian."[23] Even with legal representation and a guardian ad litem, termination may still be required in certain cases, as the client's incapacity may continue to prevent a fair hearing.

How can an attorney secure the appointment of a guardian ad litem for immigration court purposes?

Immigration judges arguably have the authority to grant motions for the appointment of a guardian ad litem pursuant to 8 C.F.R. § 1003.10(b), which authorizes them to take any action that is "appropriate and necessary" to resolve the cases before them.[24] While there are no reported cases on immigration judges appointing guardians ad litem for immigration court proceedings,[25] practitioners have had some success in persuading judges to exercise this authority. In some cases, rather than appointing a guardian ad litem, immigration judges have

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22 *See supra* pages 5-6.

23 MODEL RULES OF PROF'L CONDUCT R. 1.14(b).

24 *See* IMMIGRATION JUDGE BENCHBOOK at 120 ("Immigration Judges should … tak[e] any action consistent with their authorities under the Act and regulations…. [which] may include (1) granting multiple continuances, even sua sponte, to afford respondents time to (a) secure representation in the form of counsel or a guardian ad litem"), 121 ("Immigration Judges should assist in securing counsel and/or a guardian ad litem to the extent permissible.").

25 *Cf. Johns v. Dept. of Justice*, 624 F.2d 522, 523-24 (5th Cir. 1980) (ordering appointment of guardian ad litem for five-year-old child allegedly kidnapped by U.S. couple from Mexico shortly after birth and illegally brought into United States; both child and U.S. couple were represented by the same counsel, who could not be presumed to represent the child's interests).

required counsel to have a state court order appointing a legal guardian before allowing that individual to represent a respondent's interests in immigration court.

To protect the interests of respondents who lack competency to consent or object to the appearance of third parties on their behalf, immigration judges may (and indeed should) carefully examine the qualifications and motivations of individuals appearing as guardians ad litem.[26] Even in the absence of clear guidance as to the requisite qualifications of individuals acting as guardians ad litem, immigration judges likely have implicit authority to question their fitness under INA § 240(b)(3).

What if the immigration judge refuses to appoint a guardian ad litem?

If your efforts to secure the appointment of a guardian ad litem are unsuccessful, you may want to consider seeking a state court order appointing a legal guardian with broader authority to protect the respondent's interests. In addition to potentially jeopardizing a respondent's autonomy, this process can be complex and may not always be viable or efficient in the immigration context. Some states impose residency, citizenship or immigration documentation restrictions for the appointment of legal guardians by state courts. Even if a respondent is able to secure a legal guardian in state court, the guardianship order may not be effective if the respondent is transferred out of the state court's jurisdiction. Moreover, the state court appointment of a legal guardian requires the filing of a separate lawsuit and thus will further delay immigration court proceedings. For detained respondents, arrangements will also have to be made to transport the respondent to state court, which presents further logistical challenges.

Attorneys and guardians play distinct and potentially conflicting roles. An attorney helps a litigant to make more informed choices and acts only at the direction of the client. Where clients are unable to make decisions or communicate their preferences or goals, attorneys are ethically prohibited from substituting their own judgment.[27] By contrast, a guardian exercises decision-making authority in the place of a litigant who does not have the ability to make decisions alone. Given the different skills and obligations of guardians and attorneys, many federal courts have

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[26] *See Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990) (explaining, in the habeas context, that "'next friend' standing is by no means granted automatically to whomever seeks to pursue an action on behalf of another" as certain prerequisites must be met); *Vargas v. Lambert*, 159 F.3d 1161, 1168 (9th Cir. 1998) (finding mother successfully met prerequisites of "next friend" to a son when she presented evidence of his mental incapacity and demonstrated that she represented his "best interests").

[27] *See* MODEL RULES OF PROF'L CONDUCT R. 1.14(a) (providing that a lawyer representing a client with diminished capacity "shall, as far as reasonably possible, maintain a normal client-lawyer relationship"); R. 1.4(a)(2) (requiring reasonable consultation with the client about the means by which his objectives are to be accomplished).

found that non-attorney legal guardians and guardians ad litem are not qualified to provide legal representation in non-immigration cases.[28]

What steps can an attorney take to facilitate the release of a detained client?

Detained noncitizens may be held in facilities operated by DHS, state or local governments, or private companies.[29] Securing your client's release from detention is an important step towards helping him or her achieve the best possible state of mental health. Surveys of detained immigrants as well as general prison populations have consistently concluded that the mere fact of incarceration, even under favorable conditions, is detrimental to physical and mental well-being.[30]

ICE's Office of Enforcement and Removal Operations (ERO) has authority over decisions regarding release from detention. Even if your client is subject to mandatory detention, you may want to approach ERO to explore options that may lead to release. For example, in appropriate cases where strong equities favor an individual's release, an ERO officer might agree to

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[28] *See, e.g., Johns v. County of San Diego*, 114 F.3d 874, 876-77 (9th Cir. 1997) (holding that a minor could not be "represented" by a non-attorney acting as a guardian in a federal civil proceeding, and stating that "[i]t goes without saying that it is not in the interest of minors or incompetents that they be represented by non-attorneys. Where they have claims that require adjudication, they are entitled to trained legal assistance so their rights may be fully protected.") (internal citations omitted); *C.E. Pope Equity Trust v. United States*, 818 F.2d 696, 697 (9th Cir. 1987) (noting that a non-attorney cannot appear as an attorney for other people); *Osei-Afriyie v. Medical College*, 937 F.2d 876, 882 (3d Cir. 1991) (noting that a father could not play the role of an attorney for his children); *Cheung v. Youth Orchestra Found. of Buffalo*, 906 F.2d 59, 61 (2d Cir. 1990) (noting that a parent must be represented when bringing an action on behalf of a child); *see also Lessard v. Schmidt*, 349 F. Supp. 1078, 1098-99 (E.D. Wis. 1972) (rejecting, in involuntary commitment context, the "state's contention that appointment of a guardian ad litem may displace a requirement of appointed counsel" and finding it "apparent…that appointment of a guardian *ad litem* cannot satisfy the constitutional requirement of representative counsel"), *vacated and remanded on other grounds by Schmidt v. Lessard*, 414 U.S. 473 (1974); *Suzuki v. Quisenberry*, 411 F. Supp. 1113, 1129 (D. Haw. 1976) (noting that "[a]ppointment of a guardian *ad litem* is not a substitute for appointment of counsel"), *rev'd in part on other grounds by Suzuki v. Yuen*, 617 F.2d 173 (9th Cir. 1980).

[29] DHS is prohibited from removing a noncitizen from a mental health in-patient institution and assuming custody until a final order of removal has been issued and deportation is imminent. 8 C.F.R. § 1236.2(b).

[30] *See, e.g.*, PHYSICIANS FOR HUMAN RIGHTS AND THE BELLEVUE/NYU PROGRAM FOR SURVIVORS OF TORTURE, FROM PERSECUTION TO PRISON: THE HEALTH CONSEQUENCES OF DETENTION FOR ASYLUM SEEKERS 5, 17 (2003)**;** Jason Schnittker and Andrea John, *Enduring Stigma: The Long-Term Effects of Incarceration on Health*, 48 J. OF HEALTH AND SOC. BEHAV. 115 (2007); Jason Schnittker, Michael Massoglia, and Christopher Uggen, *Out and Down: The Effects of Incarceration on Psychiatric Disorders and Disability*, Table 1 (February 2011) (demonstrating heightened prevalence of mental disorders among people who have experienced incarceration) (unpublished article).

withdraw or cancel a Notice to Appear, thereby eliminating the legal basis for mandatory detention.

ERO is likely to be most receptive to requests for the release of individuals with mental disorders in cases where alternative housing, care and any needed treatment are available. Before approaching ERO, you should make every effort to secure such services for your client.[31] Although certain nonprofit programs may be willing to assist anyone in need regardless of immigration status,[32] most treatment programs — particularly residential treatment centers — are available only to persons who have health insurance or who are eligible for Medicaid or Medicare.[33] In cases where a client was participating in a treatment program prior to being detained by DHS, you may want to consider asking the program to reenroll the individual.

What steps can an attorney take to effect the transfer of a detained client to a facility closer to family or other support networks in a different state?

In cases where release is not possible, your client's psychological needs may warrant transfer to a different detention facility that provides better access to supportive services. Requests for transfer should be submitted directly to the ERO office with jurisdiction over the current detention facility. Local ERO officers have the authority to transfer detainees with advanced care needs to in-patient facilities in appropriate cases, and mental health service providers in detention centers are charged with making transfer recommendations when warranted.[34] Your

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[31] Your local Protection and Advocacy agency can help you determine your client's eligibility for government benefits and other programs. The Protection and Advocacy (P&A) System is a network of independent agencies in every state that provide, by federal mandate, legal representation and other advocacy services to protect the rights of persons with disabilities. Depending on their capacity, P&As may be able to provide additional assistance with your client's case. P&As are not required to inquire into the immigration status of those they serve, except as necessary to determine eligibility for particular services. For more information regarding the services provided by P&As, *see* *The Protection & Advocacy (P&A) System: An Overview for Immigration Attorneys*.

[32] In addition, some detention facilities have community reentry workers who assist incarcerated persons with mental illness in accessing supportive services in the community.

[33] A noncitizen must be a "qualified alien" to be eligible for federal public benefits. 8 U.S.C. § 1611(a); *see also* 8 U.S.C. § 1641 (listing categories of "qualified aliens"). Certain "qualified alien" groups must accrue at least five years in a qualifying status before becoming eligible for Medicaid. 8 U.S.C. § 1613. For a general overview of immigrants' eligibility for public benefits, *see* NATIONAL IMMIGRATION LAW CENTER, GUIDE TO IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS (4th ed. 2002), Table 1: Overview of Immigrant Eligibility for Federal Programs, updated October 2011. Each state has its own guidelines for eligibility for public health benefits. 8 U.S.C. § 1612(b).

[34] *See* ICE, *2008 Operations Manual: ICE Performance Based National Detention Standards*, Medical Care: Section (V)(K)(3-4); Transfer of Detainees: Section (V)(A). Attorneys and their clients should carefully consider whether to request transfer to an in-patient facility, bearing in mind that such institutions vary widely in reputation and practice, and that any detainee transferred outside the mainstream detention system may be subject to restrictive conditions.

request should clearly delineate the factors that necessitate your client's transfer, which may include the proximity of family members who could serve as witnesses at the hearing, the availability of a qualified mental health professional willing to perform a competency evaluation, the availability of treatment programs, or access to counsel.[35]

Because ICE is responsible for transporting respondents back and forth from their hearings, the agency has an interest in minimizing costs by selecting a location in close proximity to the immigration court handling the case. Thus, attorneys may be able to increase the likelihood of transfer to a facility in a different state by moving for a change of venue to that state. Such a motion should be granted for "good cause" based on a balancing of relevant factors, including administrative convenience, expeditious treatment of the case, location of witnesses, and the cost of transporting witnesses or evidence to a new location. *See Matter of Rahman*, 20 I&N Dec. 480, 482-84 (BIA 1992); 8 C.F.R. § 1003.20. *M-A-M-* specifically notes that a motion to change venue may be granted to enable a respondent to be closer to family or available treatment programs. 25 I&N Dec. at 481. However, even if a change of venue is granted, ICE is not obligated to transfer your client to a detention facility in a different state. *See Matter of Rahman*, 20 I&N Dec. at 483-84.

The *Immigration Court Practice Manual* sets forth the procedural requirements for filing a motion to change venue. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT PRACTICE MANUAL ch. 5.10(c); *see also* 8 C.F.R. § 1003.20. Most significantly, a respondent is required to admit or deny the factual allegations and charges in the Notice to Appear before venue will be changed. However, as previously noted, the regulations prohibit an immigration judge from accepting an admission of removability from "an unrepresented respondent who is incompetent." 8 C.F.R. § 1240.10(c). To the extent that competency issues prevent an attorney or other representative from effectively communicating with a client, the motion should be filed noting an exception to the pleading requirement.

How can a determination that a respondent lacks competency affect applications for relief?

Competency issues may affect both the likelihood and availability of relief.[36] Many immigration judges are hesitant to grant discretionary relief such as asylum or cancellation of removal to respondents with mental competency issues unless they are presented with some evidence that the respondent can manage, or be managed, in the community. For example, some immigration judges may require a treatment plan or assurances that the respondent will not pose a danger to self or others if relief is granted.

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[35] For additional guidance regarding procedures for addressing special needs of immigration detainees, *see* Memorandum from John P. Torres, ICE Director regarding Discretion in Cases of Extreme or Severe Medical Concern (Dec. 11, 2006).

[36] A comprehensive discussion of particular forms of immigration relief is beyond the scope of this practice advisory. For more information, *see* CAPITAL AREA IMMIGRANTS' RIGHTS COALITION, COOLEY GODWARD KRONISH LLP, PRACTICE MANUAL FOR PRO BONO ATTORNEYS REPRESENTING DETAINED CLIENTS WITH MENTAL DISABILITIES IN IMMIGRATION COURT 44 (May 2009) ([hereinafter, "CAIR PRACTICE MANUAL").

In the context of asylum or withholding of removal, the few reported decisions where respondents asserted mental illness as a basis for membership in a particular social group are not encouraging. *See, e.g., Raffington v. INS*, 340 F.3d 720 (8th Cir. 2003) (43-year-old Jamaican citizen with a history of depression and attempted suicide failed to show that mentally ill Jamaicans, or mentally ill female Jamaicans, qualify as a particular social group for asylum purposes because they are not a "collection of people closely affiliated with each other, who are actuated by some common impulse or interest"). However, some unpublished decisions have reached the opposite conclusion. *See, e.g., Matter of X-* (BIA 2007) (unpublished) (characterizing respondent's bipolar disorder as "a chronic psychiatric condition subject to treatment but not cure" and concluding that this condition "was an immutable characteristic" that could define a particular social group).[37]

In cases where mental illness is the basis for seeking withholding or deferral of removal under the Convention Against Torture (CAT), the attorney should bear in mind the respondent's heavy evidentiary burden. In *Matter of J-F-F-*, 23 I&N Dec. 912 (AG 2006), which preceded M-A-M-, the Attorney General overturned a prior grant of deferral of removal under CAT to a mentally ill Jamaican respondent. The decision held that the respondent's eligibility for relief could not be established by stringing together a series of suppositions to show that it is more likely than not that torture would result. Rather, the evidence must establish that each step in the hypothetical chain of events is more likely than not to happen. The respondent in *J-F-F-* failed to establish that his behavior would consistently change when he was not taking his medication, that he could not obtain his medication in Jamaica, and that he would consequently end up in police custody and suffer torture by government actors. *Id*. at 919.

In seeking to establish the likelihood of future persecution in a client's country of origin, be sure to inquire about past persecution based on a mental disorder, possibly including forced hospitalizations or involuntary treatment. This will create the presumption of a well-founded fear of future persecution and shift the burden of proof to DHS. You should also submit documentation regarding treatment of people with mental disorders in your client's country of origin.[38] Local treatment providers may be willing to provide affidavits about available treatment options, access to medication, and your client's likely prognosis if forced to return, among other relevant factors.

Evidence of incompetency can also be used to explain a respondent's inability to provide credible and consistent testimony, which might otherwise be the basis for a denial of asylum, withholding of removal or relief under the CAT. *See Matter of S-M-J-*, 21 I&N Dec. 722, 729 (BIA 1997).

Even if a respondent is not competent to assist with her defense, an attorney can often use documents in the record to prove eligibility for certain types of relief. For example, with respect to cancellation of removal for a lawful permanent resident, the Notice to Appear may include the date of the grant of LPR status and whether the individual has been convicted of an aggravated

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[37] Reprinted in CAIR PRACTICE MANUAL, *supra* note 36, Appendix 32.

[38] Disability Rights International has published such documentation regarding twenty-two countries in Eastern Europe, the Middle East, and the Americas. You can find their reports at www.disabilityrightsintl.org.

felony. Government records may also show whether the respondent has been outside the country or can be presumed to have resided continuously in the United States for seven years since the grant of lawful permanent residency.

For noncitizens who are not lawful permanent residents, the evidentiary burden for cancellation is significantly higher. Even if the statutory requirements of ten years of physical presence, good moral character and the absence of certain types of criminal convictions can be easily established, the respondent must still prove that his removal would result in "exceptional and extremely unusual hardship" to a U.S. citizen or lawful permanent resident spouse, parent or child. INA § 240(b)(1)(D). Relevant factors might include the availability of appropriate care, medication or support services in the respondent's home country, the likelihood that qualifying relatives would be obligated to provide significant financial support or relocate, and the extreme anxiety that would result from separation.

Bear in mind that certain mental disorders could render your client inadmissible — and thus ineligible for adjustment of status — under INA § 212(a)(1)(A)(iii) (regarding noncitizens with a physical or mental disorder and associated harmful behavior). However, a waiver may be available under INA § 212 (g)(3) for all but the most serious conditions.[39]

What steps should be taken if the immigration judge denies relief?

If the immigration judge overlooked or accorded insufficient weight to "indicia of incompetency" and denied relief, you should appeal the decision to the BIA. In addition to challenging the denial of relief, you should request that the Board remand the case to enable the immigration judge to apply the framework articulated in *M-A-M-*.[40] You should argue that the immigration judge's failure to assess competency and/or provide appropriate procedural safeguards violated the INA and prevented a fair hearing. The Legal Action Center is aware of several cases where the Board has granted remand under these circumstances.

In cases where a respondent was not competent to proceed *pro se* and lacked representation before the immigration court, the immigration judge's failure to appoint counsel arguably violated due process.[41] As *M-A-M-* notes, the INA requires that respondents in removal

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39 Regulations governing such waivers are set forth at 8 C.F.R. § 212.7(b).

40 Because the Board cannot engage in factfinding, "[a] party asserting that the Board cannot properly resolve an appeal without further factfinding must file a motion for remand. If further factfinding is needed in a particular case, the Board may remand the proceedings to the immigration judge." 8 C.F.R. § 1003.1(d)(3)(iv).

41 *See U.S. ex rel. Shaw v. Van De Mark,* 3 F. Supp. 101, 103 (W.D.N.Y. 1933) (concluding that petitioner failed to receive a fair and impartial hearing that comported with "fundamental principles of justice" because petitioner was committed to a psychiatric hospital at the time of hearing, unrepresented by counsel or any other individual, and did not comprehend that she had a right to be represented by counsel); *cf. Franco-Gonzales v. Holder,* 767 F.Supp.2d 1034, 1058 (C.D. Cal. 2010) (holding under section 504 of the Rehabilitation Act that detained respondents with serious mental disabilities were entitled to "Qualified Representatives" as a necessary accommodation in immigration proceedings). *Cf. In re Gault,* 387 U.S. 1 (1967) (finding that

proceedings have a reasonable opportunity to examine adverse evidence, present favorable evidence, and cross-examine government witnesses. *M-A-M-* at 479; INA § 240(b)(4)(B); *see also* 8 C.F.R. § 1240.10(a)(4). To carry out these tasks, an unrepresented respondent must be competent to understand and participate in the proceedings. Indeed, the *Immigration Judge Benchbook* notes that the Federal Rules of Civil Procedure "require that litigants deemed to have mental health issues have counsel and/or a guardian ad litem," and that while the federal rules are not binding in immigration matters before EOIR, they should serve as a "guide for issues arising in deportation proceedings." IMMIGRATION JUDGE BENCHBOOK at 117. At a minimum, individuals with serious competency issues need legal representation to facilitate a meaningful opportunity to be heard.[42] However, representation alone may not be sufficient to ensure a fair hearing.[43]

When confronted with due process arguments based on lack of representation, the government may argue that a respondent verbally waived the right to counsel. In cases involving respondents with serious competency issues, a waiver may be subject to challenge on the basis that it was neither knowing nor voluntary.[44] Indeed, the government itself has suggested that mental

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due process required appointment of counsel for indigent juvenile in civil delinquency proceedings).

[42] Although the Board and numerous courts of appeals have allowed removal proceedings to go forward against incompetent respondents, the vast majority of these cases have involved individuals who were represented by counsel and benefited from certain other procedural protections. *See, e.g., Soobrian v. Attorney General of the United States*, 388 Fed. App'x. 182, 2010 U.S. App. LEXIS 15406 (3d Cir. 2010) (finding that petitioner's due process rights were not violated because he was present at the hearing, represented by competent counsel, and his mother and an expert witness presented oral testimony on his behalf); *Nee Hao Wong v. INS*, 550 F.2d 521, 522-23 (9th Cir. 1977) (upholding petitioner's order of deportation upon finding that the presence of numerous procedural protections, including representation by counsel and a state-appointed conservator who testified "fully" on petitioner's behalf, rendered the hearing consistent with due process); *Matter of H-*, 6 I&N Dec. 358, 359-60 (BIA 1954) (finding that hearing comported with due process because the respondent was represented by counsel, a medical doctor appeared at the hearing "to protect the alien's interests," and the respondent answered questions "intelligently and rationally"). *Cf. Brue v. Gonzales*, 464 F.3d 1227, 1233 (10th Cir. 2006) (noting that "the statute and the regulation facially appear to require no procedural safeguards if an unrepresented, mentally incompetent alien is nevertheless able to be present at his removal proceeding").

[43] Prior to *M-A-M-*, some courts considered the mere fact of legal representation to be a sufficient procedural safeguard to ensure a fair hearing. *See, e.g., Munoz-Monsalve v. Mukasey*, 551 F.3d 1 (1st Cir. 2008) (rejecting claim for competency determination by represented detainee where attorney did not raise competency issues before immigration judge and record did not reveal indicia of mental health problems); *Long-Gang Lin v. Holder*, 630 F.3d 536 (7th Cir. 2010) (denying petition for review on grounds that petitioner was represented by an attorney who failed to raise competency issues).

[44] *See, e.g., Matter of Gutierrez*, 16 I&N Dec. 226, 228 (BIA 1977) (requiring waivers of counsel to be "competently and understandingly made" and instructing immigration judges to consider a respondent's "intelligence" and "ability to comprehend" in determining the validity of a waiver); *De Souza v. Barber*, 263 F.2d 470, 477 (9th Cir. 1959) (listing "intelligence,

incompetence may undermine the validity of a waiver of counsel. *See, e.g., Ram v. Mukasey*, 529 F.3d 1238, 1242 (9th Cir. 2008) (quoting contention in government brief that respondent provided valid waiver because no evidence existed to suggest he was "unsophisticated, *incompetent*, or in any way confused") (emphasis added).

If an incompetent respondent was "represented" in immigration court by someone other than an attorney or accredited representative, due process and regulatory arguments may still be possible on appeal. Such arguments are not negated by 8 C.F.R. § 1240.4, which seems to blur the line between a representative with expertise in immigration law and a guardian, relative or friend who appears on behalf of a respondent:

> **§1240.4 Incompetent respondents.** When it is impracticable for the respondent to be present at the hearing because of mental incompetency, the attorney, legal representative, legal guardian, near relative, or friend who was served with a copy of the notice to appear shall be permitted to appear on behalf of the respondent. If such a person cannot reasonably be found or fails or refuses to appear, the custodian of the respondent shall be requested to appear on behalf of the respondent.

This regulation is ambiguous with respect to the role of a "near relative, or friend" who "appear[s] on behalf" of the respondent in this context. In particular, it is unclear whether the regulation contemplates that such individuals would be acting as attorneys, or instead providing some other form of assistance more akin to the tasks performed by a guardian.[45]

While non-legal assistance may be helpful or even indispensable to respondents who lack competency, it cannot serve as a substitute for legal representation. The ABA Model Rules of Professional Conduct specifically distinguish the function of an attorney, who is tasked with representing a client in a legal capacity, from that of "family members or other persons," who may exercise decision-making authority on behalf of a client with a mental disorder under particular circumstances.[46] Some sections of the immigration regulations make similar distinctions. *See, e.g.,* 8 C.F.R. § 103.2(a)(2) (permitting a legal guardian to sign an application

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education, information, understanding and ability to comprehend" as factors to consider in determining whether a respondent knowingly waived counsel); *United States ex. rel. Shaw v. Van De Mark*, 3 F.Supp. 101, 102-03 (W.D.N.Y. 1933) (holding removal hearing not fair where unrepresented individual with serious mental disabilities verbally waived her right to counsel, because she "did not even have the mental capacity to understand that she was entitled to be represented at the hearing by counsel").

[45] 8 C.F.R. § 1292.1(a)(3) and (5) raise similar questions regarding the proper roles of reputable individuals of good moral character and accredited officials in representing respondents. As discussed on pages 10-11, *supra*, such individuals are unlikely to have the requisite expertise to effectively represent respondents in removal proceedings and cannot be held accountable for unethical or unprofessional conduct. Moreover, representation by such individuals requires explicit consent, which may be difficult to obtain from a respondent with serious competency issues.

[46] Model Rules of Prof'l Conduct R. 1.14 cmt..

or petition for a mentally incompetent person); 8 C.F.R. § 103.2(a)(3) (specifying that an applicant or petitioner may be represented by an attorney or BIA accredited representative).

The Departments of Justice and Homeland Security have promulgated comprehensive regulations governing the practice of immigration attorneys, *see* 8 C.F.R. § 292.3, § 1003.101-108, § 1292.3, the primary purpose of which is to protect noncitizens from practitioners unable to meet those standards. Professional Conduct for Practitioners — Rules and Procedures, 65 Fed. Reg. 39513, 39514 (June 27, 2000). Because guardians and other representatives acting in a non-legal capacity are not subject to this framework, it would be incongruous with these regulations to permit them to provide legal representation in immigration court. Under certain state bar rules, this type of representation might even constitute the unauthorized practice of law.

Prior "representation" at a removal hearing by a DHS custodian, which also appears to be permitted by 8 C.F.R. § 1240.4,[47] may also constitute grounds for appeal. In any immigration detention facility, the custodian is either employed by DHS or acting under contractual authority to detain on behalf of DHS, the very agency seeking the respondent's removal. Under these circumstances, the appearance of a custodian as a representative for the respondent would create an irreconcilable conflict of interest, preclude the respondent from trusting the individual appearing on his behalf, and thereby undermine the integrity of the judicial process.[48] Moreover, most custodial officers are not licensed to practice law and are not trained to identify and diagnose competency problems. Presumably for these reasons, the *Immigration Judge Benchbook* suggests that termination of proceedings on due process grounds may be appropriate where no one other than a DHS custodian is available to protect the interests of a severely incompetent detained respondent. *See* IMMIGRATION JUDGE BENCHBOOK at 121.

Could a client who lacks competency be eligible for a favorable exercise of prosecutorial discretion?

"Prosecutorial discretion" is the authority of a law enforcement agency or officer charged with enforcing a law to decide whether to enforce the law in a particular case. A law enforcement officer who decides *not* to enforce the law against a person has *favorably* exercised prosecutorial discretion.

A memo issued by former ICE Director John P. Torres on December 11, 2006, entitled *Discretion in Cases of Extreme or Severe Medical Concern*, emphasizes the importance of exercising prosecutorial discretion in cases involving noncitizens with severe medical conditions. Unless a noncitizen is subject to mandatory detention, the memo calls for case-by-case custody determinations "whenever a medical or psychiatric evaluation, diagnosis, treatment plan, or other documentation provided by the referring agency indicates the existence of extreme disease or an impairment that makes detention problematic and/or removal highly unlikely." Among the

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[47] Notably, 8 C.F.R. § 1240.43, which applies to proceedings commenced prior to April 1997, permits only a guardian, near relative or friend to appear on behalf of a mentally incompetent respondent.

[48] *Cf. In re Gault*, 387 U.S. at 35-36 (1967) (holding that a juvenile's probation officer, who was also superintendent of the detention facility where the child was being held, could not serve as counsel for the child).

examples of medical conditions that may warrant a favorable exercise of prosecutorial discretion, the memo lists "extreme mental retardation, mental illness, and mental incompetence."

On June 17, 2011, ICE Director John Morton issued two new memoranda encouraging the expanded use of prosecutorial discretion in all phases of civil immigration enforcement.[49] This guidance specifies certain classes of individuals warranting "particular care," which include those who are "seriously ill or disabled." The guidance also includes an extensive list of other relevant factors to be considered, including "whether the person or the person's spouse suffers from severe mental or physical illness."[50] No one factor is decisive, and decisions on prosecutorial discretion are to be based on the totality of the circumstances, with the goal of advancing ICE's enforcement priorities, namely, national security, public safety, border security and the integrity of our immigration system.[51]

On August 18, 2011, the Obama Administration and DHS announced the establishment of a high-level joint DHS-DOJ working group charged with ensuring that government resources are focused on the immigration enforcement priorities identified in the Morton memoranda.[52] Both *M-A-M-* and the Obama Administration's recent pronouncements on prosecutorial discretion support a reasonable resolution of cases involving respondents with mental competency issues.

On November 17, 2011 ICE's Principal Legal Advisor directed all ICE attorneys to begin a systematic review of immigration cases to determine whether pursuing removal would advance the Obama Administration's enforcement priorities. ICE also provided its attorneys with more detailed guidance about criteria for determining when it is appropriate to exercise prosecutorial discretion to close or dismiss a case. The guidance clearly states that a case involving an individual "who suffers from a serious mental or physical condition that would require significant medical or detention resources" is generally not an enforcement priority for DHS.

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[49] Memorandum from John Morton, ICE Director, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011); Memorandum from John Morton, ICE Director, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011).

[50] Similarly, a prior memorandum from ICE Director Morton regarding the agency's enforcement priorities stated:

> Absent extraordinary circumstances or the requirements of mandatory detention, field office directors should not expend detention resources on aliens who are known to be suffering from serious physical or mental illness, or who are disabled ….

Memorandum from John Morton, ICE Director, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (June 30, 2010).

[51] For more information on how to seek a favorable exercise of prosecutorial discretion on behalf of your client, see the Legal Action Center's Practice Advisory, *Prosecutorial Discretion: How to Advocate for Your Client* (June 24, 2011).

[52] For more information on the mandate of the DHS-DOJ working group, see the Legal Action Center's Practice Advisory, *DHS Review of Low-Priority Cases for Prosecutorial Discretion* (September 1, 2011).

Conclusion

While representation of respondents with competency issues may pose significant challenges, the Board's decision in *M-A-M-* gives immigration attorneys a unique opportunity to engage in creative advocacy on behalf of their clients. By working to ensure that existing statutory and regulatory protections are meaningfully applied in the immigration context and ultimately expanded, the immigration bar will break new legal ground and positively impact the lives of vulnerable noncitizens and their loved ones.