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Getting Off the Assembly Line:

Overcoming Immigration Court Obstacles in Individual Cases

Product of the Appleseed Network Immigration Collaborative

APPLESEED

Akin Gump
STRAUSS HAUER & FELD LLP

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Pro Bono Counsel to Appleseed, Akin Gump Strauss Hauer & Feld LLP

Appleseed Practice Guide [1]

Foreword

There are few things a lawyer can do more profound than helping an immigrant avoid deportation. From saving a refugee from persecution to keeping a long-time U.S. resident from exile, the professional and personal rewards are tremendous.

Yet there are a great number of challenges in immigration court, a venue unfamiliar to many litigators and other pro bono lawyers. This guide is intended to supplement the basic rules and procedures of immigration court with tips from experienced practitioners on how to deal with some of the peculiarities of these courts, including interpretation, videoconferencing, and a confounding document discovery process.

The fifty-seven immigration courts are staffed by approximately 250 judges,[2] sitting from New York to Honolulu. The U.S. Department of Justice's Executive Office of Immigration Reform ("EOIR") governs each of these courts, and each applies the same federal substantive and procedural law, but the practices differ formally and informally—sometimes even from judge to judge. Appleseed gathered information from practitioners in a variety of courts in diverse geographies, and the guidance in this book is the result of their willingness to share their experiences and tips.

Of course, the practical application of this guidance will depend greatly on the context in which the practitioner finds herself: the court, the judge, the opposing Department of Homeland Security ("DHS") attorney, and, of course, the client's circumstances. And a pro bono lawyer taking his first case in immigration court will undoubtedly view these tips with a different perspective than a long-time immigration practitioner. But we hope that any lawyer can find here a framework for decision-making when encountering the peculiarities of litigating in immigration court—the near-absence of formal discovery, the challenges of a hearing interpreted into and from a foreign language, the minimal out-of-court contact between opposing counsel, and the obstacles presented by a videoconference system that keeps counsel miles away from the client. The guide is intended to inform your strategic choices as counsel in immigration court, but by no means to mandate a particular course of action. Above all else, a lawyer in immigration court needs to act in the client's interest, even if that means deciding not to push aggressively against a videoconference hearing, to stop a sloppy interpretation, or to file a complaint against a misbehaving DHS attorney. We hope this guide makes your experience in immigration court more comfortable and successful.

– Malcolm Rich, Bert Brandenburg, Steven Schulman

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INTRODUCTION

The purpose of this guide is to help attorneys practicing in immigration court navigate various procedural obstacles to fair and full hearings; its genesis is Appleseed's work on immigration court reform, which started in 2009 with the publication of *Assembly Line Injustice* and has continued with advocacy to the Executive Office for Immigration Review ("EOIR"), individual immigration courts, the Department of Homeland Security, the White House, and Congress. Appleseed also has published additional reports on immigration reform: Reimagining the Immigration Court Assembly Line in 2012, and Texas Appleseed's Justice for Immigration's Hidden Population in 2010, which focuses on the rights of detained immigrants with mental disabilities. Although Appleseed has had success in advocating for change in the immigration courts, we came to realize that our advocacy was missing one critical element: change at the most basic level, from the advocates appearing in immigration court who are taking on these issues case-by-case to help their individual clients.

The immigration courts pose many challenges, particularly for pro bono counsel. On the one hand, the EOIR has policies that encourage pro bono representation, and many immigration judges go out of their way to welcome and accommodate pro bono counsel. On the other hand, pro bono counsel enter an environment that is often foreign to them and their clients, while the deportation officers, DHS counsel, and immigration judges are familiar colleagues. Moreover, DHS trial attorneys often have a "deport-in-all-cases approach" that distracts them from seeking fair and just results.

Even immigration court personnel can be uncooperative to immigrants and their counsel. One practitioner who observed exchanges between the Baltimore "court administrator" and immigrants asking for procedural help noted that the administrator's responses were completely unhelpful and confusing, and even to get these "useless" answers, the immigrants had to shout their most personal information because the court administrator was positioned behind bullet-proof glass.[3] Appleseed has found that court rules and practices—even the seemingly minor ones—reinforce an "us vs. them" culture in the immigration courts.[4]

Accordingly, we developed this guide to help advocates immediately address the obstacles we have identified, which include:

- ***Section 1:*** **Working with a Client in Detention:** This section discusses the difficult conditions faced by respondents in detention facilities.

- ***Section 2:*** **Discovery:** From requesting A-Files to filing FOIA requests, this section suggests ways for practitioners to identify what documents they need and how to retrieve them.

- ***Section 3:*** **Pre-Hearing Conferences:** This section aims to help practitioners bridge the communication gap with opposing counsel by providing techniques for requesting and holding court-ordered or informal pre-hearing conferences to narrow disputed case issues.

- ***Section 4:*** **Interpretation:** Appleseed's research shows that language interpretation procedures differ significantly from court-to-court. This section summarizes the different interpretation standards and procedures while providing helpful tips for how to ensure that translation issues do not harm a respondent's case.

- ***Section 5:*** **Videoconferencing:** This section focuses on helping the practitioner handle common logistical problems and evidentiary risks behind videoconferencing use.

- ***Section 6:*** **Immigration Judge and DHS Attorney Misconduct:** Some immigration courts continue to suffer from an anti-immigrant culture, which can manifest as judicial and government attorney misconduct. Because many such incidents go unreported, this section focuses on providing practitioners with the tools needed to report such misconduct.

Brief Orientation on Immigration Court Proceedings

This guide aims to help attorneys and advocates who are handling substantive claims in immigration court. While there are a number of different types of immigration court proceedings, pro bono attorneys are mostly likely to be involved with removal proceedings—i.e., the hearing to determine whether the immigrant is deported or merits relief.

DHS initiates removal proceedings by serving an alien with a charging document known as a Notice to Appear.[5] An alien in removal proceedings is called a "respondent." A Notice to Appear orders the respondent to appear before an immigration judge and advises the respondent about the nature of the proceedings, along with the alleged immigration violations.

Removal proceedings typically involve an initial "master calendar" hearing and, subsequently, an "individual" or "merits" hearing. During the master calendar hearing, the immigration judge must ensure that the respondent understands the alleged violations and charges and explain the availability of pro bono or low-cost legal representation resources in the area. The judge also will review the charges brought against the respondent and allow the respondent to state his requested relief from removal (e.g., asylum). The judge will then schedule deadlines for any document submissions and, unless she re-sets the master calendar for another scheduling hearing, will also set the date of the individual hearing. Every immigration court also has a court administrator in charge of scheduling who can be a valuable help in terms of scheduling hearings, especially if an attorney takes a case on short notice.

During the individual hearing, the respondent or his legal counsel and the DHS attorney prosecuting the case present the merits of the case to the immigration judge. In most cases,

the immigration judge issues an oral decision at the conclusion of the individual hearing. Once a case is completed, either the respondent or DHS (or both) may appeal the decision to the Board of Immigration Appeals ("BIA"), whose decisions are thereafter appealable to the federal appeals court in which the immigration court is located for the circuit.

In most cases involving respondents seeking protection from persecution, the respondent will concede that he is removable, typically because he has no valid visa to enter or remain in the United States,[6] but will then apply for one or more forms of relief from removal. The following are the common bases to seek relief in removal cases:

- **Asylum:** Asylum protection provides relief from removal to respondents who are unable or unwilling to return to their country of nationality because of persecution or a well- founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. In asylum proceedings, the immigration judge hears the applicant's claim and also hears any concerns about the validity of the claim raised by the DHS attorney. The immigration judge then makes a determination of eligibility. If the court finds the respondent ineligible for asylum, the immigration judge determines whether the respondent is eligible for any other forms of relief from removal (listed below) and, if not, orders the individual removed from the United States.

- **Withholding of Removal:** Withholding of removal prohibits the government from removing the respondent to a country where her life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. Although the grounds for withholding of removal are the same as for asylum, it is harder to qualify for withholding. A court will grant withholding of removal when the respondent shows a clear probability of future persecution, meaning that the respondent is more likely to be persecuted than not. In addition, withholding of removal has a narrower scope of relief than asylum. For example, if the respondent can safely be removed to another country other than the country of his or her nationality, he or she will be sent there over remaining in the United States.

- **Protection under the United States Convention Against Torture ("CAT"):** Like withholding, CAT protects a respondent from being returned to a country where there are substantial reasons for believing that she would be in danger of being subjected to torture.[7] A court will grant CAT when the respondent shows that it is more likely than not that she would be tortured if removed to the country from which she is claiming protection. This also requires the respondent to show that the harm feared meets the statutory definition of "torture," meaning any act in which severe pain or suffering— physical or mental—is intentionally inflicted on a person, with the consent of a public official, for purposes such as punishment, intimidation, coercion, discrimination, or obtaining a confession.[8] As with withholding of removal, CAT protection has more limited benefits than asylum, including possible removal to a safe third country.

- **Cancellation of Removal:** § 240A(b) of the Immigration and Nationality Act allows respondents to have their removal cancelled if they establish before an immigration judge that they fall into various enumerated categories qualifying them for cancellation. For example, a respondent must prove he maintained a continuous physical presence in the United States for several years, is a person of good moral character, and/or that the respondent's removal would result in extreme hardship to family members who are themselves United States citizens or permanent lawful residents.

METHODOLOGY

In researching and writing our 2009 and 2012 reports, *Assembly Line Injustice* and *Reimagining the Immigration Court Assembly Line*, Chicago Appleseed, Appleseed, Akin Gump Strauss Hauer & Feld LLP and Latham & Watkins focused a clear eye on practical and achievable reforms to improve the efficiency of immigration courts. We interviewed practitioners, observed courtrooms, conducted surveys, reviewed primary and secondary sources, discussed issues with judges and administrative officials, and vetted preliminary conclusions with practitioners familiar with immigration advocacy. Appleseed Board member and an author of the above reports and this guide, Steven Schulman of Akin Gump, brings his considerable experience and leadership to this task. This practice guide benefits from his direct experience as an immigration attorney and pro bono partner at a firm with a longstanding commitment to immigration work, as well as his leadership of the Association of Pro Bono Counsel, APBCo.

Reports alone cannot trigger change, and while Appleseed advocacy plans for immigration courts may tend to advance in fits and starts, advocates can and should be empowered to provide the most effective representation for their clients. These practice tips, flowing from research, interviews with expert practitioners across the country, and Appleseed's past policy reports, will be helpful to individual clients; they will empower more attorneys to help address the monumental access to the justice crisis before us; and they will produce changes in Department of Homeland Security's counsel offices as well as immigration courts across the country. In this sense, this guide also serves as a companion piece to the very practical, practitioner-oriented report from 2014, *A DREAM Deferred: From DACA to Citizenship, Lessons for Advocates and Policymakers*.

Appleseed also thanks the many immigration court practitioners who selflessly offered their wisdom and war stories. There are too many to list here – and many wanted to remain anonymous for reasons that will be obvious as you read this Guide.

ABOUT APPLESEED

A non-profit network of public interest justice centers in the U.S. and Mexico, Appleseed and many of the Appleseed Centers have long been researchers and advocates regarding various aspects of immigration—from fair courts, to fair administrative processes, to fairness in immigrants' financial transactions, to safety in workplace conditions, and more. For more information on Appleseed, please visit www.appleseednetwork.org.

Appleseed and Appleseed Centers seek large-scale changes. Almost any aspect of immigration law and policy is large-scale, with approximately 400,000 persons deported annually and 70,000 persons granted refugee status.

Appleseed's deep commitment to civic engagement is reflected in this publication. We believe that lawyers have a special responsibility to ensure that the law is fair to all and that governmental institutions provide fair process to all. While the country's current understanding of constitutional protections does not require the appointment of counsel in asylum or deportation proceedings, we believe lawyers can and should step up to help those facing return. Through this publication, Appleseed seeks to deepen the pool of those able and willing to help.

The Appleseed Network Immigration Collaborative includes the following Centers that contribute to this Guide:

- Chicago
- Texas
- South Carolina
- Nebraska

OTHER USEFUL RESOURCES

We have not attempted a substantive review of immigration law or all the defenses and claims counsel might make for their client. Other resources and organizations that may be useful include:

- American Immigration Counsel, Immigration Policy Center, How the United States Immigration System Works, A Fact Sheet, https://www.americanimmigrationcouncil.org/research/how-united-states-immigration-system-works.
- The American Immigration Lawyers Association, http://www.aila.org/
- CLINIC, Catholic Legal ImmigrationNetwork, Inc., https://cliniclegal.org/resources
- Immigration Advocates Network, Pro Bono Resource Center, https://www.immigrationadvocates.org/probono/newsletter/item.3421-Introduction_to_Immigration_Court
- Immigration Judge Benchbook, https://www.justice.gov/eoir/immigration-judge-benchbook
- Immigration and Nationality Act (INA), https://www.uscis.gov/laws/immigration-and-nationality-act
- Title 8 of the Code of Federal Regulations (CFR), https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/8cfr.html

Glossary of Terms

A-Number: Alien Registration Number

A-File: Alien Files

ACIJ: Assistant Chief Immigration Judge

AMPED: Advancing Merits Proceedings for Efficient Docketing

BIA: Board of Immigration Appeals

CAT: United Nations Convention Against Torture

CRCL: DHS Office of Civil Rights and Civil Liberties

DHS: Department of Homeland Security

EOIR: Executive Office for Immigration Review

FOIA: Freedom of Information Act

FRCP: Federal Rules of Civil Procedure

ICE: U.S. Immigration and Customs Enforcement, an agency within the Department of Homeland Security

INA: Immigration and Naturalization Act

OCC: DHS Office of Chief Counsel

OCIJ: Office of the Chief Immigration Judge, regional offices that represent ICE in immigration court

OIG: Office of Inspector General

OPLA: Office of the Principal Legal Advisor

PTSD: Post-Traumatic Stress Disorder

VTC: Video-teleconference and/or Video conferencing

Endnotes

1 Note: The recommendations made in this report are just that, recommendations. Before pursuing any course of action, counsel should consider all potential outcomes and always act in the client's best interest.

2 EOIR Immigration Court Listing, EOIR (April 2016), https://www.justice.gov/eoir/eoir-immigration-court-listing.

3 *See* Appleseed, Assembly Line Injustice: Blueprint To Reform America's Immigration Courts, APPLESEED, 31 (2009), http://appleseednetwork.org/wp-content/uploads/2012/05/Assembly-Line-Injustice-Blueprint-to-Reform-Americas-Immigration-Courts1.pdf.

4 Appleseed, Reimagining the Immigration Court Assembly Line: Transformative Change for the Immigration Justice System 34, APPLESEED, (2012) http://www.appleseednetwork.org/wp-content/uploads/2012/03/Reimagining-the-Immigration-Court-Assembly-Line.pdf.

5 Executive Office for Immigration Review, EOIR at a Glance, U.S. DOJ (Sep. 9, 2010), https://www.justice.gov/eoir/eoir-at-a-glance.

6 Increasingly, pro bono attorneys are representing individuals who do not concede removal, in particular, permanent residents charged with removability due to criminal convictions. The New York Immigrant Family Unity Project is also undertaking the first public defender program in the country for immigrants facing deportation, and is a valuable resource to any attorneys who encounter such criminal immigration matters. This Guide applies in most circumstances with equal force to these criminal immigration cases, even though the Guide often discusses issues in the context of hearings involving respondents seeking protection from persecution.

7 Withholding of Removal and protection under CAT are both more temporary forms of relief than asylum, as they do not allow the respondent to seek permanent legal status in the United States and can be revoked if the government determines the immigrant is no longer likely to be subjected to persecution or torture. However, immigrants who are ineligible for asylum for one reason or another can still seek to avail themselves of these forms of relief.

8 *See* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

SECTION I. WORKING WITH A CLIENT IN DETENTION

Appleseed's *Assembly Line* reports do not directly touch upon issues that relate to immigration detention, but the expert petitioners we interviewed for this guidebook made clear that this increasingly common aspect of practice is an important topic to address.

Immigration detention has exploded over the past two decades: in 1994, the daily population of immigrants in detention was 5,532; but as of 2015, the daily population in detention had grown to approximately 28,000.[1] ICE detains immigrants at roughly eighty detention facilities across the nation.[2] Detention of asylum seekers, which had become less common in the early years of the Obama Administration, expanded in the summer of 2014 in response to the influx of Central American women and children fleeing violence in their home countries. Many of these families were detained for extended periods while awaiting hearings on the merits of their asylum claims. Representation of these detained immigrants is vitally important, given the increased chances of success that come with representation. [3]

1.1 Working with a Detained Client

The immigration detention population is generally divided into those who are apprehended at or near a land border or in an airport (often asylum seekers), and those who are apprehended in the interior of the United States (many coming from state and federal incarceration).[4] If a respondent in immigration custody is not subject to mandatory detention, he will be eligible for release by posting a bond. The court will set the amount of the bond by looking at two factors: whether the respondent is: (1) a "flight-risk," (i.e., a person deemed unlikely to attend future immigration hearings), or (2) dangerous to others.[5] A court cannot set a bond below $1,500, but an immigration judge can order a respondent's release on his own recognizance.[6]

In many situations, however, a respondent may not be able to obtain release, either because she cannot afford the bond, or for other reasons. Therefore, it is important that counsel be prepared to work with detained respondents and address the particular challenges detention creates.

Not surprisingly, detention is most challenging for the detainees. Though immigration detention is civil, not criminal, ICE facilities operate according to correctional standards and are hardly differentiated from prisons.[7] Detainees are often housed in overcrowded cells, with dirty floors and little natural lighting.[8] Some facilities require that immigrants wear prison-like jumpsuits at all times and handcuff and/or shackle them during transfers, including to and from court hearings.[9] ICE confiscates detainees' personal belongings upon arrival, allowing them to keep only essentials (which usually, but not necessarily,

includes personal documents). Men and women usually are housed in separate facilities, although sometimes families are permitted to stay together. Many detainees will have traveled into the United States either alone or with a group of strangers and have a difficult time adjusting to life in the facility, especially if they do not speak English or Spanish.

Detention presents many obstacles to maintaining regular and effective communication with clients. ICE detention facilities strictly limit visiting hours, even for attorneys. Therefore, attorneys should make an appointment at a specific time at least one day in advance to increase the chances of successfully seeing the respondent. Note, however, that even these pre-scheduled meetings are subject to significant delay for various reasons, such as the detention facility's day- to-day schedule. Indeed, one practitioner noted that each facility has its own idiosyncrasies, and that the staff running the facility control day-to-day operations more than ICE itself. For example, facilities may be staffed by city jail staff, county sheriff departments, or other institutional staff. For this reason, counsel should familiarize themselves with the rules of the specific facility at which their client is detained.

- ***Practice Tip:*** **Prepare in advance.** Confirm your appointment with the detention center on the day of any client meeting. In addition, bring a state-issued attorney ID, bar card, or at the very least a business card or law firm letterhead identifying you as an attorney.[10]

  Anyone assisting on the case who is not an attorney—such as a paralegal or a law student—may have difficulty attending meetings in detention without an admitted attorney. If a non-attorney needs to meet with the respondent, you should alert the detention center as soon as possible and prepare a letter describing the circumstances. The letter should introduce the non-attorney, explain that she will be working under counsel's supervision, and request permission to visit the detainee client. In some places, like Santa Ana, California, for example, a translator will need to fill out a one-page security background form as well as provide a copy of his driver's license or other government-issued identification so that the facility may run a background check.

While detention centers typically provide private rooms for counsel to meet with their clients, most facilities prohibit bringing smartphones, recording devices, or laptop computers into these private rooms. Counsel should bring note paper and writing materials to collect as much information as possible during the attorney/client meeting.

Moreover, ICE does not provide interpreters. If a respondent has trouble telling her story in English or another familiar language, counsel must bring an interpreter to the detention center; the interpreter most likely will need advance clearance from ICE for the visit. An alternative is to use a translator by phone; however, counsel must let the detention center know in advance that counsel will be using a telephonic interpreter.

ICE detention facilities do not have private telephones, and detention centers usually will not bring a client to the phone when counsel calls. Accordingly, counsel must plan telephone calls with the respondent in advance, typically by leaving a message for respondents with detention officials, and respondents usually call back as soon as possible during "visiting hours." To that end, counsel should offer to help the client make collect calls at the center, which usually involves buying a pre-paid phone card available at the detention center, keeping in mind any time zone difference between the detention center

and where any foreign family members or witnesses are located.[11] If the difference is great enough to make arranging international calls for the respondent difficult, then counsel may consider volunteering to handle the calls or correspond with sources via email and then relay any pertinent information to the respondent.

- ***Practice Tip:*** **Go after what you need.** One practitioner provided this advice: "Figure out what you need to put together your case, and then go after it methodically with the jail staff. If not with the jail staff then with ICE. If not with ICE locally, then with ICE headquarters. Part of the joy of this work is that you have a little clout to take things up the chain-of-command. And push for what you need in order to best represent your client's interest. Sometimes that may stop locally and sometimes it may go all the way up to Washington, D.C. We've seen a lot of success when we start working at all the different levels to navigate for our clients."

1.2 Building the Respondent's Trust and Confidence

One of the most important aspects of any removal case—regardless of whether the respondent is detained—is establishing a working relationship with the respondent, which involves developing a sense of trust and confidence. Effective communication with respondents aids in developing a case-in-chief because respondents likely will be: (a) more easily prepared for hearings, (b) more open to fully discussing the facts of their case or past traumatic incidents, and (c) more willing to gather pivotal evidence from outside sources (such as affidavits from family and friends in their home country).

At the beginning of the first meeting, counsel should explain the general format of immigration proceedings and the attorney-client relationship. Counsel should make sure the client knows counsel is not affiliated with the detention center, the government, or immigration services.[12] Stress that all communications with the respondent are confidential and that no information will be revealed to anyone, including court officials, without the respondent's prior consent unless disclosure is required under the relevant state's ethics rules, professional rules of conduct, or by court order.[13] Counsel may consider advising their clients that they need to share as much information as possible so that counsel can provide the most effective representation and suggest ways that respondents can assist with the case, such as providing key facts for the declaration, helping gather evidence for the hearing, and preparing for direct and cross examination. Ensure that respondents understand that counsel cannot present anything to the court that is untruthful or misleading. It is important to allow the client to ask any questions before proceeding with the interview about his case. For a detained client, part of the challenge is simply surviving detention. Therefore, counsel should explain, as best as possible, the timeline of the case so the client has an understanding of how long he may be detained until receiving an initial decision from an immigration judge.

- ***Practice Tip:*** **Break up your initial meeting.** Consider breaking up the initial interview process into at least two meetings: one short and one long. The short meeting should be introductory to explain counsel's role and put the client at ease. One practitioner suggests asking limited questions at this first meeting to gauge where the client is emotionally, and then letting the client know that counsel will want to address more sensitive issues at the next meeting. See Section 1.3 below (discussing strategies for dealing with psychological obstacles).

- ***Practice Tip:*** **Practice with warmth and kindness.** Perhaps the best way to build trust and confidence with the client has nothing at all to do with laying out roles or describing a timeline of events, but simply with the attorney's demeanor. One practitioner stated that "part of the importance of your work is interacting with people who have been locked up and caged, which can be an inherently dehumanizing experience. It may sound a bit cheesy, but being a kind human presence in that space helps bring humanity and dignity back to your client. Treat them respectfully; treat them kindly; have a smile for them. Those things make a tremendous difference. Obviously this is true in many client contexts, but in a detained context in particular, because the experience of being locked up is so dehumanizing, being that human face for your client, I think goes a really long way."

Counsel should spend ample time preparing the client for any hearings or trial to increase client confidence. Before each hearing, counsel should explain what will happen—even if all that is anticipated is a request for a continuance. When preparing for trial, it may be useful to conduct an entire mock trial, complete with opposing counsel, to allow the client to visualize the trial setting.

1.3 Overcoming Cultural and Psychological Obstacles

Essential to an open working relationship between counsel and respondents is recognizing and overcoming cultural and psychological barriers to effective attorney-client communication. Not only do counsel and respondent often come from different cultures, but many respondents enter the United States after experiencing serious traumatic events in their home country or during their journey seeking refuge. In fact, a substantial percentage of detained respondents, and asylum seekers in particular, suffer from Post-Traumatic Stress Disorder ("PTSD") or other psychiatric conditions, such as depression or anxiety.[14] These factors can have a significant impact on a respondent's ability to discuss background facts or recall events, and also create serious difficulties for counsel when interviewing the client. On the one hand, counsel must be aware that discussing background events can be painful or traumatic. On the other hand, counsel must do her best to elicit facts crucial to establishing the client's case. In some cases counsel may be able to refer a client to a therapist or counselor to help guide the interview process.[15] Below are a number of tips from immigration practitioners on best practices for dealing with sensitive interview topics.

- ***Practice Tip:*** **Ease into discussing traumatic events.** "When you're working with a client who's really traumatized, jumping into those details and asking them about every horrible thing that's happened to them is not the way to go. Move more slowly. Check in regularly to make sure that the client is doing OK. If the client is having trouble answering questions, ask the client if he or she wants a break. You may not be able to walk around the block in this setting, but you can still take a break, talk about something else for a little while, and come back to that topic later."

- ***Practice Tip:*** **Let the client know that speaking with counsel is voluntary.** If, during the interview, counsel must inquire about a traumatic event, let the client know. For example, say, "Now I would like to talk with you about this particular part of your life. Are you OK to talk about this now?" If there is something the client does not want to discuss, let the client know that he does not have to discuss

it. Of course, if the information is important to the case, help the client understand the goal of the interview and how not speaking about events may hamper his immigration case.

- ***Practice Tip:*** **Assure the client that it is OK if she does not remember.** Sometimes, people do not remember something. One practitioner tries to empower her clients by emphasizing that they should feel comfortable saying "I don't remember" or "I don't know." This approach may help the client in the future when faced with questions by the judge or DHS attorneys during hearings.

- ***Practice Tip:*** **You do not need to get the entire story in one take.** One practitioner advises attorneys that the interview process will consist of several conversations from which counsel will piece the story together. In terms of memory lapses, it may be useful to ask your client for a general sense of her story in timeline form. Then you may fill in the details on subsequent meetings once you have an idea of the key facts or events to your client's case.

- ***Practice Tip:*** **Ask the client to explain his story like a movie.** If a client is having trouble describing events, one tactic is to ask the client to tell his story—or a piece of the story—as if it were a movie. But exercise caution: such an approach may raise trauma for the client, and using this approach may depend on the client's comfort level and extent of trauma suffered.

- ***Practice Tip:*** **Press the client to avoid diminishing harm.** Some clients tend to diminish the harm they suffered before seeking asylum or other relief. For instance, a client may say that a person "just slashed my ankle, but it was okay because I made it to the hospital and I'm okay now." Do not simply take the client's word that everything was "okay," but rather investigate the harm: the injury may be healed now, but how did the client feel when it happened? How did the injury affect the client before it healed? How much physical pain did the client suffer? How much emotional pain did the client suffer?

Though a full review of this topic is beyond the scope of this guide, it is important for counsel to be aware of these issues and to educate themselves on the strategies to overcome these obstacles. For more information, see:

- Sabrineh Ardalan, *Access to Justice for Asylum Seekers: Developing an Effective Model of Holistic Asylum Representation,* 48 U. Mich. J. L. Reform 1001 (2014-2015) (an article recommending a model of holistic representation to asylum seekers and addressing the challenges that asylum seekers face when forced to present their cases without access to holistic representation);

- Capital Area Immigrants' Rights, Practice Manual for Pro Bono Attorneys Representing Detainees with Mental Disabilities in the Immigration Detention and Removal System, CAIR Coalition (2nd Ed. 2013), https://www.caircoalition.org/pro-bono-mental-health-manual (a manual intended to provide practical and useful information for attorneys acting as pro bono counsel for detained non-citizens);

- Susan M. Meffert et al., *The Role of Mental Health Professionals in Political Asylum Processing,* 38 J. Am. Acad. Psychiatry L. 479 (2010) (an article discussing the contributions that mental health professionals can make in asylum cases); and

- Linda Piwowarczyk, *Seeking Asylum: A Mental Health Perspective,* 16 Geo. Immigr. L.J. 155 (2001) (an article discussing ways in which the presence of psychiatric disorders or symptoms related to trauma exposure and psychosocial adjustment in a new country may adversely impact an asylum seeker's capacity to file an application and to cogently present one's story).

1.4 Vicarious Trauma and Attorney Stress

While preparing clients to present traumatic events as part of the case, counsel should also be aware of the emotional impact this may have on the attorneys themselves. Vicarious trauma, also known as "secondary trauma" or "compassion fatigue," is emotional duress resulting from hearing and learning about the firsthand traumatic experiences of another person. Indeed, attorneys representing traumatized immigrants will have to listen to their client recount the details of often harrowing experiences, and process these events multiple times: while cataloging evidence, drafting briefing, and preparing arguments for the court, to name a few.

Behavioral warning signs of vicarious trauma might include: (1) deliberately avoiding any discussion about the case, (2) increases in workplace hostility or conflict, and (3) increased difficulty communicating with co-workers or close friends.[16] Vicarious trauma can manifest itself physically, including rapid exhaustion, apathy, predilection toward morbid humor, and increases in anger or irritability in the workplace and at home.[17] It can also lead to drug and alcohol abuse, weight loss or gain, depression, or even suicidal thoughts if left untreated or if exacerbated by other factors.[18]

A full review of the signs and diagnosis of vicarious trauma is beyond the scope of this guide. For more information, see:

- Jennifer Polish, Vicarious Trauma: What is it and How Can Legal Culture Make it Worse?, L.Street Media (Jun. 3, 2015) http://lawstreetmedia.com/issues/health-science/vicarious-trauma-can-legal-culture-make-worse/ (an article providing an introduction to vicarious trauma and preventative measures);

- Helen Baillot et. al., Second-Hand Emotion? Exploring the Contagion and Impact of Trauma and Distress in the Asylum Law Context, 40 J.L. Soc'y 4, 509 (2013) (an article discussing the risks faced by professionals suffering vicarious trauma and identifying emotional coping strategies that attorneys use that could jeopardize a respondent's asylum claim); and

- Professional Quality of Life Elements Theory and Measurement, ProQOL Scale Compassion Satisfaction and Compassion Fatigue Assessment, ProQOL, http://www.proqol.org/ProQol_Test.html (an online assessment testing various factors and providing a score corresponding to vicarious trauma stress levels).

SECTION I: EXPERT PRACTITIONER STORIES

Making a Proper Introduction

Many asylum clients have experienced a whole lot of trauma; trauma which we as attorneys can't even relate to at a basic level. And so I do not go into an initial client meeting and immediately say, "All right, tell me what happened." Instead, I usually introduce myself. I introduce my family, I introduce my children. I make sure I bring a hard copy picture of my family with me, so they can understand who I am and why I'm doing this and why I care. Many respondents have a general distrust of authority because they've experienced such horrible things. It may be totally irrelevant in the long scheme of things, but this helps establish a rapport between attorney and client. And then I move in to them, asking "Where are you from?" "What did you do?" And try to get information just generally about their lives.

And then once we sort of established the relationship, sometimes I'll ask about their journey to America and help them ease into the part of their story that's really difficult to talk about. It is after establishing this rapport that I can try to bring out the details of what happened and get their understanding of what is most vital to their case.

PREPPING YOUR CLIENT FOR DIFFICULT TOPICS

It's incredibly difficult to ask a client for details about a severely traumatic experience. At a minimum, you have to ask very horrible questions, such as asking the respondent to recount specific details about their rapist. The client may be thinking, "Why are you focused on what color the shirts were of the people who were raping me?" It's terrible, but you have to do it.

And so I usually explain the immigration process to them, and I say, "Listen, we have this process and it really is hard, and it feels unfair. And even though I believe you, the reason we have this process is because we have to know that what you're saying is true." But there are a lot of attorneys who will go into court without informing their client of those things, and DHS and the judge will ask difficult questions which will stress the respondent. And it's not because they don't necessarily believe the respondent, it's because they've heard so many false stories they have to make sure that the respondent is telling the truth.

And part of the truth is giving all of these details and being able to tell it consistently time and time again—when I direct examine the respondent, when the government cross-examines them, when the court asks their questions. And so putting it into context helps the respondent understand that you're on their team.

End Notes

1 Immigration Detention: Additional Actions Needed to Strengthen Management and Oversight of Detainee Medical Care, U.S. GOV'T ACCOUNTABILITY OFF. 5-6 (Feb. 2016), http://www.gao.gov/assets/680/675484.pdf.

2 *See* Detention Facility Locator, USCIS, https://www.ice.gov/detention-facilities?state=All&title=.

3 *See* Appleseed, Assembly Line Injustice, Blueprint To Reform America's Immigration Courts, APPLESEED, 29 (2009), http://appleseednetwork.org/wp-content/uploads/2012/05/Assembly-Line-Injustice-Blueprint-to-Reform-Americas-Immigration-Courts1.pdf.

4 For a discussion of the most frequent ways in which people are identified and detained by immigration authorities, see Bryan Lonegan & the Immigration Law Unit of the Legal Aid Society, Immigration Detention and Removal: A Guide for Detainees and Their Families, NAT'L IMMIG. L. CTR., at 2 (2006), https://www.nilc.org/wp-content/uploads/2015/12/detentionremovalguide_2006-02.pdf.

5 *Id*. at 6.

6 Esther Yu-Hsi Lee, Migrant Woman Attempted Suicide Minutes After Realizing She Can't Afford Her Own Release, THINK PROGRESS (Mar. 12, 2015, 4:49 PM) http://thinkprogress.org/immigration/2015/03/12/3633003/honduran-woman-attempts-suicide-over-high-bond/ (discussing bond prices as high as $15,000). *See also* Practice Advisory: Immigration Judges' Authority to Grant Release on Conditional Parole Under § 236(a) as an Alternative to Release on a Monetary Bond, ACLU, at 1 (Sept. 2015), https://www.aclu.org/legal-document/rivera-v-holder-practice-advisory (describing judges' discretion to release a respondent on own recognizance).

7 *See* Mark Noferi, Deportation Without Representation, SLATE (May 15, 2013), http://www.slate.com/articles/news and politics/jurisprudence/2013/05/the immigration bill should include the right to a lawyer.html.

8 See Molly Hennessy-Fiske & Cindy Carcamo, Overcrowded, Unsanitary Conditions Seen At Immigrant Detention Centers, L.A. TIMES (Jun. 18, 2014), available at http://www.latimes.com/nation/nationnow/la-na-nn-texas-immigrant-children-20140618-story.html#page=1.

9 *See* Cindy Chang, ICE Agrees to Stop Shackling Some Defendants for Court, L.A. TIMES (Jan. 23, 2014), available at http://articles.latimes.com/2014/jan/23/local/la-me-ff-immigrant-shackles-20140124.

10 Basically, the attorney visitor needs to bring documentation that demonstrates that he or she is a licensed attorney.

11 For a greater discussion on the inconsistencies of telephone access at immigration detention centers, see Leticia Miranda, Dealing with Dollars: How County Jails Profit From Immigrant Detainees, THE NATION (May 15, 2014), http://www.thenation.com/article/179775/dialing-dollars-how-countv-iails-profit-immigrant-detainees/.

12 One practitioner suggests that wearing business casual attire, instead of a suit, may help distinguish counsel from government officials or attorneys.

13 CAL. RULES OF PROF'L CONDUCT, R. 3-100 (2015), available at http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules/Rule3100.aspx.

14 *See also* Ramin Asgary, Beth Charpentier, Delia C. Burnett, Socio-Medical Challenges of Asylum Seekers Prior and After Coming to the US, 15 J. IMMIGRANT MINORITY HEALTH 961, 963 (2013) http://link.springer.com/article/10.1007/s10903-012-9687-2 (diagnosing 69% of study participant asylees with depression and PTSD).

15 In the event counsel does retain a mental health professional, it may prove difficult to bring the mental health professional to the facility to meet with the client. Counsel should coordinate as far in advance as possible with the facility staff—or, if necessary, an ICE field office—to arrange for such meetings.

16 For a longer list of vicarious trauma signs and symptoms, see Warning Signs of Compassion Fatigue and Vicarious Trauma, Neb. Dep't of Health & Hum.Servs. (2013), http://dhhs.ne.gov/children_family_services/Training/Documents/h.%20Warning%20Signs%20of%20Compassion%20Fatigue%20and%20Vicarious%20Trauma%20Symptoms.pdf.

17 *See generally* Christian Pross, *Burnout, Vicarious Traumatization and Its Prevention,* 16 TORTURE J. 1 (2006), *available at http://www.irct.org/media-and-resources/library/torture-journal/archive/volume-16--no--1--2006.aspx; see also* Rebecca Napier & Sharmin Demoss, *The Caregiver's Guide to Secondary Traumatic Stress: A Manual for Those Who Work with Survivors of Torture and Severe Trauma* 25-28 (2004).

18 Jennifer Polish, Vicarious Trauma: What is it and How Can Legal Culture Make it Worse?, L.Street Media (Jun. 3, 2015) http://lawstreetmedia.com/issues/health-science/vicarious-trauma-can-legal-culture-make-worse/.

SECTION II. OBTAINING CLIENT DOCUMENTS FROM THE GOVERNMENT

Because the Federal Rules of Civil Procedure ("FRCP") do not apply in immigration court, practitioners must utilize different mechanisms to secure the documents necessary to present the case. Appleseed's *Assembly Line* reports proposed recommendations for simplified document disclosure requirements in immigration court proceedings. While immigration regulations, such as 8 C.F.R. § 1003.35, provide for discovery methods such as depositions and subpoenas, these are rarely used; immigration court practice in general differs from long-established practices in civil and criminal courts across the United States. For instance, immigration court rules do not require that DHS produce the documents in its files to a respondent against whom it is prosecuting removal.[1] Appleseed's reports found that current immigration court discovery practices are inefficient and unnecessarily restrict immigrants' access to important documents.[2] For example, the reports found that:

- the government often requires immigrants to issue a Freedom of Information Act ("FOIA") request for documents but rejects less than one percent of FOIA requests actually filed; and
- immigrants are not immediately provided with important documents, such as the Record of Deportable/Inadmissible Alien, the Warrant for Arrest of Alien, the Notice of Custody Determination, and other salient and standard documents.

On the other hand, it is worth noting that the lack of formal discovery in immigration proceedings can provide significant advantages. Most notably, without the burdens of formal discovery, immigration proceedings are often more streamlined and efficient than traditional civil litigation. Additionally, the lack of formal discovery imposes fewer burdens on the client and minimizes the risk of waiver of the attorney-client privilege.

While the discovery conducted in immigration proceedings is different than traditional discovery in civil litigation, it is no less important. Practitioners must often pursue methods such as FOIA requests to ensure they receive the documents they need to present their case. This is particularly important if counsel suspects at the start of the case that the government possesses documents that could be relevant to the respondent's case. Additionally, because the respondent's adversary in immigration proceedings is the federal government, respondents' counsel must be aware of uncommon privilege arguments and other potential barriers to obtaining relevant information. Finally, because the respondent may be detained and unfamiliar with U.S. laws regarding his

rights to documents and information, respondent's counsel must work closely with their client to ensure they both collect and preserve the information they need for the case.

In light of the unique challenges of the immigration court by its discovery process in immigration proceedings, practitioners must be diligent in locating and preserving the information they need. Most importantly, as explained in more detail in this section, respondent's attorney must acquire his or her client's Alien file and understand its contents, coordinate with the client to determine what additional documents may be needed to help the client's case, and learn and fully understand DHS disclosure obligations.[3]

2.1 What is the Discovery Process in Immigration Court?

Immigration courts are not included within the scope of the FRCP and its discovery rules. Consequently, DHS counsel are not required to provide individuals in removal proceedings with relevant documents. As a result, practitioners obtain documents by submitting FOIA requests via USCIS Form G-639.[4] Typically, DHS produces documents it plans to use in its case-in-chief at the "cross-service deadline," which is 15 days prior to the merits hearing.[5] It does not, however, produce documents it plans to use for impeachment.

The FOIA process was not designed for the production of documents in litigation proceedings, and it does not contemplate the involvement of opposing counsel. As a result, FOIA requests often are not processed in coordination with the immigration court schedule and are less effective than traditional discovery. For example, unlike in typical civil discovery, the respondent has no legal mechanism for holding opposing counsel accountable for missing discovery deadlines or avoiding discovery requests. Moreover, DHS can withhold documents or redact information.[6] Although the government implemented a "fast track" FOIA response system in 2007, many respondents still encounter needless delays of up to two to three months in responses to FOIA requests.

Representing a detained respondent further complicates the difficulty of obtaining discovery. The length of time for the resolution of immigration cases, on average, is 667 days, with the wait in some states reaching more than 900 days for non-detained immigrants.[7] Detained immigrants usually have less of a wait, with an average processing time of under 100 days.[8] As a result, there are different timelines associated with representing a detained versus a non-detained respondent. And because detained cases tend to move so quickly, it is imperative that counsel try to obtain documents outside the FOIA process.

2.2 The Basics: What You Need and Why it is Important

(a) Alien File—The government assigns each person in removal proceedings an Alien Registration Number ("A-Number"), a unique personal identifier assigned to non-citizens. The individual files associated with each asylum seeker's registration number are referred to as Alien Files, or A-Files. Currently, when a respondent files a FOIA request, DHS must send the A-File to a centralized national office for review, reproduction and processing. This process is costly and inefficient. A-File documents are critical to ensuring that respondents can defend themselves and obtain relief because they contain important information that can prove the identity of the respondent and corroborate key elements of her story. While some DHS attorneys willingly distribute copies of A-Files to

opposing lawyers, counsel should attempt to acquire A-Files as soon as they undertake immigration court cases.

A respondent's A-File usually contains the following types of documents:

- **DHS documents relating to the respondent:** Detained respondents will likely have records regarding their entry into the United States from their home country (including interviews with U.S. Customs and Border Protection). This includes Warrants for Arrest of Alien (Form I—200), Notices of Custody Determinations (Form I-286), or Records of Deportable/Inadmissible Alien (Form I-213). In contrast, non-detained respondents may have had less contact with federal immigration agencies and therefore fewer documents;
- **Immigration forms filed by the respondent:** This includes Applications for Naturalization or Permanent Residence, Applications for Asylum, processing sheets, biographical information and petitions for alien relatives;
- **Birth and marriage certificates, passports, and green cards**;
- **Previously submitted documents:** This includes any documents which the respondent may have previously filed in the case, for example:
  - **Letters and affidavits:** Including those from the respondent's employers or former spouses;
  - **School records**;
  - **Medical records:** Detained respondents may have medical records from DHS or the detention center where the respondent was held;
  - **Photographs:** Photographs evidencing harm or injury sustained by the respondent are particularly helpful, if previously provided.
- **Criminal record documents, if any:** Documenting the respondent's criminal record in detail is particularly important with some requests for relief, such as Lawful Permanent Resident cancellation, where the absence of aggravated felony convictions is a prerequisite to relief. Some criminal records may be incomplete, and therefore counsel may wish to run a search of FBI files for complete history of criminal records, known formally as an Identity History Summary, and known more colloquially as a rap sheet.[9] To obtain an Identity History Summary, the requestor must provide the following three items to the FBI: (1) a written request, (2) proof of identity, and (3) a processing fee.[10]
- **DHS "credible fear" documents:** Including the Worksheet, Determination, and Interview Statement (asylum seekers only).[11]

(b) Documents seized by ICE or DHS at the border or detention center—Counsel should confirm with the respondent whether government officials seized documents when the respondent entered the country. It is possible the government improperly or mistakenly took documents, however the government may not have a duty to return these documents unless asked by an attorney. There also is a risk that DHS officials may confiscate documents, intentionally

or accidentally, while respondents reside in an ICE detention center. Therefore, counsel should remind the respondent to keep track of all of his possessions while in detention. It also is important to help the respondent secure any such documents upon her release from the detention center. To that end, one good tactic is to have the respondent write down an inventory of the documents and possessions he brought to the detention center and provide a copy of this list to counsel for safekeeping.

- ***Practice Tip:*** **No mandatory disclosure.** Unlike in civil discovery, there is no mutual duty to disclose. Thus as you engage in immigration court discovery, keep in mind that you do not have any obligation to provide the government with documents unless your client is required to turn over documents as part of statutorily required disclosures.

(c) Identification documents—Identification can be a central issue in asylum cases. While A-Files may contain certain identification documents such as birth certificates, passports, and green cards, counsel may consider conferring with her client to ensure that all documents the respondent has confirming his identity are in his possession. If such documents are not in the respondent's possession, counsel should determine where they are and how to obtain them.

- ***Practice Tip:*** **Make sure to return original documents.** You should return original identification documents to your client, if possible. Many documents, such as birth certificates, may be important for your client's subsequent immigration proceedings.

(d) Immigration court documents—Immigration courts will have two types of documents on file for many respondents: bond filings (if bond was requested) and merits filings. Bond documents include anything filed as part of a respondent's request for bond. The merits file will include anything that the respondent's counsel or DHS files with the court as part of removal proceedings and will include "credible fear" documents, if any.

- ***Practice Tip:*** **Getting the documents for a detained respondent is a critical first step.** For example, detained respondents likely will have records regarding their entry into the United States from their home country (including interviews with U.S. Customs and Border Protection). In contrast, non-detained respondents have less contact with federal immigration agencies and therefore fewer documents. At a minimum, however, non-detainees will have documents relating to their identification (such as passports) or copies of forms filed with the government (e.g., I-94 Arrival/Departure Record).

2.3 Tactics for Obtaining Needed Documents

(a) How to request documents—Filing a FOIA request merely requires that you have your client's signature along with her A-Number.[12] However, because different federal agencies maintain various records, counsel may have to file FOIA requests across multiple departments. For example, seeking an A-File via FOIA requires that respondents submit a request to USCIS, while seeking documents relating to detention by border patrol or at ports of entry requires

submitting a FOIA request to U.S. Customs and Border Protection.[13] For this reason, counsel should double-check to make sure that he sends the request to the correct department and address.

- ***Practice Tip:*** **Preserve your client's rights by making proper requests.** Even if your client indicates that she has certain documents, the prudent practitioner should nonetheless file a FOIA request to get these documents from the government to preserve the client's rights.

The Immigration and Naturalization Act ("INA") requires the government to turn over visa, entry documents, and other records and documents "pertaining to the alien's admission or presence in the United States,"[14] but INA § 240(b)(4)(B) applies only to individuals admitted to the United States who are contesting removal.

In addition to FOIA requests, "parties to a proceeding, and their representatives, may inspect the official record, except for classified information, by prior arrangement with the immigration court having control over the record."[15]

Of course, access to documents is equally vital to all respondents in removal proceedings, and respondent's counsel has the burden to seek documents directly from DHS. Counsel may therefore consider contacting DHS to request documents as soon as possible after the initial meeting with the client.

Counsel may consider documenting all attempts to communicate with DHS. If documents are still outstanding as the merits hearing approaches, counsel can file an emergency motion for a continuance (after considering whether a continuance is in the client's best interest) until receiving the requested documents.

- ***Practice Tip:*** **Consider informal document requests.** Particularly where FOIA is not yielding timely results, consider asking the judge to instruct the government attorney to provide the necessary documents. Be prepared to articulate your reasons for needing each type of document that you are requesting. If your request fails, but you still do not have access to potentially important documentation, consider asking for a continuance.

(b) DHS Disclosure Practices—DHS can use nine different categories of FOIA exemptions to withhold or redact documents.[16] DHS also retains privileges similar to those extended in other civil matters. For example, it may withhold notes of an asylum officer. If counsel determines that DHS is withholding or redacting documents without specifying the grounds, counsel can prepare and file an objection with the court to order disclosure or a continuance. Immigration judges have the authority to hear and act on such objections.[17] The failure of DHS to disclose certain documents in its possession may present due process problems. For example, in *Dent v. Holder*, the government initiated removal proceedings after the respondent was convicted of several crimes.[18] The respondent attempted to prove that he was a naturalized citizen, but was unable to produce documentation to support his claim and was ordered removed. Unbeknownst to the respondent, the government had his A-file in its control, and the documents in his A-file arguably supported his citizenship claim. In a separate criminal proceeding, Dent's attorney discovered the

relevant documents in his A-file. Dent then appealed his removal order and argued before the Ninth Circuit that the government's failure to turn over his A-file denied him due process. The Ninth Circuit relied on INA § 240(b)(4)(B), as well as the right to due process, to find that DHS had an obligation in that case to disclose documents relating to Dent's immigration status. It cautioned, however, that its holding was limited to the facts of Dent's case.[19]

Courts and the BIA have narrowly construed the holding in *Dent*.[20] Some DHS attorneys are still demanding that respondents file FOIA requests to access their A-files.

Certain changes to the discovery system are also being pushed outside of the courts. EOIR is leading an initiative to expedite competency evaluations for mentally ill respondents and provide health records for mentally ill detainees.[21] This initiative will help court-appointed mental health evaluators determine a respondent's competency to participate meaningfully in removal proceedings.[22] Counsel contemplating undertaking asylum cases for previously unrepresented mentally ill respondents may wish to contact EOIR to inquire about this program.

SECTION II: EXPERT PRACTITIONER STORIES

BEYOND FOIA

Obstacles in the discovery process force you to think creatively. In one case, my client was in removal proceedings, and the government claimed that he had re-entered the U.S. illegally after he had been deported. My client conceded that he had, in fact, been in deportation proceedings several years prior but had not actually been deported; rather, he believed that he had been granted voluntary departure at his request when he was a student.

This dispute became a key issue in the case. Had he been previously deported, or did he leave voluntarily? Prior counsel had done a FOIA request and received a response that made no sense. The FOIA process was a dead end. The response was returned with the odd explanation, "There are no documents. This A-File does not exist."

I later learned that the file was part of some set of documents that had been destroyed by a flood, so I had to get creative. With the help of the judge, I started thinking about what types of documents only the government would have that could address the dispute at issue.

After I created a list of those documents—admittedly quite small—I submitted a new request to the government attorney. By focusing on documents that were only in the hands of the government, my argument was very convincing, and we were able to get the documents that did exist. Although the entire A-File was not available, we were able to get records from the old INS files confirming that my client had indeed made an application for voluntary departure. This was enough to put the prior "deportation" at issue and get an evidentiary hearing on this issue.

KILL 'EM WITH KINDNESS

Sometimes a bad attitude can create a barrier to gaining access to important documents. When I attended a Master Calendar hearing in Atlanta, Georgia, I witnessed a private attorney speaking very disrespectfully to the DHS attorney. The private attorney was belligerent and kept putting the DHS attorney down.

After acting this way, the private attorney turned around and asked the DHS attorney for a copy of an important document from the DHS attorney's file. Agitated by the private attorney, the DHS attorney flatly refused and told him to do a FOIA request. Of course, a FOIA request can take anywhere from several weeks to—occasionally—years.

The private attorney left, and now it was my turn before the judge and the same DHS attorney. I, too, did not have access to a file important to my client's case, and the previous scenario made me a little nervous. Before I could articulate the question, the DHS attorney offered me the file. She just gave it to me.

So, I now contrast my experience with that of the attorney on the docket ahead of me. Yes— we're attorneys; yes—we have a lot of education; yes—we have a lot of skill and talent, but we're also people. We can never forget to be kind and courteous to one another.

Endnotes

1 *See* Appleseed, *Reimagining the Immigration Court Assembly Line: Transformative Change for the Immigration Justice System,* 63-64 (2012) http://www.appleseednetwork.org/wp-content/uploads/2012/03/Reimagining-the-Immigration-Court-Assembly-Line.pdf.

2 *See* Appleseed, Assembly Line Injustice: Blueprint to Reform America's Immigration Courts, 25-26 (2009) http://appleseednetwork.org/wp-content/uploads/2012/05/Assembly-Line-Injustice-Blueprint-to-Reform-Americas-Immigration-Courts1.pdf.

3 Appleseed also has proposed the adoption of new mandatory document disclosure procedures by DHS and EOIR to improve immigrants' access to documents in removal proceedings. For more information on these proposals, please see App. A, Appleseed, *Proposal for Simplified Document Disclosure Procedures for Individuals in Removal Proceedings* (2014).

4 FOIA requests are not the only means of discovery allowed in immigration court. Indeed, the federal regulations contain deposition and subpoena provisions. *See* 8 C.F.R. § 1003.35. In addition, the Immigration Court Practice Manual allows parties to submit exhibits prior to hearings. *See* IMMIGR. CT. PRACTICE MANUAL § 3.3 (2013). This section, however, deals with securing documents in immigration proceedings.

5 *See* 8 C.F.R. § 1003.32(a); IMMIGR. CT. PRACTICE MANUAL § 3.1(b)(ii)(A) (describing the requirements for individual calendar hearings) ("For . . . hearings involving non-detained aliens, filings must be submitted at least fifteen (15) days in advance of the hearing. This provision does not apply to exhibits or witnesses offered solely to rebut and/or impeach. Responses to filings that were submitted in advance of an individual calendar hearing must be filed within ten (10) days after the original filing with the Immigration Court. Objections to evidence may be made at any time, including at the hearing."). *See also id.* at § 3.1(b)(i)(A) (describing the requirements for master calendar hearings). The immigration court specifies filing deadlines for hearings involving detained respondents. *See id.* at § 3.1(b)(i)(B), 3.1(b)(ii)(B).

6 *See* 5 U.S.C. § 552(b)(1)-(9) (enumerating the exceptions to federal agencies' disclosure requirements).

7 *See* Transactional Records Access Clearinghouse, *Average Wait Time in Immigration Court Rises to 667 Days* (Feb. 12, 2016), http://trac.syr.edu/whatsnew/email.160212.html.

8 *See* Center for Migration Studies, *Immigration Detention: Behind the Record Numbers* (Feb. 13, 2014), http://cmsny.org/immigration-detention-behind-the-record-numbers/.

9 *Identity History Summary Checks,* FBI, https://www.fbi.gov/services/cjis/identity-history-summary-checks.

10 *U.S. Department of Justice Order,* 556-73, FBI, https://www.fbi.gov/about-us/cjis/identity-history-summary-checks/identity-history-summary-checks/order.

11 ICE gives "credible fear" interviews to asylum seekers who are apprehended by U.S. Customs and Border Protection. A credible fear interview focuses on three main areas: (1) fear of persecution; (2) fear of torture; and (3) fear of return. Immigration rules provide guidelines for what constitutes "credible fear," and the ICE interviewer has the discretion to determine whether the information provided by the asylee meets those guidelines. If ICE makes an initial determination that credible fear exists, the respondent's case is then referred to an immigration judge. If ICE determines that the respondent lacks credible fear, he is subject to immediate removal, which can be appealed and eventually lead to a full hearing before an immigration judge.

12 FOIA APPLICATION, USCIS, https://www.uscis.gov/sites/default/files/files/form/g-639.pdf.

13 *How to File a FOIA/PA Request,* USCIS (Jan. 13, 2016), https://www.uscis.gov/about-us/freedom-information-and-privacy-act-foia/how-file-foia-privacy-act-request/how-file-foiapa-request.

14 INA § 240(b)(4)(B).

15 IMMIGR. CT. PRACTICE MANUAL § 1.6(c)(i).

16 These categories are wide-ranging and include, for example, documents kept secret in the interest of national defense, documents containing trade secrets, and documents which, if disclosed, would constitute a clearly unwarranted invasion of personal property. For the full list, see 5 U.S.C. § 552(b)(1)-(9).

17 *See* 8 C.F.R. § 1003.10(b) (providing immigration judges with the ability to "take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases." Such authority includes "receiv[ing] evidence" and "issu[ing] administrative subpoenas," and therefore also can include ordering disclosure).

18 *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010).

19 *Id.* at 374-75 (concluding that "Dent, having asked for help in getting what records the agency had that bore on his case, should have been given access to his file. The only practical way to give an alien access is to furnish him with a copy. We do not imply that Dent's request for help getting records was a necessary precondition to the government's obligation, nor do we imply that the government would have no obligation if Dent had not asked, because those cases are not before us. We are unable to imagine a good reason for not producing the A-file routinely without a request, but another case may address that issue when facts call for it.").

20 *E.g., Lyon* v. *United States Immigration & Customs Enforcement,* No. 13-cv-05878-EMC, 300 F.R.D. 628 (N.D. Cal. 2014) (rejecting argument that *Dent* provides respondents with a general right to investigate and gather evidence in advance of a hearing); *In re: CARLOS FLORES-PALOMARES a.k.a. Carlos Flores,* A035 864 305 - Houston, TX, 2015 Immig. Rptr. LEXIS 7814 (March 3, 2015) (distinguishing *Dent* where DHS provided respondent with a copy of his immigrant visa petition; "Even if the respondent's request for a copy of the entire A- file is construed as a request for a remand to apply for a subpoena pursuant to 8 C.F.R. § 1003.35(a)(2), the respondent has not met his burden to establish what he expects to prove by the documentary evidence he demands be produced, or that he has made diligent effort, both during the hearing process and the appellate process, without success, to produce the same."); *In the Matter of JULIO CESAR MORA-FLORES RESPONDENT,* A035 621 725, 2011 Immig. Rptr. LEXIS 8519 (Nov. 22, 2011) (distinguishing *Dent* where respondent failed to demonstrate why additional documents he requested and had not yet received were relevant to his case).

21 *See* Memorandum from John Morton, Director of U.S. Immigrant and Customs Enforcement (ICE), to Thomas D. Homan, ICE Acting Executive Associate Director, Peter S. Vincent, ICE Principal Legal Advisor, and Kevin Landy, ICE Assistant Director (Apr. 22, 2013), https://www.ice.gov/doclib/detention-reform/pdf/11063.1_current_id_and_infosharing_detainess_mental_disorders.pdf .

22 *See* App. A, Appleseed, *Proposal for Simplified Document Disclosure Procedures for Individuals in Removal Proceedings,* 5-6 (2014).

SECTION III. PRE-HEARING CONFERENCES AND PRE-TRIAL COMMUNICATIONS WITH DHS

Appleseed's *Assembly Line* reports recommended that EOIR promote pre-hearing conferences as a mechanism to encourage DHS and respondent's counsel to narrow issues or even resolve cases, particularly in light of DHS's emphasis on the use of prosecutorial discretion announced in a 2011 memo by ICE Director John Morton.[1] Such a mechanism was badly needed, as the reports found that:

- DHS attorneys had fallen prey to a "deport-in-all-cases culture," predicated on DHS attorneys' high-volume workload and a lack of "vertical prosecution" (meaning that DHS attorneys typically were not responsible for a case from inception to trial);[2]
- DHS attorneys routinely failed to return phone calls before hearings;[3] and
- Most immigration judges did not use pre-hearing conferences or otherwise encourage DHS and respondent's counsel to confer.[4]

These failures in pre-trial communication resulted in longer hearings than necessary, as well as a burden on witnesses who came to trial even though DHS did not intend to examine them.

This lack of communication perhaps has its roots in the immigration courts' streamlined process, with very limited discovery and few opportunities for counsel to interact outside of court. Indeed, a typical immigration court proceeding is limited to a single "master calendar" hearing for initial pleading, followed months—or even years—later by trial. It might shock any state or federal court litigator—used to meeting opposing counsel regularly during lengthy pre-trial discovery— to learn that opposing counsel in an immigration court proceeding often do not meet until the day of trial, which is too late to resolve issues effectively and efficiently.

The onus, therefore, is on the immigration court practitioner to bridge this communication gap. The most obvious way is by contacting DHS directly, though as noted above, many DHS counsel do not respond to calls or emails before trial. A potentially more effective mechanism may be asking the court to order a pre-hearing conference or a formal "meet and confer" between counsel only.

3.1 What is a Pre-Hearing Conference?

Pre-hearing conferences, sometimes referred to as "status conferences," are held between the respondent's counsel and a DHS counterpart. Pre-hearing conferences provide a forum for the parties to exchange information in an informal setting. Such conferences can be particularly helpful for pro bono counsel unfamiliar with immigration court procedure or law.

Immigration court regulations permit pre-hearing conferences and explain their purpose:

> **§ 1003.21 Pre-hearing conferences and statement.**
>
> Pre-hearing conferences may be scheduled at the discretion of the Immigration Judge. The conference may be held to narrow issues, to obtain stipulations between the parties, to exchange information voluntarily, and otherwise to simplify and organize the proceeding.

The Immigration Court Practice Manual ("Practice Manual"), Chapter 4.18, reiterates the regulation, and further explains that either the court or any party may request such a hearing:

> Pre-hearing conferences may be requested by a party or initiated by the Immigration Judge. A party's request for a pre-hearing conference may be made orally or by written motion. If in writing, the motion should be filed with a cover page labeled "MOTION FOR A PRE-HEARING CONFERENCE," and comply with the deadlines and requirements for filing.[5]

The Practice Manual continues by noting that even when "a pre-hearing conference is not held, the parties are strongly encouraged to confer prior to a hearing in order to narrow issues for litigation. Parties are further encouraged to file pre-hearing statements following such discussions."

The immigration courts thus recognize two possible avenues for pre-trial communication: the pre-hearing conference with the court or a less formal conference between counsel only.

3.2 Moving for a Pre-Hearing Conference

As useful as an informal conversation may be, experienced advocates do not count on meeting or speaking with the DHS trial attorney before a merits hearing. Unfortunately, DHS trial attorneys are not required to agree to a pre-hearing conference, or even to communicate with respondent's counsel before the merits hearing.

As noted in the Practice Manual, counsel may request a pre-trial conference either orally or by written motion.[6] The first—and perhaps only—opportunity to present an oral request may be at the first master calendar hearing, which could be too early in the case to know exactly which topics might be covered at a pre-trial hearing. Nonetheless, raising the possibility of a pre-hearing conference at the master calendar hearing may reveal the immigration judge's own predilection toward using this mechanism or another avenue of narrowing issues. When advocating for a pre-hearing conference, counsel should emphasize any and all efficiency gains; Immigration Judges resist setting aside scarce court time for such hearings unless the Court will gain time later.[7]

A written request should state clearly the reasons why a pre-hearing conference will be useful in a particular case. Practitioners suggest the following issues that can be best resolved at a pre-hearing conference:

- **Issues in Dispute:** Narrow the issues that are truly in dispute, allowing the respondent to focus on the issues of concern to the Court or the Government. When it is clear that a case is particularly strong or weak, pre-hearing conferences may even present an opportunity to dispose of the case without using further court resources.

- **Witnesses:** Determine which witnesses need to appear in person or by phone, or whether a written declaration or expert report will suffice. The parties may also discuss the order of witnesses, putting first those who will address contested issues, leaving secondary issues for later.

- **Admissibility of Documents:** Each party may have an interest in confirming that the parties possess any and all filings, including all exhibits.

- **Other Evidentiary Issues:** Address any lingering evidentiary concerns leading up to the merits hearing. Consider preparing any objections to documents, witnesses, or other evidence prior to a pre-hearing conference so that you can make the most efficient use of the limited time allotted for a merits hearing by arguing only the most substantive issues of your case-in-chief.

3.3 Asking for an Order to "Meet and Confer"

The Practice Manual "strongly encourage[s]" counsel "to confer prior to a hearing in order to narrow issues for litigation,"[8] but offers no mechanism to ensure that this meeting in fact happens. Borrowing a page from Federal Rule of Civil Procedure 26(f) (which is not binding or even cited in immigration court), counsel can ask the court to order that the parties "meet and confer" out of court prior to the trial. Because neither the Practice Manual nor the EOIR regulations anticipates orders compelling out-of-court meetings of counsel, practitioners requesting an order to "meet and confer" should cite 8 C.F.R. § 1003.10(a), which provides immigration judges with broad discretion to "take any action consistent with their authorities" under the INA.

- ***Practice Tip:*** **Inquire about your local DHS offices' prehearing case resolution programs**. One practitioner in Portland, Oregon stated that the local DHS attorneys' office provides form requests aimed at accelerated resolutions of individual or master calendar hearings.[9] The forms allow counsel to lay out the specific issues which may allow the case to be resolved without the need for a full hearing. The forms also allow counsel to ask for prosecutorial discretion or administrative closure if warranted based on the facts of the case. While this program is certainly unique, you should inquire with your DHS counterparts about any similar program in your immigration venue.

  In addition, Chicago immigration courts use a procedure called Advancing Merits Proceedings for Efficient Docketing ("AMPED"), which allows counsel and DHS's Office of Chief Counsel ("OCC") to agree that a case has met all the statutory requirements and therefore the case appears likely to be approved.[10] In these situations, pre-hearing stipulations can result in a case being advanced and

shortened exponentially, because there already is an agreement on the statutory eligibility elements, which will generally mean less testimony by your client. Find out if such an approach exists in your court or with your local OCC office.

3.4 Following a Pre-Hearing Conference or Meet-and-Confer

Following a pre-hearing conference, the immigration judge may order either party to file a pre- hearing "statement of position" that includes, but is not limited to, the following: a statement of stipulated facts together with a list of hearing witnesses and exhibits; desired length of time to present the case; and a statement of the unresolved issues to be litigated.[11] The court may also require both parties to submit any evidentiary objections regarding matters contained in the prehearing statement.[12] If the court requires these objections in writing and does not receive them by the requested date, admission of all evidence described in the pre-hearing statement shall be deemed unopposed.[13]

3.5 Tactics for Effective Pre-Hearing Communications with DHS Counsel

Absent a formal pre-hearing conference, counsel should try to confer with the DHS attorney. Appleseed has found that DHS attorneys often do not return phone calls prior to merits hearings, though some Chief Counsel have instructed trial attorneys to do so. In addition, DHS attorneys often have no incentive to delve into a case well in advance. In fact, it is unusual for the government to present its own witnesses; instead, it typically relies on cross-examination and argument.

Another obstacle to pre-trial communication is that some Offices of Chief Counsel do not assign trial attorneys to handle a case from beginning-to-end. This means that the DHS lawyer at the master calendar does not know if he will be handling the case at trial. In some cases, the DHS trial attorney may not be assigned until a week or two before trial, limiting the opportunities for meaningful pre-trial communication.

Despite this all-too-common practice of ignoring calls from respondents' counsel, a good advocate nonetheless will make an effort to discuss the case with his DHS counterpart before the day of trial. Even if a practitioner only can make a brief introduction and summarize the merits of his client's case, a call (or even voice message) ahead of trial can be worth the effort.

When trying to confer with DHS counsel before trial, experienced advocates recommend the following:

- ***Practice Tip:*** **Be persistent and communicative.** Call DHS and ask for the attorney assigned to your case. Introduce yourself and make sure the DHS attorney—or even the person who picks up the phone—understands that you are working as a pro bono attorney. Be persistent and try contacting her at all times of her workday, even if it means getting up earlier if she is in a different time zone.

  These efforts may help you get an important stipulation or narrow case issues.

- ***Practice Tip:*** **Document all communications in writing.** Document any and all attempts to coordinate a conference with DHS trial counsel, and put specific requests in writing. If DHS does not respond, you have a strong counter to any objection to the unavailability of a witness testifying by written declaration. In

addition, if DHS counsel is hostile or non-responsive to pre-hearing conference requests, be prepared to show the court your record of attempts to coordinate meetings. This is especially useful if you believe that your client's evidence meets the burden to narrow the issues in the case or if there is otherwise any reason to believe that a pre-hearing conference will aid judicial economy.

SECTION III: Expert Practitioner Stories

PERSISTENCE CAN PAY OFF

I had been trying to negotiate a stipulation with opposing counsel to a very compelling, very favorable asylum case. My client was a student who, at a very young age, escaped his country with three other students for political reasons. All of the others were granted asylum, either at the affirmative stage or in court; my client was the only one whose application was still pending in court after a denial at the affirmative stage. And so we wrote a letter brief to DHS asking for stipulation on certain dispositive issues. However, we did not hear from DHS at all, and I had a feeling that my messages were just not getting through. So what I did was I printed out the brief and I also put together a joint motion for stipulation just in case.

And so when I finally reached the DHS attorney, after waiting for her at her office, she was apologetic that she wasn't able to return my calls because she had been very busy in court. We spoke in the waiting room of the DHS offices for maybe ten or fifteen minutes about the case and she looked through the brief that I had sent her (that she didn't have the chance to read beforehand).

After reviewing the brief, she gave up the whole case because she finally was able to see what the issues were, and see clearly that the other students were granted asylum and my client's case was an aberration. She was also able to see that there were some very minor inconsistencies in his testimony that led to the denial of his asylum at the affirmative stage, and so she realized that this was not a valid reason for ICE to oppose his asylum.

I am really glad I had the draft motion with me. The DHS attorney signed it right there. I co-signed it, and we submitted it to the court the same day. And the court granted asylum without a hearing.

"*MEET-AND-CONFER*" DOESN'T NECESSARILY HAVE TO HAPPEN *BEFORE* THE HEARING

My most notable experience with a DHS attorney meet-and-confer occurred *after* a merits hearing, rather than before.

The judge basically ordered me and the DHS attorney to meet-and-confer to try reaching an agreement on a "Particular Social Group" determination. We were to report back to the court on the meeting and whether we agreed to a stipulation. I ended up having two meetings with my DHS counterpart. However, after the second meeting, we reached a resolution on the phone and subsequently filed a joint pleading with the court without having to again appear before the judge.

Endnotes

1 *See* Appleseed, Reimagining the Immigration Court Assembly Line: Transformative Change for the Immigration Justice System, Appleseed, 39-44 (2012) http://www.appleseednetwork.org/wp-content/uploads/2012/03/Reimagining-the-Immigration-Court-Assembly-Line.pdf.

2 *See id.* at 39.

3 *See id.* at 46-47.

4 *See id.* at 44.

5 The Practice Manual provision also includes a citation to the section on the deadlines and requirements for filing a request, along with a sample cover page. See generally Immigr. Ct. Practice Manual § 4.18(a) (2013) [hereinafter Practice Manual].

6 *Id.*

7 We have included in this guide a copy of a sample letter requesting a pre-hearing conference and evidentiary stipulations with DHS counsel. See App. B, Sample Letter to DHS Discussing Pre-Hearing Conference and Stipulations.

8 Practice Manual, supra note 5.

9 *See* App. C, Request for an Accelerated Resolution of an Individual or Master Calendar Hearing Scheduled within Three Months.

10 *See* App. D, Advancing Merits Proceedings for Efficient Docketing (AMPED) Request and Instructions.

11 Practice Manual, supra note 5; *see also* 8 C.F.R. § 1003.21(b).

12 *Id.* at § 1003.21(c).

13 *Id.*

SECTION IV. INTERPRETATION

Interpretation is an integral part of the experience of many respondents in immigration court. A non-English-speaking respondent depends entirely on her interpreter during the hearing. Because the court does not allow a respondent to bring her own interpreter, but rather requires a respondent to use the court's own in-house or contracted interpreters, the interpretation process is completely outside the respondent's control. Appleseed's 2009 *Assembly Line* reported a litany of problems with the state of immigration court's interpretation system.[1] These problems stemmed both from incompetency in the quality of the interpretation, as well as a lack of any uniformity in the standards applied to interpreters and translations. Appleseed's recommendations for improving this system included the following:

- Mandating simultaneous interpretation of everything said during proceedings;
- Improving the certification system for interpreters to ensure that only qualified interpreters can assist in the immigration courts;
- Enhancing the complaint tracking procedure for interpreters;
- Enforcing the existing prohibition on paraphrasing and opining by interpreters; and
- Ensuring that immigration judges question and, if necessary, remove interpreters when the interpretation appears to hinder a respondent's ability to testify fully and openly.[2]

Three years later, in 2012, Appleseed found that there had been little-to-no progress in the quality and regulation of interpretation in immigration courts.[3] Accurate interpretation is critical to a respondent's case.[4] Without it, a respondent does not have the ability to participate fully and effectively in her own deportation proceedings. It is imperative that counsel learn the different types of interpretation and how these differences can affect the respondent's case.

4.1 How Are Proceedings Interpreted?

- ***Full vs. Partial Interpretation:*** The most important distinction between modes of interpretation is the difference between a full versus a partial interpretation. As the name implies, a full interpretation means that every aspect of the proceeding is translated to the respondent. This includes when the judge or counsel is speaking or when the judge gives instruction to anyone in the courtroom. Partial rather than

full interpretation unfortunately is the more common practice in immigration courts. This means that only the questions translated are those directed to the respondent (from either the judge or counsel), leaving the respondent with no idea what is going on in the courtroom during the rest of the proceeding. There also is a third mode of interpretation employed at some hearings, in which the immigration judge will summarize what has been said, such as discussions with counsel to the respondent through an interpreter. While this option is not as desirable as true full interpretation, a judge may be more likely to authorize this hybrid approach.

- ***Simultaneous vs. Consecutive Interpretation:*** Interpretation also differs by simultaneous versus consecutive interpretation. In a simultaneous interpretation, both the interpreter and respondent wear headsets, and the interpreter translates to the respondent with only a few seconds' delay. This takes a high degree of skill, as the interpreter must translate while simultaneously listening to and comprehending the next words. With consecutive interpretation, on the other hand, the interpreter listens and takes notes on what is being said, then waits for a break in testimony (usually once a paragraph or so) to translate out loud to the respondent. Simultaneous interpretation is preferred both because it is more likely to be the most accurate and because it limits disruptions to the flow of proceedings.

Until 2013, partial interpretation was the dominant means of interpretation at immigration hearings. On February 11, 2013, EOIR Chief Judge Brian M. O'Leary issued a memo ordering the implementation of full and complete interpretation of all court proceedings.[5] More than three years later, it does not appear that all immigration courts are in fact following this mandate. The problem goes well beyond efficiency: when courts do not provide full interpretation, the respondent is left in the dark about much of what is going on at the hearing because the only part that is translated to the respondent is what is said directly to or by the respondent.[6] Accordingly, counsel should confirm with the court that full interpretation will be used in accordance with the February 11, 2013 memorandum. In addition, counsel may consider requesting simultaneous interpretation rather than consecutive interpretation. This includes the use of equipment necessary to interpret simultaneously, including headphones for the respondent and a microphone for the interpreter.[7]

4.2 What Standards Govern Interpretation?

In general, the court has an obligation to provide an interpreter when a respondent does not have enough mastery of the English language to understand and fully participate in her immigration court hearing. As the Immigration Court Practice Manual states:

> Interpreters are provided at government expense to individuals whose command of the English language is inadequate to fully understand and participate in removal proceedings. In general, the Immigration Court endeavors to accommodate the language needs of all respondents and witnesses. The Immigration Court will arrange for an interpreter both during the individual calendar hearing and, if necessary, the master calendar hearing.[8]

Normally, if a respondent or her attorney expresses the need for an interpreter for either or both of the master calendar hearing and individual hearing, the immigration court will provide one, without questioning the level of the respondent's fluency in English.

One of the only legal standards governing interpretation is the requirement under federal statute that an interpreter take an oath to interpret and translate accurately.[9] Interpreters are required to promise to translate accurately, but there is no process in place by immigration courts to ensure that interpretations are accurate.[10] Immigration courts utilize both staff interpreters hired by the Department of Justice, as well as contract interpreters who work for outside private agencies.[11] Interpreters in immigration court, however, are not subject to the same stringent certification requirements as interpreters who appear in U.S. federal court.[12]

In federal court the Court Interpreters Act applies to all court interpreters. That Act requires the government to certify the qualifications of all interpreters in federal court proceedings.[13] A federal court interpreter must meet certain guidelines before he is selected to interpret. In addition, under the Act, a party may request an electronic recording of the interpretation after the hearing.[14] A party also is entitled to simultaneous interpretation under the Act.[15] Unfortunately, it is not clear how or even if the Act applies to immigration court proceedings.[16]

The Immigration Judge Benchbook suggests how immigration judges should evaluate the need for an interpreter.[17] First, at the respondent's initial hearing, after the case is announced, the judge must establish communication with the respondent by asking her (1) what language she speaks and understands best, and (2) what language she spoke as a child. With the answers to those questions, the immigration judge can determine whether the respondent needs the services of an interpreter.[18] If the respondent speaks and understands Spanish best, a staff interpreter usually is on site and will assist with the Master Calendar hearing. If the language is one other than Spanish or a Spanish speaking interpreter is not available in person, the immigration judge must contact an interpreter to translate over speakerphone.[19]

Not only should spoken words be interpreted, but so should any English-language documents. For instance, when a respondent denies any allegations in the Notice to Appear, the government must provide evidence supporting those allegations. That evidence likely will come in the form of documents, typically written in English. In this case, the Benchbook instructs the judge to go off the record while the interpreter translates the documents for the respondent.[20]

- ***Practice Tip:*** **Get the translation on the record.** Request that oral translation of documents be included *on the record* in order to capture any potential inaccuracies. This will create a record for any appeal about the translated document or the interpretation itself.[21]

If circumstances do not allow translation of documents (for instance, if the interpreter is available only by telephone), the immigration judge should adjourn the case to another Master Calendar hearing and give instructions to the respondent to find a friend, relative, or other person to translate the documents, assuming the court-appointed interpreter cannot appear in person on another date.[22]

4.3 Inconsistency in Interpretation Across Immigration Courts

In 2013, the EOIR announced its commitment to standardize "full and complete" language interpretation and strongly encouraged courts to use "simultaneous" rather than "consecutive" interpretation. More than three years later, there is little uniformity in the mode of interpretation used by immigration courts across the country. *See* Appendix J.

4.4 Does Your Client Need An Interpreter?

The key question counsel must answer is whether the client can effectively communicate with the court in English. It often is tempting to have a client speak English, even if imperfect, to avoid the hassle of interpretation and to allow the client to speak directly to the judge. Nonetheless, even if a client understands and speaks English, an interpreter should be used if the client is *more* comfortable explaining himself in his native language. With this in mind, practitioners should consider the following:

(a) At the outset of the case, decide whether and how using an interpreter will further the respondent's case.

- Ask the following questions:
  - Can the respondent both read and speak English?
  - What is the respondent's education level?
  - Does the respondent speak English on a regular basis inside the home?
  - Can the respondent answer a line of questioning in English well beyond a simple "yes" or "no" response?
  - Will the respondent become confused during cross-examination by the government attorney without the help of an interpreter?

(b) Check the respondent's specific dialect. Confirm that the interpreter speaks the same dialect as the respondent, unless the client indicates that dialect is not important to understanding.[23]

(c) Make sure the respondent and the interpreter understand each other. At the beginning of the proceedings, the immigration judge should make sure that the respondent and the interpreter understand each other. If the immigration judge does not, respondent's counsel should intervene and ask the respondent whether she understands the interpreter.

(d) Make sure the immigration judge is following the Immigration Judge Benchbook Procedures regarding interpreters. The Immigration Judge Benchbook is available online through the DOJ's website at https://www.justice.gov/eoir/immigration-judge-benchbook. Make sure at the first hearing that the judge asks the respondent if she wants an interpreter and that an interpreter speaks the correct language or dialect. Ensure that all documents used during the hearing are translated for the respondent and ask that the translation be on the record.

(e) Request full interpretation. In accordance with EOIR policy, request that the immigration judge allow full interpretation of everything said in immigration

court, not just what is "on the record." Full interpretation is helpful for the attorney, and a lack of full interpretation may present due process concerns. Request that the court allow respondent to bring her own interpreter if EOIR cannot provide full interpretation. Explain to the judge that the respondent has a right to hear and understand *everything* happening in the proceeding, and if the EOIR cannot provide this, then the respondent should be able to make arrangements to do so. If the court denies counsel's request for full interpretation, speaking with the judge on the record will help preserve the client's rights on appeal.

(f) Consider whether to request simultaneous interpretation. While simultaneous may be a more practical option than consecutive interpretation, it is by no means automatically a better choice. Some practitioners advise that simultaneous translation provides a potential disadvantage because the attorney cannot listen to the translation and also pay attention to the in-court proceedings. In cases where counsel understands the respondent's language or dialect, consecutive translation may be the best option. Keep in mind, however, that whether a hearing is conducted via simultaneous or consecutive interpretation may hinge on the technology set-up in each specific courtroom.

(g) Evaluate the interpreter. The level of experience for individual interpreters varies widely. In evaluating your interpreter, note her experience. In addition, make sure that the interpreter understands what will happen in the court proceedings and the legal jargon that will be used. An interpreter must do more than just interpret normal conversation. She also needs to be sufficiently familiar with the terminology and procedures of the immigration courts to accurately convey to the respondent what is being said. To monitor the interpreter, ask yourself: Is the interpreter truly bilingual? Does it appear that the interpreter understands common terminology used during the immigration proceedings? Is the interpreter sensitive to all the nuances of interpretation, like tone, facial cues, and gestures?

- ***Practice Tip:*** **Evaluate your interpreter.** There are many different ways you can evaluate your interpreter, whether or not you speak the subject language:

  - Bring your own interpreter to court and have the interpreter sit next to or behind you and signal you when an improper interpretation has occurred.

  - Practice with your client so that you know about how long her answers should be to each question. Make sure that your client's answer and the interpretation of the answer take about the same amount of time. If they do not, then consider objecting.

  - Make sure that the substance of the interpretation sounds the same as what your client had previously told you in preparing to testify. If not, make sure to ask a clarifying question to ensure that poor interpretation is not causing the mistake.

(h) Prepare the client. Advise the respondent to use language that will make it as easy as possible for the interpreter to convey what he is trying to get across.

For example, tell the respondent to use as many descriptive words as possible. Make sure the client knows that he can monitor the interpreter for mistakes. Tell the respondent to say something to you immediately if the interpreter is not accurate, and make sure he knows he has a right to a completely accurate interpretation.

- ***Practice Tip:*** **Practice using a translator with your client.** When practicing testimony with your client, use an interpreter. Train the client to listen to the interpretation and to look for mistakes. While preparing the client, ask the interpreter to purposefully misinterpret something important so the client can practice how to respond and notify the court or you of the mistake.

- ***Practice Tip:*** **Prepare the court translator if possible.** In advance of any hearing requiring an interpreter, prepare a list of difficult names, places, or other words that are likely to come up during the hearing that could cause trouble for the interpreter. This may help simplify the translation process while also providing a more accurate hearing transcript. Provide copies to DHS counsel and the court.

4.5 How to Report Interpreter Misconduct and Mistakes

Counsel should be prepared to report poor interpretation as soon as practicable. After the interpretation is complete, object—but do not interrupt the interpreter—and tell the judge that you believe there has been a mistake in interpretation. Request to hear the question and answer again.

- ***Practice Tip*** **Avoid interpreting your client yourself.** Even if you speak the language of interpretation, avoid acting as an interpreter when objecting. Instead of volunteering what the client intended to say, it is a better practice to request that the question be asked again.

- ***Practice Tip:*** **Don't interrupt.** Do not interrupt a question or an interpretation to correct the misinterpretation unless there is prejudice by allowing the question to continue uncorrected. Once you realize there is prejudice, interrupt and clarify for the judge what was wrong with the interpretation and why.

Counsel also must decide when it is appropriate to file a formal complaint about an immigration court reporter. EOIR has an email address to receive issues or concerns about immigration court reporters. To submit a complaint, send an email to: complaints.interpreter@usdoj.gov. Because the only publicized avenue for complaints is through email, it does not appear possible to post complaints anonymously, unless you use an untraceable email account.

The complaint should contain the following information: the name of the interpreter; the name of the presiding immigration judge; the date, time, and immigration court where the issue occurred; a statement explaining the concern; and the complaining party's name, address, phone number, and any other contact information.[24]

SECTION IV: Expert Practitioner Stories

PREPARING FOR AN INTERPRETER

I think that clients feel like they should testify in English because it shows that they care about the culture here and they want to be in America. For one of my clients, we practiced that after he said his name at the beginning of his testimony, I would ask him a question, and he practiced interrupting me, saying, "I am going to answer you in my native language. But, your honor, I want you to know that I speak English. But, I am so nervous right now that I want to make sure that the court knows everything that I am saying. So, I will be speaking in Somali." And when he got up on the stand he said that, and it gave him a comfort to know that the judge knew that he would try to speak English if he could but that English is not his primary language, which is why he would be testifying in his native language.

MY LEFT FINGER TOE

Part of my client's story of persecution is that his toe was shot off. I have seen my client's foot. I have seen where the toe has been shot off. When he was testifying in court describing his injuries, the interpreter translated that he was testifying that his left *finger* was shot off. So then I asked him again to say what was shot off. And then the translator again translated that his left finger was shot off.

Now, you're looking at my client, you can see he has all ten fingers. So I tried to find a different way to ask the question but then the judge started to get irritated with me. And finally, my client was so frustrated, that even though he hardly knows any English, he shouted out in English: "My left finger toe, my left finger toe!" When he was trying to testify to describe it, it was the second toe, which apparently, in Somalia is referred to as the finger toe because it's longer and more like a finger. But the translator was interpreting it as his finger.

The judge looked at him and then my client started to take his shoe off because he is so frustrated. He's talking about his shot off finger and he clearly has ten fingers. The judge finally said "No, you don't have to take your shoe off. I understand." But it was a really good lesson for me in ways that translation can go wrong and can cause a big problem. The judge could have found my client to be totally not credible in saying that his finger was shot off when he had ten fingers there.

GRABBING ISN'T TOUCHING

My client testified in Spanish that her husband had "grabbed her arm," but the interpreter translated it to English as "touched her arm." I luckily understood Spanish and so was able to catch the mistake in interpretation. At the time, I waited to re-examine my client to correct the mistake. In hindsight, I now believe the better course of action would have been to object right away.

Endnotes

1 Appleseed, *Assembly Line Injustice: Blueprint to Reform America's Immigration Courts*, Appleseed, 19-21 (2009), http://appleseednetwork.org/wp-content/uploads/2012/05/Assembly-Line-Injustice-Blueprint-to-Reform-Americas-Immigration-Courts1.pdf.

2 Appleseed, *Reimagining the Immigration Court Assembly Line: Transformative Change for the Immigration Justice System*, Appleseed, 49 (2012), http://www.appleseednetwork.org/wp-content/uploads/2012/03/Reimagining-the-Immigration-Court-Assembly-Line.pdf [hereinafter Reimagining the Immigration Court Assembly Line].

3 *Id.*

4 *Id.*

5 *See* App. E, Feb. 11, 2013 Memorandum from Brian M. O'Leary.

6 *Reimagining the Immigration Court Assembly Line, supra* note 2, at 50.

7 *See* Rosado Professional Solutions, *Interpreting at the Immigration Court: Is It Really Headed For Disaster?* The Prof. Interpreter (Feb. 14, 2013), http://rpstranslations.wordpress.com/2013/02/04/interpreting-at-the-immigration-court-is-it-really-headed-for-disaster/.

8 Immigr. Ct. Practice Manual § 4.11 (2013).

9 8 C.F.R. § 1003.22 (2016) ("Any person acting as an interpreter in a hearing shall swear or affirm to interpret and translate accurately, unless the interpreter is an employee of the United States Government, in which event no such oath or affirmation shall be required.").

10 *Reimagining the Immigration Court Assembly Line, supra* note 2, at 53.

11 Rosado Professional Solutions, *supra* note 7.

12 *See Federal Court Certification Examination*, U.S. Cts., http://www.uscourts.gov/services-forms/federal-court-interpreters/federal-court-interpreter-certification-examination.

13 *See Understanding the Federal Courts: Federal Court Interpreters*, U.S. Cts., http://www.uscourts.gov/uscourts/educational-resources/get-informed/understanding-federal-courts.pdf.

14 28 U.S.C. § 1827(d)(2) (1978).

15 *Id.* at § 1827(k).

16 *See* Augustin v. Sava, 735 F.2d 32, 36-37 (2nd Cir. 1984) (applying the Court Interpreters Act in deportation proceedings). But see Baba v. Holder, 569 F.3d 79, 81 n.2 (2d Cir. 2009).

17 *See Immigration Judge Benchbook*: *Index*, EOIR, http://www.justice.gov/eoir/vll/benchbook/index.html#intro; *see, e.g., Initial Hearing - Prose*, EOIR, http://www.justice.gov/eoir/vll/benchbook/tools/Script Initial Hearing.pdf; *see, e.g., Introductory Guide on the Introduction to the Master Calendar*, EOIR, https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Purpose_and_History_of_MC.pdf [hereinafter *Benchbook: Master Calendar*].

18 The Benchbook refers to these questions with regard to an unrepresented respondent, but there is no reason to expect that the same questions would not be asked to counsel of a represented respondent.

19 *See Benchbook: Master Calendar, supra* note 17, at 13.

20 *Id*. at 16.

21 The Benchbook, on the other hand, suggests that translation be done after going off the record, and after the translation is done off the record, immigration judges should go back on the record and recite the substance of the discussion as well as register on the record an agreement as to that substance by both parties. See generally id. at 22.

22 *See id*. at 16.

23 *See also* Stephen M. Kahaner, The Administration of Justice in a Multilingual Society - Open to Interpretation or Lost in Translation?, 92 JUDICATURE 224, 227-228 (2009) (cautioning that a fully competent interpreter should have strong language skills in both English and the foreign language, and understand "geographic differences in meaning and dialect").

24 For additional information and guidelines, see Filing a Complaint Regarding an Immigration Court Interpreter, EOIR (Feb. 12, 2015), http://www.justice.gov/eoir/sibpages/InterpComplaint.htm.

SECTION V. VIDEOCONFERENCING

In its prior reports, Appleseed documented significant problems associated with video teleconferencing ("VTC") in immigration proceedings. Specifically, Appleseed concluded that:

- **VTC can directly infringe upon a respondent's basic due process rights.** Based on numerous studies showing that VTC is a poor substitute for in-person hearings, Appleseed concluded that VTC usage can impair the accuracy and fairness of the court's decision-making, while also undermining the legitimacy of immigration courts.[1]

- **Some proceedings are difficult to conduct through VTC.** In particular, because merits hearings rely heavily on in-person testimony and credibility determinations, it may be impractical and detrimental to conduct such hearings via VTC.[2]

- **VTC presents a variety of logistical issues.** For example, counsel may have to choose between staying with a client during a videoconference or appearing in the courtroom with the government attorney and the judge.[3]

Nonetheless, the use and acceptance of VTC has risen sharply as a result of the increasing backlog of immigration cases over the past few years, and there are several benefits to using VTC in immigration proceedings: VTC not only helps reduce the backlog of cases in the nation's immigration court system, but it also is a proven cost-cutting measure for the court.[4] For example, in areas where there are physical immigration courts, VTC creates greater flexibility in docket management by allowing judges in other, less busy, courts to assist in hearing cases.

VTC usage was specifically approved by Congress and has been in use in removal proceedings since 1996.[5] While outside groups and academics have conducted a number of empirical studies on VTC usage over the past few years, EOIR still lacks the feedback and data necessary to determine the real impact that VTC usage has on hearing outcomes.[6]

Counsel should be particularly sensitive to problems presented by VTC and prepared to object to VTC usage when it interferes with the presentation of evidence or argument or necessary attorney-client communications. Ultimately, the immigration judge will determine whether VTC proceedings can be conducted fairly and without prejudice to the respondent's right to participate or to the government's right to present its case-in-chief.

5.1 What Is Videoconferencing?

Almost all VTC takes place in detained settings; non-detained individuals usually attend live hearings, except when a judge substitutes from another court or, in particular, from the Headquarters Immigration Court.[7]

- ***Practice Tip:*** **Get a live hearing for a detained client by getting her out of detention.** Because VTC primarily occurs with detained individuals, in some cases the best way to get a live hearing is to advocate aggressively for release by bond or parole (in which case the respondent will be switched to the non-detained docket).

VTC units have been installed at EOIR headquarters and in many immigration courtrooms. These units also can be found at many other sites where immigration hearings take place, including detention centers and correctional facilities. Despite the widespread availability of uniform VTC technology, different immigration courts have distinct approaches to VTC usage; the regulations do not mandate any restrictions on VTC use or impose any standards to ensure that courts use VTC consistently or fairly.[8]

To evaluate fully how VTC may affect the hearing it is helpful to understand how a respondent appears to the court during VTC and how the court appears to the respondent.[9] Typically, a detained respondent sits in a room in a detention center, and a DHS detention officer assigned to assist the court with any technical difficulties supervises the respondent. The respondent may be dressed in an ICE-labeled prison jumpsuit and may be handcuffed. The camera does not move during the hearing (unless directed by the immigration judge), and the respondent views it from several feet away. The respondent appears to the courtroom on a large television with a picture-in-picture reflecting the image projected to the detainee. The respondent may not know to look into the camera rather than at the television screen when testifying in order to look directly at the viewer.

- ***Practice Tip:*** **Prepare your client for testifying via VTC.** While it is likely to be impossible to practice using a VTC before the hearing, counsel should explain in detail the VTC process with a respondent prior to a court appearance to make her feel more comfortable. For example, explain to the respondent where VTC equipment will be located, where to look during the hearing (into the camera), and what the judge will see during the hearing.

- ***Practice Tip:*** **Prepare yourself for working with VTC.** If time permits, try to observe a few of the judge's hearings before your client appears in court. Because the impact of the use of VTC equipment varies substantially between judges (some judges are better versed in technology, and some courtrooms simply have better equipment), this will give you the best opportunity to determine what your client face and allow you best to prepare your client for her hearing.

5.2 Considerations for Objecting to Videoconference Use

There are some situations that may make VTC use favorable for the respondent. For example, a non-detained respondent may reside far away from the immigration courthouse and find it difficult to attend short, minor hearings.[10] Some immigration judges endorse VTC because it allows them to preside over more hearings in a single day or to hear cases ad hoc to assist colleagues with heavy dockets in other immigration courts.

VTC use may not always be appropriate, however. Counsel should evaluate the practical and logistical implications of VTC technology before considering whether to object to VTC usage or move for an in-person hearing.[11]

(a) Type of hearing—Preliminary hearings (such as master calendar and bond hearings) and pre-hearing conferences are likely appropriate proceedings for VTC usage because they rarely require the respondent to provide lengthy testimony.[12] Use of VTC during merits hearings may be less appropriate because it could impair the immigration judge's ability to evaluate a respondent's demeanor and credibility or lead to interpretation and translation difficulties.[13]

(b) Moving for an in-person hearing—If VTC usage will present a substantial risk of impairing the respondent's presentation of evidence or affect the immigration judge's ability to evaluate credibility (see section 5.3(c), infra), counsel may consider preparing a motion asking the court for permission for the respondent to appear in-person and provide reasons why VTC usage will interfere with the respondent's due process rights.[14]

- ***Practice Tip:*** **Evaluate whether VTC will affect your client's ability to speak about the subject matter of his case.** Remember that many times the client will not be the only person in the room. Often there are correctional officers or other detainees in the VTC room who will hear the testimony. A respondent should not, for example, be forced to speak about sensitive events related to sexual orientation or abuse.

5.3 How to Confront the Potential Disadvantages of VTC

EOIR defends VTC as a useful tool for case management that saves time and reduces court costs. However, a number of immigration practitioners argue that the disadvantages outweigh any benefits. For example:

- Interpreters typically are in a different location from respondents, compounding issues with the accuracy of interpretation. Outdated VTC equipment and poor sound quality exacerbate the problem of understanding respondents, even those testifying in English.[15]
- Only detention officers (rather than court personnel trained in troubleshooting common VTC problems) are available at detention centers to assist the court with VTC problems.
- Presenting evidence via video can be challenging because of issues inherent in video quality and the ability to transmit images or documents to different locations.
- ***Practice Tip:*** **Object to technical issues with VTC.** When faced with technological problems with VTC equipment, you should state for the record the problems with the equipment. Be as specific as possible, e.g., "the VTC equipment has now broken down x number of times." The respondent can also help with this. Tell the respondent to state out loud exactly what the problem is, e.g., "I need to stop my testimony because I can't see you; the screen is flashing in and out."

- ***Practice Tip:*** **Arrive to court early and observe your court's VTC.** If you notice technical difficulties occurring with VTC equipment before your case is called, consider asking the judge if your case can be called last or near the end; the technical difficulties may have been resolved by that time. If the issues are not resolved, consider moving for a continuance.

In addition to either filing or making an objection, counsel should strategize how to overcome the difficulties associated with VTC. Some of the most common issues include:

- **Conferring with the respondent**—When VTC is used at an immigration hearing, counsel most likely will appear in the courtroom while the respondent appears remotely.[16] This raises an obvious problem when counsel needs to consult with the respondent privately. In such a situation counsel should inform the immigration judge that he needs to confer with the respondent. If counsel believes that the ability to effectively communicate with a respondent is impaired by VTC, he should request a continuance and/or object on the record that the respondent's right to counsel under INA § 240(b)(4)(A) has been impaired.[17]

  - ***Practice Tip:*** **Sharing documents with the respondent on VTC.** You should ask the court, before the hearing, what technology is available to share documents, pictures, or notes with a respondent appearing by VTC. The court likely will dictate the precise method of off-the-record communication between counsel and the respondent. Nevertheless, you can coordinate with the court to scan documentary evidence or email notes directly to the respondent at the VTC unit. You should not rely on the detention center to have a system in place for providing documents or pictures to the respondent. In addition, leave a copy of exhibits with the respondent before the hearing if the detention center will allow the respondent to keep documents with her.

  - ***Practice Tip:*** **Consider clearing the courtroom.** If it becomes necessary to confer with your client regarding something private or sensitive during a hearing, ask the immigration judge to clear the courtroom or provide a separate room to allow you to speak with your client through VTC. The exact method by which you can speak with your client will depend on the technology available in your court and the detention center.

- **Lack of nonverbal communication**—VTC use of any kind will have a substantial effect on how the case-in-chief is presented. For example, VTC can limit the immigration judge's ability to observe body language and make it difficult for the parties and court interpreter to understand one another clearly. In addition, a lack of clear video resolution can make it difficult for those in the courtroom to observe a respondent's facial expressions or emotion.[18] Further, the respondent and the court interpreter, who is located in the courtroom or is participating by telephone, cannot rely on visual cues to signal whether they understand one another.

- **Physically examining evidence**—VTC may present a substantial frustration when examining physical evidence. For instance, DHS may introduce a document in rebuttal that was not previously provided, leaving the respondent unable to review the document with her attorney if they are at separate locations.[19]

- ***Practice Tip:*** **Object to the use of a document without examination.** If the respondent has no opportunity to examine and understand the presentation of a document, object on the record that the respondent's right to examine evidence under 8 U.S.C. § 1229a(b)(4)(B) has been violated.[20]

- **Physical injuries**—The video quality may not be sharp enough for the immigration judge to see the respondent clearly. If physical injuries are central to the respondent's claim, counsel may want to coordinate with the respondent in advance to present pictures to the court.[21] The respondent also may have injuries, such as a limp or twitch, which can be effectively demonstrated only in person. In that case, counsel may wish to ask the immigration judge to continue the hearing so that the respondent can demonstrate the injuries in person, explaining on the record why the injury cannot be fully demonstrated through VTC. Even if the court refuses the request, the point is made that the injury is an important fact.

- **Harmful effect on determination of credibility**—Technological limitations can make it difficult for the respondent to connect emotionally with the immigration judge. Compounding this problem for a detained respondent is the prejudicial perception of an inmate in prison clothing or handcuffs.[22]

  - ***Practice Tip:*** **Object to use of prison clothing.** In places where respondents are forced to appear in detainee-issued jumpsuits or handcuffs, consider objecting in advance on the basis that it is unduly prejudicial to the respondent.

- **Logistical concerns**—Counsel will usually appear live in court while the respondent appears at the VTC unit. Counsel must ensure that the court personnel in charge of VTC technology are aware of the respondent's appearance by video. If representing a non-detained respondent, counsel must ensure the respondent knows where to appear. If the respondent is not appearing in a detention center on bond, counsel may want to coordinate transportation to the VTC unit. Sometimes facilities do not take time zones into account when scheduling phone calls, which could affect the availability of experts or key witnesses to appear from foreign countries.[23] In addition, many facilities lack the necessary office equipment, such as fax machines or copiers, to send documents or pictures between the courtroom and VTC unit.[24]

  - ***Practice Tip:*** **Test equipment beforehand.** You may request that personnel at the VTC unit test technical equipment prior to the hearing (e.g., respondent's microphone placement, whether the court can hear the respondent clearly, and verify that the respondent can hear you).

Ensure the respondent is present during all parts of the hearing. As soon as any conversation begins, even an off-the-record discussion, VTC should be turned on and the interpreter, if necessary, should resume translating.[25]

- ***Practice Tip:*** **Send another person to the detention center.** Consider having a second attorney (or another person, such as a paralegal) present in the detention center. Make sure this other attorney or paralegal has filed the necessary paperwork to have clearance to get into the detention center, although her presence in court should be governed by EOIR.[26]

SECTION V: Expert Practitioner Stories

PREPARING YOUR CLIENT FOR VTC ISSUES

I remember one judge that used to do the detained docket in Arlington did not know how to use the camera to zoom in on the individual, to move the individual, or to even show them who they were facing—their attorney or the judge or the interpreter. He would just focus the client's view on a wall. Because I knew that beforehand, whenever I prepared my client, I told him, "You're going to be looking at a wall. You're not going to be looking at anybody. You're going to be hearing just me talking from somewhere," and that was something to prepare him for.

NO VIDEO-NO CLIENT

I was in San Antonio, and the judge was doing master calendars on VTC to a detention center. I was in the court with the judge in San Antonio. And the video cut out repeatedly, and, finally, the judge just dispensed with it and conducted the hearing in person with the lawyer off the record because the respondent couldn't be on the record without the video. And then she would go back on the record and say, "We just conducted a master calendar hearing, and I'm summarizing, for the record, the outcome. We agreed to do this."

But the respondent wasn't present, didn't hear any of that, and didn't have a chance to object to any of that. The lawyer wasn't able to consult with his client. I thought that was terrible. The judge—basically because of the technical difficulties—just went forward and conducted the hearing without the respondent present because of the failure of the video.

INJURIES OVER VIDEO

I had a client who had been in jail in Iran, and he had been tortured. He had a broken nose by having been hit in the face with the butt of a rifle. And, if you looked at his profile you could see that his nose had been dislocated and had a bump in it. And, similarly, he had had three fingers on one of his hands broken by being hit in the same way. But there was no way on video conference to show that.

Because of time and resource limitations, I was unable to get a physician to go to the detention center in the right amount of time to corroborate this by means of a written report. But if the judge would have been able to see him in person—if she could look at his face and hold up his fingers—then she would have been able to see that his condition was manifest.

In that particular case, I was able to get the judge to grant the motion for in-person testimony, so she could observe these problems. But on video, that would not have been possible. If he were forced to use VTC, then I think the significance would have been lost and it would have negatively impacted his credibility.

THE IMPACT OF VTC ON THE LAWYER/CLIENT RELATIONSHIP

Before an Arlington Immigration Court Judge, a detainee from Guatemala was appearing by VTC. Let's call him "Francisco." He had been detained for a few weeks, and his lawyer had not yet discussed with him in detail his potential claims for relief. His lawyer appeared in court in Virginia. The court did a good job of pivoting the camera so that Francisco could see his lawyer and acknowledge that this was his representative. Upon counsel's request, the court agreed to grant a continuance so that the lawyer and client could discuss relief, as well as bond, and file applications before the next hearing.

As the judge was getting ready to enter the order for a continuance, Francisco asked if he could say something. Francisco said that he did not want to stay in detention - he had been there for some number of weeks - and wanted to be deported. The judge advised him of the consequences of such a decision, and asked him at some length about whether he wanted to forego all relief (all the while, only half his head was showing on the screen, though in these circumstances the only impact this may have had was making it easier for counsel to disconnect from his client).

The lawyer never jumped in to object, to ask for a recess, or otherwise to counsel his client. I don't know this lawyer, but I'm a pretty sure that had Francisco been sitting next to him, he would have asked for time to discuss this turn of events with his client. Instead, the judge carefully walked through the request for deportation, and ultimately granted it, ordering removal to Guatemala.

Endnotes

1 Chicago Appleseed & The Legal Assistance Foundation of Metropolitan Chicago, *Videoconferencing in Removal Hearings: A Case Study of the Chicago Immigration Court*, CHI. APPLESEED, 5 (Aug. 2, 2005), http://chicagoappleseed.org/wp-content/uploads/2012/08/videoconfreport 080205.pdf [hereinafter Chicago Appleseed: *Videoconferencing*].

2 *See* Appleseed, *Assembly Line Injustice, Blueprint To Reform America's Immigration Courts*, Appleseed, 22-24 (May 2009), http://appleseednetwork.org/wp-content/uploads/2012/05/Assembly-Line-Injustice-Blueprint-to-Reform-Americas-Immigration-Courts1.pdf.

3 Chicago Appleseed: *Videoconferencing, supra* note 1, at 27.

4 Ellen Garrison, *Beamed Into Court: The Drawbacks of Videoconferencing*, IMMIGR. CONNECT (Jun. 17, 2013), http://www.immigrantconnect.org/2013/06/17/beamed-into-court-the-drawbacks-of-videoconferencing/.

5 Chicago Appleseed: *Videoconferencing, supra* note 1, at 16.

6 One recent study concluded that there was no statistically significant difference in outcomes in detained VTC deportation hearings versus in-person deportation hearings. However, VTC cases in general were more likely to result in deportation as a result of the respondents' "depressed engagement with the adversarial process" because they, for example, were less likely to retain counsel or seek permission to remain lawfully in the United States or return voluntarily to their home country. *See* Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 Nw. Univ. L. REV. 933, 937-38 (2015) [hereinafter *Remote Adjudication*].

7 *See* Daniel L. Swanwick, *Location, Location, Location: Venue for Immigration Appeals in the U.S. Circuit Courts*, IMMIGR. L.ADVISOR, 2 (Jan. 2011), http://www.justice.gov/sites/default/files/eoir/legacy/2011/02/03/vol5no1.pdf (explaining that the Headquarters Immigration Court assists other Immigration Courts with their dockets by conducting hearings exclusively via videoconferencing).

8 Chicago Appleseed: *Videoconferencing, supra* note 1, at 6 ("There is virtually no regulation or written policy . . . governing videoconferencing in the immigration court.").

9 NPR has also commented on issues presented during VTC hearings in immigration court. *See* Jennifer Ludden, *Debate Over Video in Immigration Courts*, Nat'l Pub. Radio (Feb. 10, 2009), http://www.npr.org/templates/story/story.php?storyId=100534850.

10 For example, there is no immigration court located in Austin, Texas. As a result, a non-detained respondent would have to travel a long distance, most likely to San Antonio, for what could be a five to ten minute hearing.

11 *See* Chicago Appleseed: *Videoconferencing, supra* note 1, at 23 (stating that detainees are sometimes given only a few hours' notice of upcoming hearings, and sometimes no notice that their hearings will be conducted via VTC); *see also Rapheal v. Mukasey*, 533 F.3d 521, 534 (7th Cir. 2008) (noting that the government's decision to use VTC was "strange" because it transported respondent a longer way to get to the VTC location than it would have to bring her to appear in person and encouraging the immigration judge on remand to reconsider the respondent's motion for an in-person hearing "given the logistics involved").

12 Remote Adjudication, *supra* note 6, at 951-52 (explaining that government officials initially maintained that use of VTC should be limited to pretrial procedural hearings but that, over time, VTC has been used in all hearings, including individual hearings).

13 Chicago Appleseed: *Videoconferencing, supra* note 1, at 17-19.

14 *See* App. F, Sample Motion for In-Person Hearing.

15 Chicago Appleseed: *Videoconferencing, supra* note 1, at 37-38.

16 *Id*. at 27.

17 *See* Rapheal v. Mukasey, 533 F.3d 521, 531-32 (7th Cir. 2008) (rejecting argument that VTC use violated respondent's statutory right to legal representation because attorney was in courtroom and not physically next to client, noting that there was "nothing in the record [...] to indicate that the video conferencing interfered with [respondent's] attorney's representation," and neither the respondent nor her attorney "at any time during the hearing requested to talk in private").

18 Chicago Appleseed: *Videoconferencing, supra* note 1, at 44-46.

19 *Id*. at 44-46.

20 8 U.S.C. § 1229a(b)(4)(B) (2006) (The alien 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 . . . .") (emphasis added).

21 *See* John Stanton, *The Technology the Government Uses for Immigration Hearings Doesn't Work Right*, BUZZFEED (Aug. 11, 2014), http://www.buzzfeed.com/johnstanton/the-technology-the-government-uses-for- immigration-hearings#4e2rpei ("A young El Salvadoran woman sat in a room at the detention facility, her small son fidgeting in her lap, alternately sucking from a bottle and playing with a box of tissues on the table. Her attorney's legal assistant was heard talking to a guard in the room, worrying that the television picture would not be sharp enough for the judge to see the woman's broken nose—a key part of a bond request she presented. 'I don't know if they can see it or not,' she said.").

22 *See Rusu v. U.S. I.N.S.*, 296 F.3d 316, 322-23 (4th Cir. 2002) (discussing various problems with VTC in merits hearings and observing that "video conferencing may render it difficult for a fact-finder in adjudicative proceeding to make credibility determinations and to gauge demeanor" and acknowledging that "an immigration judge's ability to judge a petitioner's credibility and demeanor plays a pivotal role in an asylum determination"). But *see* Remote Adjudication, *supra* note 6, at 973-74 (concluding that VTC's effect on credibility may not play a significant role in the outcome of a case given newly standardized procedures governing immigration judges, including an immigration court practice manual, immigration judge benchbook, and training for judges emphasizing "aspects of credibility beyond demeanor, such as factual inconsistencies in the applicant's testimony").

23 *See Stanton, supra* note 21.

24 *See id*.

25 *See also supra* Ch. 4, §4.3.

26 *See also supra* Ch. 1, §1.1.

SECTION VI. REPORTING IMMIGRATION JUDGE AND DHS ATTORNEY MISCONDUCT

Appleseed has documented significant problems with the culture of immigration courts. *Assembly Line Injustice* described a system in which some judges were quick to temper, and preexisting relationships between the judge and DHS attorneys gave the appearance of bias.[1] Furthermore, Appleseed identified a "deport-in-all cases culture" propagated by DHS attorneys[2] and noted DHS attorneys' failure to cooperate or even communicate with immigrant counsel prior to trial.[3]

Appleseed proposed action items to counter the cultural problems among DHS attorneys:

(1) the immigration judge should remind DHS attorneys to enforce immigration law as it is written rather than deporting every immigrant;

(2) the immigration judge or counsel should encourage DHS attorneys to use prosecutorial discretion;

(3) DHS should assign a trial attorney to cases from beginning to end; and

(4) immigration judges should require a pre-hearing conference if either party requests one.

While DHS attorney misconduct has not been as publicly scrutinized as the misconduct of immigration judges, it still is important to know how to report any problematic behavior or misconduct exhibited by government lawyers in immigration proceedings. Interviewees indicated that DHS attorneys "typically do not return phone calls, refuse to negotiate to resolve issues or settle cases and fail to drop weak cases when prosecutorial discretion would warrant."[4] In fact, Appleseed reported no change in this troubling DHS attorney culture between its 2009 report and its report in 2012.[5] Despite authorization to do so by Congress, no regulation has been adopted to allow immigration judges to discipline DHS counsel;[6] the impetus is therefore on the practitioner to report DHS attorney misconduct.

Likewise, Appleseed proposed three recommendations to counter the cultural problem among some immigration judges: (1) implement a code of conduct for judges; (2) create appropriate mechanisms to address judge misconduct; and (3) increase training for judges.[7]

Since 2009, EOIR has adopted a judicial code of conduct, improved the disciplinary process and its enforcement, and enhanced training for new and sitting immigration judges. One of the most significant strides is EOIR's efforts to increase transparency by publicizing the complaints against judges.[8] EOIR currently publishes "statistics on the number of complaints received, the general basis of the complaint (e.g., court conduct, bias), the number of judges implicated, and generally how the complaints were resolved (e.g., dismissed and on what basis, disciplinary action, informal action)."[9] EOIR maintains a compilation of immigration judge complaint statistics on its website.[10]

Furthermore, Appleseed urges immigration judges to adhere to more stringent ethical standards. EOIR has improved its training programs and developed new training initiatives.[11] For instance, new immigration judges now receive a six-week training period, a mentor is assigned to them, they must pass an immigration law exam, and they are subject to a formal review process.[12] Some of these new trainings address conscious and unconscious bias,[13] a major complaint against immigration judges in the past.[14] Judges who fail to meet these ethical standards are retrained or urged to resign or retire.[15] Through these efforts, EOIR hopes to create a culture of professionalism in the immigration courts. Despite these strides, the perception of unethical immigration judges persists.[16] Indeed, there have been a number of cases relating to such misconduct, including instances of immigration judges posing questions that belittle the respondent, being insensitive to difficult matters faced by the respondent, "cherry picking" facts or testimony provided by respondent, and coming to a conclusion not supported by the record as a whole.[17]

It therefore is important to be aware of the mechanisms available for reporting the misconduct of government lawyers and immigration judges during asylum proceedings. The procedures for submitting a complaint against government lawyers and immigration judges are straightforward and support anonymity. But the burden remains with the immigration court practitioner to report misconduct in a timely and persuasive manner.

6.1 How to Report Misconduct of Immigration Judges

There are two ways to file a complaint about the conduct of an immigration judge: (a) by email or (b) by regular post. For online complaints, email EOIR.IJConduct@usdoj.gov.[18] The EOIR website provides directions for filing a complaint (along with an overview of the process, a link to the Ethics and Professionalism Guide for Immigration Judges,[19] and statistics on dispositions). For complaints by regular post, send the complaint to the Assistant Chief Immigration Judge ("ACIJ") for Conduct and Professionalism or the appropriate supervisory ACIJ. ACIJ assignments and contact information are available on the EOIR website.[20]

- ***Practice Tip:*** **File your complaint via email.** Email provides many benefits for filing a complaint. It makes it easy to track the progress of an individual complaint, as well as to build a case for later complaints. Additionally, email makes it easy to forward the complaint to a number of people so the chances are increased that someone will listen and respond.

The complaint should include the name of the immigration judge about whose conduct you wish to complain; a statement of what occurred; the time and place of the occurrence(s); any other information that may be helpful in investigating the complaint;

and your name, address, telephone number, and any other contact information you wish to provide. In 2012, Assembly Line advocated for a complaint process that protects and ensures anonymity.[21] Today, despite the instruction to include name and address, a complaint against an immigration judge may be submitted anonymously, and may be submitted by individuals or groups.[22]

- ***Practice Tip:*** **Utilize nationwide pro bono advocates as needed.** Pro bono lawyers or national immigration organizations that do not practice in the court of issue may be good candidates to file complaints about systematically bad behavior. For instance, in one Texas court, a pro bono volunteer based in Washington, D.C. filed a complaint that led to the reassignment of an immigration judge from a particular docket.

6.2 How Complaints against Immigration Judges are Processed

Once a complaint is submitted, the ACIJ conducts an investigation of the complaint, which includes a review of the hearing record and possible contact with the complainant, the immigration judge and witnesses. The ACIJ then determines a course of action, which can include: (a) dismissal of the complaint; (b) conclusion of the complaint; (c) corrective action; or (d) disciplinary action.[23]

According to EOIR, a complaint will be dismissed for any of the following reasons: frivolity; disproven allegations; allegations cannot be substantiated; or failure to state a claim. Conclusion of a complaint might be appropriate where corrective action already has been taken or where intervening events make action unnecessary. Corrective action might include counseling, training, or performance-based action. Disciplinary action might include reprimand, suspension, or removal from federal service. A flowchart of the complaint process is reproduced at Appendix G.[24]

- ***Practice Tip:*** **Create a record of court actions.** Court transcripts capture the words of the judge, witnesses and attorneys, but these transcripts often fail to reflect the physical actions and emotions associated with the words. Think about how the dialogue in the courtroom will read months later on a piece of paper. If you think that an important point may be missed with the words alone, help the court by narrating some of the nonverbal actions. For example, if the judge becomes upset and starts yelling, consider stating the following: "Your honor, I object, there is no reason to raise your voice." When providing context like the statement above, counsel should stick to concise and direct statements to keep the record as clear as possible in case of an appeal or recusal of the judge on remand.

6.3 How to Report Misconduct of DHS Attorneys

Immigration court practitioners might face a situation where it becomes necessary to report the misconduct of the DHS trial attorneys who handle the deportation and removal proceedings on behalf of DHS. ICE, the principal investigative arm of DHS, has not provided any clear instruction on the appropriate avenue for reporting DHS trial attorney misconduct. Nonetheless, Appleseed has identified two methods to file a complaint against a DHS Attorney; Appendix H contains a flowchart of the complaint process.[25]

- ***Practice Tip:*** **Keep a record of attorney interactions.** Keep a record of efforts to communicate with DHS attorneys. If the DHS attorney assigned to your case remains uncooperative, your record provides an argument to the judge that you took substantive steps to resolve an issue, and your record may convince the judge to rule in your client's favor.

(a) Method #1: The "Misconduct Allegation Submission Form" to the OIG

The "Contact Us" page of the Office of Inspector General ("OIG") of DHS's website provides a method for reporting corruption, waste, fraud, abuse, mismanagement, and misconduct to DHS.[26] This involves filling out the "Misconduct Allegation Submission Form" available through the OIG's website.[27]

The form may be submitted (a) anonymously; (b) on a confidential basis; or (c) with the complainant's full identity and contact information disclosed. Anonymous and confidential submissions do come with a caveat: The OIG may reveal a confidential complainant's identity to investigate the alleged matter or if required by law. Anonymous or confidential complaints may hinder the OIG's ability to thoroughly pursue the complaint, likely because the OIG cannot follow up with anonymous or confidential complainants. Additionally, complainants wishing to receive electronic confirmation of their Complaint Number must provide a valid email address. Desire for an electronic confirmation is incompatible with filing an anonymous complaint.

The complaint form consists of several fields of required information, including: description of the individuals involved, i.e., identity and contact information; identity and contact information of the "alleged offender;" date the incident occurred; location of the incident; DHS agency involved and the type of allegations involved; and a summary of the allegations.

The form may be submitted online, by telephone (1-800-323 8603 and TTY 1-844-889-4357), fax (202-254-4297), or by mail (DHS Office of Inspector General/MAIL STOP 0305, Attn: Office of Integrity & Quality Oversight - Hotline, 245 Murray Lane SW, Washington, DC 20528-0305).

(b) Method #2: Office of the Principal Legal Advisor (OPLA)

OPLA is the legal arm of ICE.[28] It provides "legal advice, training and services in cases related to the ICE mission" and serves as the "exclusive legal representative for the U.S. government in exclusion, deportation and removal proceedings."[29] There are no instructions on the OPLA website on how to file a complaint against a DHS trial attorney. We recommend, however, using a format similar to the EOIR system for filing a complaint against an immigration judge.

Submit the complaint by either email or postal mail to the DHS Office of Chief Counsel where the relevant immigration court is located.[30] As with a complaint filed against an immigration judge, the complaint should include: (1) the name of the DHS Trial Attorney about whose conduct you wish to complain; (2) a statement of what occurred; (3) the time and place of the occurrence(s); (4) your name, address, telephone number, and any other contact information you wish to provide unless submitting the complaint anonymously; and (5) any additional information that may be helpful in investigating the complaint.

(c) Method #3: The DHS Office of Civil Rights and Civil Liberties (CRCL)

If the problem cannot be resolved through the above methods, some types of misconduct may be addressed to the DHS Office of Civil Rights and Civil Liberties ("CRCL"). The CRCL reviews and assesses civil rights and civil liberties complaints, such as abuse of authority, discrimination, and due process violations.[31] While CRCL does not specifically investigate DHS attorneys, nothing in the CRCL procedures excludes attorneys from complaint proceedings.

CRCL complaints may be submitted anonymously or on a confidential basis. Like the OIG, the CRCL anonymity comes with a caveat: anonymous complaints may hinder the CRCL's ability to thoroughly pursue the complaint. CRCL complaints may be submitted confidentially by checking the appropriate box on the first page of the complaint form.[32]

Also similar to the OIG, the CRCL provides a complaint form to aid the reporting process.[33] The complaint form requires certain information, including: (1) information about the person who experienced the civil rights/civil liberties violation; (2) whether the complaint is being filed on behalf of another individual; (3) a description of what happened; (4) a list of any witnesses; and (5) whether you have contacted another DHS component about the complaint.

Alternatively, individuals may choose not to use the form and, instead, provide a detailed written description of the event. This description must include: (1) contact information, including full name, date of birth, alien registration number (if applicable), phone number, mailing address, and email address; (2) a written description of the specific circumstances, including date, time, and location, name(s) and contact information of any witness(es), and name(s), job title, and agency of the individual alleged to have committed the violation; (3) a summary of other steps taken, if any, to resolve the complaint; and (4) if the complaint has been filed on behalf of a third party, express written consent from that individual for CRCL to share information about the complaint along with name and contact information of the individual fielding the complaint on behalf of the third party.[34]

CRCL complaints may be submitted by email to CRCLCompliance@hq.dhs.gov, fax (202-4014708), or mail (Department of Homeland Security, Office for Civil Rights and Civil Liberties Compliance Branch, 245 Murray Lane, SW, Building 410, Mail Stop #0190, Washington, DC 20528).[35] CRCL indicates that submitting the form via email is the fastest way to reach them.[36]

SECTION VI: Expert Practitioner Stories

HARASSMENT AT THE HANDS OF A JUDGE

Two years ago, a judge made inappropriate advances toward me, which I had rejected. After I made it clear that I did not want to pursue a relationship with that judge, he began to take it out on me in the courtroom. He was cold and disrespectful during trials, and he frequently made negative comments about me in front of my clients.

Finally, I took action. I emailed the Assistant Chief Immigration Judge ("ACIJ"). There was no formal decision from the ACIJ. It was all handled administratively, and the judge received no more than a slap on the wrist. However, the complaint process opened up the lines of communication so that the judge had to listen to my concerns and take them seriously.

I'm glad I spoke up and filed a complaint. I still interact with this judge, but his treatment of me has changed dramatically. We now have a cordial relationship, and that would not have happened if I had tried to ignore his conduct.

THREATS FROM THE BENCH

Not all complaints against judges end well. Last year, I took a legal position with which the judge disagreed. Rather than setting aside his emotions and just applying the law to the situation, he focused that emotion toward me. He turned off the recorder, stood up out of his chair, leaned across the desk, pointed his finger toward me and yelled "Don't you ever do that in my courtroom again!"

I told him, "I have the right to state my legal position and to advocate for my client, and you have the duty to make a decision based on my arguments. Just because you put on a robe doesn't mean you get to threaten me for how I perform my job." The judge called for security to come in and escort me out of the courtroom.

The next day I set up a meeting with the judge to discuss what had happened in the courtroom. When I walked into his office, he was sitting at his desk. He didn't stand. He didn't even acknowledge me. I reached out my hand, and said "Good morning, judge." Rather than shaking my hand, he finally looked up and asked, "Why are you here?"

"Well, I'd like to discuss yesterday's incident in court."

"Incident? What incident?"

"I felt the atmosphere yesterday was threatening."

"Threatening? I didn't threaten anybody!" By now he was yelling. He continued, "Did you come here to threaten me?" He wouldn't have anything at all to do with me and began yelling for security.

I wrote a letter to the ACIJ about my experiences with this judge, but I never got a response, not even an acknowledgment that I had felt threatened by him in a court of law. I continue to interact with this judge on a regular basis, and I continue to face this type of disrespectful conduct.

DHS ATTORNEY SECRETLY CONTACTS CLIENT'S DOCTOR

One case my client had a U.S. citizen son who had medical problems with his eyes, and we had submitted a letter from the doctor of my client's son. Before the hearing, the DHS attorney called the doctor and said "I'm an attorney for the Department of Homeland Security, and I need to talk to you about this letter that you've submitted." The way that she said it—the doctor didn't realize that my client did not authorize the doctor to speak to the DHS attorney. The doctor had no idea that the DHS attorney was acting inappropriately or that the DHS attorney was the opposing counsel in her patient's case, so the doctor spoke freely. The doctor said, "Well, I don't know. They haven't shown up for the last two appointments, so I don't really know."

In her closing argument, the DHS attorney brought up the doctor's statement: "Well, I've spoken to the treating physician of the child and *his father isn't even taking him to appointments!*" Not only had the DHS attorney spoken to my client's physician without permission, she had misrepresented the statements made by that physician, and added new testimony into the closing argument.

I immediately objected.

The judge told me that she'd take my objection into consideration, but it wasn't stricken from the record, and the DHS attorney was not admonished for her conduct. I ended up winning the case, so I didn't pursue the issue any further, but maybe I should have.

DHS ATTORNEY ATTACKS THE CHARACTER OF CLIENT'S WIFE

My client was applying for cancellation of removal, which is a rare form of relief for nonpermanent residents who have been in the U.S. for many years and have developed strong ties to the United States. The requirements are very strict. You have to be physically present in the United States without leaving for 10 years, and you have to have immediate family members, U.S. citizens or permanent residents, who will encounter extremely unusual and extraordinary hardship if you're deported from the United States. The hardship to the respondent doesn't count. It's only the hardship to the immediate family members.

My client, who was from Guatemala, married a U.S. citizen. His wife already had three children from a prior relationship, and together they had a fourth child. His wife had been sexually abused as a child by her U.S. citizen parents, and she grew up in a house that was full of drugs and abuse.

She and the client fell in love and got married. He was the bread winner for his wife and four kids, and she stayed home and took care of their children

Instead of cross-examining the respondent on the issues he testified to, the DHS attorney started attacking his wife's past and her character, her mental health issues resulting from sexual abuse, and suggesting openly that he may be better off going back to Guatemala, rather than staying with his damaged wife.

It was so offensive and so appalling that even the judge stopped her on cross. I objected, of course, several times, but she continued with this line of questioning. The wife was in the courtroom. She heard every attack on her character and by the end of the cross examination was sobbing uncontrollably behind me.

Endnotes

1 Appleseed, *Assembly Line Injustice, Blueprint to Reform America's Immigration Courts*, Appleseed, 12 (2009) http://appleseednetwork.org/wp-content/uploads/2012/05/Assemblv-Line-Iniustice-Blueprint-to-Reform-Americas-Immigration-Courts1.pdf. [hereinafter *Assembly Line Injustice*]

2 *Id.* at 16.

3 Appleseed, *Reimagining the Immigration Court Assembly Line: Transformative Change for the Immigration Justice System*, Appleseed, 47 (2012) http://www.appleseednetwork.org/wp-content/uploads/2012/03/Reimagining-the-Immigration-Court-Assembly-Line.pdf [hereinafter *Reimagining the Immigration Court Assembly Line*]

4 *Assembly Line Injustice, supra* note 1, at 16.

5 *Reimagining the Immigration Court Assembly Line, supra* note 3, at 41.

6 *Id.* at 30.

7 *Assembly Line Injustice, supra* note 1, at 12, 14.

8 *Reimagining the Immigration Court Assembly Line, supra* note 3, at 35.

9 *Id.*

10 *See Immigration Judge Conduct and Professionalism*, EOIR (May 2015) https://www.justice.gov/eoir/immigration-judge-conduct-and-professionalism.

11 *Reimagining the Immigration Court Assembly Line, supra* note 3, at 36.

12 *Id.*

13 *Id.*

14 *Assembly Line Injustice, supra* note 1, at 12.

15 *Reimagining the Immigration Court Assembly Line, supra* note 3, at 35.

16 *Id.* at 33.

17 *See, e.g., Matter of Y-S-L-C-*, Respondent, 26 I&N Dec. 688, 691 (BIA 2015); *see also* Ilunga v. Holder, 777 F.3d 199, 207 (4th Cir. 2015) (citing Ai Jun Zhi v. Holder, 751 F.3d 1088, 1091 (9th Cir. 2014) ("The IJ cannot 'cherry pick solely facts favoring an adverse credibility determination while ignoring facts that undermine that result[.]'") (quoting *Shrestha v. Holder*, 590 F.3d 1034, 1040 (9th Cir. 2010)).

18 *Reimagining the Immigration Court Assembly Line, supra* note 3, at 35.

19 *See Immigration Judge Conduct and Professionalism*, EOIR (May 13, 2015) http://www.justice.gov/eoir/sibpages/IJConduct/IJConduct.htm.

20 *See* Office of the Chief Immigration Judge, EOIR (April 4, 2016) https://www.justice.gov/eoir/office-of-the-chief-immigration-judge-bios; *see also* ACIJ Assignments—March 2016 (April 28, 2016) https://www.justice.gov/eoir/acij-assignments.

21 *Reimagining the Immigration Court Assembly Line, supra* note 3, at 35.

22 *Id.* at 36.

23 *See* App. G, OCIJ Procedure for Handling Complaints Against Immigration Judges.

24 *Id.*

25 *See* App. H, DHS Attorney Complaint Flowchart.

26 *See Contact Us*, Dep't of Homeland Security, http://www.oig.dhs.gov/index.php?option=com content&view=article&id=91 &Itemid=62.

27 *Report Corruption, Waste, Fraud, Abuse, Mismanagement and Misconduct to the Department of Homeland Security, Office of Inspector General*, Dep't of Homeland Security, http://www.oig.dhs.gov/hotline/hotline.php.

28 *Office of the Principal Legal Advisor (OPLA): Overview*, U.S. Immigr. & Customs Enforcement, https://www.ice.gov/opla.

29 *Id.*

30 *Principal Legal Advisor Offices*, U.S. Immigr. & Customs Enforcement, https://www.ice.gov/contact/legal (providing a list of addresses for immigration courts).

31 *CRCL Compliance Branch*, Dep't of Homeland Security (Nov. 13, 2015) http://www.dhs.gov/complaints.

32 *Civil Rights Complaint*, Dep't of Homeland Security (March 15, 2015) http://www.dhs.gov/sites/default/files/publications/crcl-complaint-submission-form-english.pdf.

33 *File a Civil Rights Complaint*, Dep't of Homeland Security (Aug. 11, 2015) https://www.dhs.gov/publication/file-civil-rights-complaint.

34 *Id.*

35 *How to File a Complaint with the Department of Homeland Security*, Dep't of Homeland Security (April 2015) https://www.dhs.gov/sites/default/files/publications/dhs-complaint-avenues-guidance-april-2015_0.pdf.

36 *File a Civil Rights Complaint, supra* note 32.

APPENDIX A

Proposal for Simplified Document Disclosure Procedures for Individuals in Removal Proceedings

PROPOSAL FOR SIMPLIFIED DOCUMENT DISCLOSURE PROCEDURES FOR INDIVIDUALS IN REMOVAL PROCEEDINGS

Appleseed Memo of May 2014

On behalf of Appleseed, a network of 17 public policy law centers in the United States and Mexico, we respectfully propose to the Department of Homeland Security ("DHS" or the "Department") new document disclosure procedures for removal proceedings, consistent with the Immigration & Nationality Act, the 9th Circuit Dent v. Holder decision, and common sense changes proposed in the U.S. Senate's Border Security, Economic Opportunity, and Immigration Modernization Act (S.744).[1] These new disclosure procedures should ensure that individuals in removal proceedings get immediate access to relevant non-privileged documents, including their A-Files. Immediate disclosure will make immigration court proceedings more equitable and efficient, as proven by at least two current situations in which Offices of Chief Counsel are already disclosing documents without resorting to FOIA.

As practice has amply demonstrated, the Department's current reliance of Freedom of Information Act ("FOIA") requests for document production in these cases is inefficient and burdensome. Requiring individuals in removal proceedings – many of whom are unrepresented and have limited English proficiency – to file FOIA requests unnecessarily burdens both the respondent and the government, delays the disposition of immigration court matters, and in some cases denies due process. DHS has the authority and should take independent and immediate action to eliminate the FOIA requirement. A simple document disclosure procedure in immigration court more similar to civil litigation discovery will lead to a more efficient and fair immigration court system, while still providing the agency the ability to withhold or redact documents that are classified, privileged, or fall within another recognized exception to disclosure.

In sum, we respectfully propose that the DHS adopt policies to require that Offices of Chief Counsel implement the following five reforms:

1. Automatically produce the respondent's A-file at the beginning of the proceedings or at a reasonable time thereafter;

2. Disclose the known location and type of any other documents relating to the respondent's immigration status in the possession of DHS;

1 *Dent v. Holder,* 627 F.3d 365 (9th Cir. 2010).

3. Produce any other documents relating to the respondent's immigration status in the possession of DHS in a timely manner, upon written request from the individual or individual's counsel;

4. Make reasonable decisions to redact or withhold documents on the basis of attorney-client or work product privilege, classified status, or any other applicable exception; and

5. Promptly produce any previously redacted or withheld documents that the immigration judge determines are not subject to any privilege or exception, upon challenge by the individual.

INTRODUCTION

In 2009 and 2012, Appleseed issued reports on the efficacy of the immigration court system that included recommendations for simplified document disclosure procedures in immigration court proceedings. See *Assembly Line Injustice* (2009) [2] and Reimagining the Immigration Court Assembly Line (2012).[3] Appleseed proposes that DHS follow the example of other agencies by adopting mandatory document disclosure requirements similar to those used in civil proceedings under Rule 26 of the Federal Rules of Civil Procedure ("FRCP") to eliminate the burdensome and time-consuming FOIA process currently used in individual removal proceedings. DHS should also establish a mechanism to monitor compliance with the new procedures.

Appleseed's recommendation for mandatory disclosure of pertinent documents acknowledges that some records may not be immediately available or may be eligible to be withheld or redacted by DHS. Accordingly, Appleseed proposes that DHS and the Department of Justice agree that immigration judges, upon objection by a respondent, have the authority to review any asserted grounds for the withholding or redaction of documents by DHS, and order further disclosure to the respondent if warranted.[4]

Individuals facing removal have a particular need for quick access to A-File documents and any documents relevant to their citizenship claim, immigration status, grounds for removal, or claim(s) for relief. Timely access to A-File documents is critical to ensure that these individuals can properly defend themselves and obtain any relief to which they are entitled.

As Appleseed has reported, the FOIA requirement – which is based not on a statutory mandate but only on agency practice – delays immigration court proceedings and prevents individuals from obtaining documents essential to their cases. There are serious liberty and property deprivations at stake in removal proceedings, as individuals must defend against the possibility of permanent separation from family members, loss of their home, and persecution in their country of origin. With such weighty concerns in the balance, it is imperative that individuals have timely access to documents essential to their cases.

2 Appleseed, *Assembly Line Injustice: Blueprint to Reform America's Immigration Courts* (2009), available at http://bit.ly/ALI2009.

3 Betsy Cavendish & Steven Schulman, *Reimagining the Immigration Court Assembly Line: Transformative Change for the Immigration Justice System* (2012), available at http://bit.ly/AppRICAL.

4 See 8 C.F.R. § 1003.10(b) (2014), providing immigration judges with the ability to "take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases." Such authority includes "receiv[ing] evidence" and "issu[ing] administrative subpoenas," and therefore can also include ordering disclosure.

SUMMARY OF PROPOSALS

Appleseed proposes that DHS adopt new mandatory document disclosure procedures that will provide individuals more immediate and thorough access to relevant documents in connection with removal proceedings. Accordingly, DHS should eliminate the FOIA requirement, which can deny a respondent's right "to a full and fair hearing in a deportation proceeding."[5] Specifically, Appleseed recommends the following:

1. *For individuals in removal proceedings, the Office of Chief Counsel should require that the DHS trial attorney prosecuting the removal must: (a) produce, at the beginning of the proceedings or at a reasonable time thereafter, the respondent's A-File and any other relevant documents in possession of the Office of Chief Counsel or the Immigration Court where the matter pending relates to the respondent's immigration status; and (b) disclose the known location and type of any other documents relating to the respondent's immigration status in the possession of DHS.*

2. *Upon written request from the respondent or respondent's counsel, DHS must produce in a timely manner any other documents relating to the respondent's immigration status in the possession of DHS.*

3. *DHS may redact or withhold any documents or information falling within the disclosure requirements outlined in recommendations #1 and #2 on the basis of attorney-client privilege, work product privilege, classified information, or other applicable exceptions.*

4. *A respondent may object if DHS withholds or redacts documents or information subject to disclosure, and upon such objection, the immigration judge presiding over the removal proceedings may review the bases for withholding or redacting those documents or information, and order further disclosure to the individual if warranted.*

DHS has the authority to implement the first three recommendations through administrative action, without rulemaking. The fourth recommendation would require coordination with the Executive Office of Immigration Review (EOIR).

ANALYSIS

Currently, DHS does not automatically provide an individual in removal proceedings with documents relating to his immigration status, in stark contrast to discovery procedures in other civil matters. Rather, current DHS policy requires an individual in immigration court proceedings to submit a FOIA request, a process never designed for the production of documents in litigation proceedings, such as those in immigration court. In addition to burdensome logistical hurdles, FOIA includes nine different categories of exemptions that DHS may use to withhold or redact documents.[6]

A policy requiring DHS to produce documents without request would be more consistent with the INA, which requires the government to turn over visa, entry documents, and other records or documents "pertaining to the alien's admission or presence in the United

5 *Dent v. Holder*, 627 F.3d 365, 373 (9th Cir. 2010).
6 *See* 5 U.S.C. § 552(b)(1)-(9).

States." INA § 240(b)(4)(B).[7] This provision by its terms applies only to individuals who have been admitted to the United States and are contesting removal, but access to such documents is equally vital to all respondents in removal proceedings.

In at least two circumstances with which we are familiar, DHS Offices of Chief Counsel have agreed to provide documents without requiring the filing for a FOIA request. One example is the New York Immigrant Family Unity Project,[8] which provides public defender services at the Varick Street Immigration Court. As part of this pilot project, DHS is providing respondents' NTAs, rap sheets, and records of custody determination to the lawyers from Bronx Defenders and Brooklyn Defender Service the morning of the respondents' first master calendar, immediately after respondents have agreed to be represented. This allows counsel to advise clients on pleading so that the master calendar hearing does not need to be rescheduled.

DHS is also disclosing documents without requiring FOIA filings in connection with EOIR's efforts to provide competency evaluations.[9] According to EOIR, DHS is providing mental health records for detainees to allow EOIR-appointed mental health evaluators to make competency determinations for respondents who have exhibited some inability to participate meaningfully in their removal proceedings. While this process is apparently not without some procedural difficulties – according to EOIR, DHS still needs to clarify its own disclosure rules to that the documents can be disclosed directly to the evaluators rather than via EOIR – this process again proves that FOIA is not a necessary or useful hurdle.

Current DHS disclosure practices are not only cumbersome, but present due process problems that have lead federal courts to become increasingly critical of the Department. In Dent v. Holder, the Ninth Circuit relied on INA § 240(b)(4)(B), as well as the right to due process, to find that DHS had an obligation to disclose documents relating to immigration status to an individual in removal proceedings. 627 F.3d 365 (9th Cir. 2010). The Dent court further indicated that § 240(b)(4)(B) requires the government to produce the entire A-file in removal proceedings. In the Ninth Circuit's view, requiring a formal FOIA request to obtain A-files may raise "a serious due process problem." Id. at 373. The Dent holding is consistent with the views of other courts that hold "due process standards of fundamental fairness extend to the conduct of deportation proceedings," despite the fact that the rules of evidence applicable in court proceedings are not applicable to removal proceedings. Bustos-Torres v. INS, 898 F.3d 1053, 1055 (5th Cir. 1990).[10] Likewise, the Supreme Court has noted that "[t]hough deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty - at times a most serious one - cannot be doubted. Meticulous care must be exercised lest the procedures by which he is deprived of that liberty not meet the essential standards of fairness."[11]

7 See Am. Immigration Council, Practice Advisory: Dent v. Holder and Strategies for Obtaining Documents from the Government during Removal Proceedings 8-9 (June 12, 2012), available at http://www.legalactioncenter.org/sites/default/files/dent_practice_advisory_6-8-12.pdf.

8 *See* http://www.vera.org/project/new-york-immigrant-family-unity-project.

9 *See* http://immigrationreports.files.wordpress.com/2014/01/eoir-phase-i-guidance.pdf.

10 *See also Sulo v. Ashcroft*, 114 Fed.Appx. 253, 256 (7th Cir. 2004) ("[a]dministrative agencies are not bound by the Federal Rules of Evidence, but the IJ's…still must comply with the standard of due process."); Bauge v. I.N.S., 7 F.3d 1540, 1543 (10th Cir. 1993) (non-citizen "has a right to a full and fair deportation heating that comports with due process").

11 *Bridges v. Wixon*, 326 U.S. 135, 154 (1945).

In a recent Third Circuit decision echoing the concerns raised by the Ninth Circuit in Dent, the non-citizen filed a motion with the BIA to reopen his case in order to obtain additional evidence through a FOIA request. Totimeh v. Holder, 666 F.3d 109, 112-13 (3rd Cir. 2012). The government's FOIA response revealed that the government had information that the non-citizen had been admitted to the U.S. three years before the time initially alleged by the government. Id. The court found that this evidence "was controlled by the Government" and thus that it was "strange that the Government did not provide this information to [the non-citizen] or the Immigration Judge at the time the former asserted his correct admission date, and instead forced him to seek out documents through a FOIA request," which "resulted in unnecessary delay." Id. The court stated its expectation that "the Government will respond (and quickly) in the future with such information in similar circumstances." Id.

The power to comply with the dictates of these opinions is entirely within the power of DHS. Nonetheless, even within the Ninth Circuit, it is unclear the extent to which DHS is abiding by Dent; advocates report that some DHS attorneys are still demanding that respondents file FOIA requests to obtain documents. Outside the Ninth Circuit, ICE representatives have stated only that "[e]veryone is very cognizant of the Dent case and... we are asking everyone around the country to utilize the 'rule of reason.'"[12]

In other types of civil litigation, it is acknowledged that certain materials should be disclosed to adversaries immediately, in the name of fairness and efficiency. The same principles should apply in removal proceedings. A "major purpose" of disclosure requirements in federal court civil proceedings is "to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information," resulting in "savings in time and expense."[13] For example, FRCP Rule 26 requires parties to make certain mandatory disclosures absent any formal request. Rule 26(a)(1) governs initial disclosures and provides, in part:

> [A] party must, without awaiting a discovery request, provide to the other parties...a copy – or a description by category and location - of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment.[14]

Rule 26(a)(3) governs pretrial disclosures and provides, in part:

> [A] party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment...an identification of each document or other exhibit, including summaries of other evidence – separately identifying those items the party expects to offer and those it may offer if the need arises.[15]

12 *See* American Immigration Council, Practice Advisory: *Dent v. Holder* and Strategies for Obtaining Documents from the Government During Removal Proceedings 4 (2012) ("[T]he government's approach to responding to Dent requests is to tell attorneys outside of the Ninth Circuit to 'use FOIA, use PD [prosecutorial discretion], we don't give up everything in the A file, i.e., confidential information or if the alien already admits or concedes removability.'"), available at http://www.legalactioncenter.org/sites/default/files/dent_practice_advisory_6-8-12.pdf (last visited Jan. 31, 2014).

13 Fed. R. Civ. P. 26 Notes of Advisory Committee on Rules – 1993 Amendment.

14 Fed. R. Civ. P. 26 (a)(1)(A)(ii).

15 Id. § (a)(3)(A)(iii).

Incorporating these principles into the immigration court context is straightforward. Appleseed proposes a process similar the requirements passed by the Senate in 2013: that DHS provide A-Files and any documents relevant to the repondent's immigration status, grounds for removal, or claims for relief to individuals "at the beginning of the proceedings or at a reasonable time thereafter [...]"[16] Because DHS trial attorneys will already have these documents as part of an individual's case file, disclosure should not be unduly burdensome - particularly compared with the current inefficiency of the FOIA process. The proposed procedures would not require DHS to search for files not already located within the Office of Chief Counsel or the immigration court. We do, however, suggest that DHS be required to produce such documents if it receives a written request from the respondent or the respondent's counsel, as is customary in civil litigation in U.S. courts.

A-Files are particularly important, as they typically contain a variety of documents:

- Correspondence between U.S. Citizenship and Immigration Services (USCIS) and the individual;
- Forms completed by the individual such as Applications for Naturalization or Permanent Residence, Applications for Asylum, processing sheets, biographic information, and petitions for alien relatives;
- Birth and marriage certificates, passports, and green cards;
- Letters and affidavits such as from the individual's employers and former spouses;
- School records;
- Medical records;
- Criminal record documents, if any;
- Immigration Court records, including any Warrants for Arrest of Alien, Notice of Custody Determinations, or Records of Deportable/Inadmissible Alien;
- DHS Credible Fear documents including the Worksheet, Determination, and Interview Statement; and
- Photographs.

DHS should automatically provide each of the documents listed above to individuals in removal proceedings so that they can prepare a defense and so that the immigration court case can proceed without delay. This requirement would not obligate DHS to disclose privileged or internal deliberative documents.

The Use of FOIA for Immigration Court Document Production is Illogical and Inefficient

The current system of relying on FOIA for immigration court document production is too burdensome and inefficient for civil litigation, particularly in cases where the

16 *See* 113th Congress, Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, at Sec. 3502(b) (last passed Senate on June 27, 2013). Our proposal, based on language from the recent U.S. Senate immigration reform bill, is significantly more lenient than the disclosure schedule contained in the Federal Rules of Civil Procedure, which provide that pretrial disclosures must be made at least 30 days before trial. Fed. R. Civ. P. § 26(a)(3)(B).

respondent is unrepresented. Indeed, there is no indication that the statute was ever intended to be used for administrative litigation discovery. Rather, the resort to FOIA is entirely the doing of DHS, which has adopted policies and regulations to establish FOIA as the only process through which an individual may seek access to his government records, regardless of the reason or context in which disclosure is sought.[17]

Furthermore, the proposed new disclosure rule would be consistent with this Administration's FOIA policy. President Obama directed agencies to adopt an open-door policy of providing information, stating that "[t]he presumption of disclosure also means that agencies should take affirmative steps to make information public. They should not wait for specific requests from the public."[18] Document production standards like these we propose are consistent with this open-door policy.

The following explains in more detail several specific problems caused by requiring document requests via FOIA in immigration proceedings.

1. FOIA in this Context is an Unnecessary Burden on Government Resources.

Using FOIA as a litigation document request procedure results in undue delays and high costs without any countervailing benefit to the government. In 2012, DHS received 190,589 FOIA requests.[19] USCIS received the vast majority of those requests, a total of 117,787 FOIA requests,[20] an average rate of 600 requests per day.[21] Ninety-nine percent of the FOIA requests that go to USCIS are from individuals seeking their own records.[22]

Responding to these voluminous requests is time-consuming and expensive. In 2012, USCIS dedicated 210 full-time employees to responding to FOIA requests, at a cost of more than $16.3 million.[23] With all these human and financial resources, less than one percent of properly-submitted FOIA requests by individuals were denied.[24] This data indicates that the laborious formality of a FOIA request wastes valuable time and resources. Although the Offices of Chief Counsel would assume the burden of providing documents to the non-citizen, the DHS attorney typically has more access to a wider variety of the relevant documents due to his position on the case. In addition, when a respondent files a FOIA request, the DHS attorney must send the A-file to a centralized national office in order to allow for review, reproduction and processing. These extra steps require more time and effort, which is inefficient and costly.

17 Dep't of Homeland Security, Disclosure of Records and Information, 6 C.F.R. § 5.21 (2013). This provision governs requests for access to records under the Privacy Act of 1874, as amended, 5 U.S.C. § 552a. While individuals are not technically covered by the Privacy Act, it is the policy of DHS, and the Department of Justice's Executive Office of Immigration Review Records, to by and large apply the Privacy Act to individuals. See Dep't of Homeland Security, Privacy Policy Guidance Memorandum No. 2007-1 (2009) (as amended from Jan. 19, 2007), available at http://www.dhs.gov/xlibrary/assets/privacy/privacy_policyguide_2007-1.pdf.

18 Memorandum for the Heads of Executive Departments and Agencies (Jan. 21, 2009), available at http://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act.

19 Privacy Offices, Dep't of Homeland Security, 2012 Freedom of Information Act Report to the Attorney General of the United States 3 (2012), available at https://www.dhs.gov/sites/default/files/publications/foia/privacy-foia-annual-report-fy-2012-dhs.pdf [hereinafter 2012 DHS FOIA Report].

20 *Id.*

21 Mitchell, *supra* note 8.

22 *Id.*

23 2012 DHS FOIA Report, *supra* note 17, at 16. The reported exact figure was $16,361,631.26

24 Appleseed, *Assembly Line Injustice, supra* note 2, at 25.

2. FOIA Delays Disposition of Immigration Court Matters.

Even the implementation of a "fast track" three-track FOIA response system in 2007 has not made the system adequate for immigration court document production. Some USCIS responses to FOIA requests can still take months.[25] The process leaves far too many individuals unnecessarily waiting for access to records to which they have an undeniable right under the INA, and that are essential to their defense or claims in removal proceedings. This is particularly burdensome for the many respondents who have no legal counsel for their immigration court proceedings.

The multi-track FOIA response system was developed to expedite processing. Track One is reserved for "simple" requests, which are less complex cases requesting one or a few documents. The second track is for "complex" requests, which include requests for all or most of a file. The third track is an "accelerated" track for cases involving individuals scheduled for a hearing before an immigration judge, and involve the additional requirement that the individual submit specific documents related to the hearing as part of the FOIA request.[26] The vast majority of requests fall under Track Two or Track Three.

Unfortunately, it appears that the multi-track system has not eliminated needless delay. As of January 27, 2014, USCIS reported that the average FOIA request processing time was 31 business days for Track One requests, 37 business days for Track Two requests, and 23 business days for Track Three requests – delays of more than a month to almost two months.[27] In 2012, practitioners reported that they were experiencing delays of several months in waiting for responses to their FOIA requests.[28] Time is often of the essence for individuals facing potential removal, and the inability to obtain timely access to these critical records is an unfair hardship without justification. These timeframes often mean that many non-citizens will not receive their responses before their hearing. For example, EOIR has estimated that in 85% of non-citizen mandatory detention cases, the removal proceedings conclude in an average of 47 days; cases which involve appeal finish on average within four months.[29] Based on these turnaround times, non-citizens, in many instances, would miss the benefit of responses to FOIA requests. Alternatively, a detained respondent can wait for the FOIA response by asking for a continuance, thereby "choosing" to extend the stay in detention. This unfortunate calculus has reportedly dissuaded many non-citizens and practitioners from filing FOIA requests at all. A recent academic survey found that 57% of certain legal aid practitioners did not rely on FOIA in detained cases, in part, because of the length of the process.

3. The FOIA Request Process Presents Unnecessary Obstacles.

Finally, FOIA presents particular problems to the many unrepresented individuals in immigration court. FOIA requests must be made in accordance with a particular bureaucratic process that was neither designed for immigration court litigation nor for the typical respondent in immigration court. This process can be difficult for individuals to follow, especially individuals who are unrepresented or detained. All FOIA requests

25 *See* 2012 DHS FOIA Report, *supra* note 16, at 17. At the end of 2012, 10,727 USCIS FOIA requests remained backlogged as unprocessed.

26 U.S. Citizenship and Immigr. Servs., *USCIS FOIA Request Guide*, available at http://www.uscis.gov/sites/default/files/USCIS/About%20Us/FOIA/uscisfoiarequestguide(10).pdf [hereinafter *USCIS FOIA Request Guide*].

27 U.S. Citizenship and Immigr. Servs., Check Status of Request, http://www.uscis.gov/about-us/freedom-information-and-privacy-act-foia/foia-request-status-check-average-processing-times/check-status-request (last visited Jan. 31, 2014).

28 Cavendish & Schulman, *supra* note 3, at A-7.

29 *See Demore v. Kim*, 538 U.S. 510, 529 (2003).

must be submitted in writing to a specific address and include a notarized signature or signature made under penalty of perjury.[30] Individuals must also provide particular "verification of identity" information. If the requestor's identity information - i.e., name, place, date of birth - has multiple matches, it may be difficult or impossible for the USCIS to fulfill and provide the correct information on which the requestor needs to rely, without more specific information.[31] The request must also include a description of the records sought.[32] If Track Three processing is requested—for example, where an individual has an upcoming court date—the individual must understand enough about FOIA to request such processing and adequately describe a valid justification.[33]

Unfortunately, in 2012 thousands of requests were denied as "improper" based on issues with the form of submission rather than the individual's right to obtain the information.[34] Even when a request is properly made, the response itself may be incomplete. In some cases, information may be lost; in others, the information may be in the possession of a separate agency. An individual may not know that a file is incomplete, particularly if documents have been misplaced, or at the very least will have to submit another round of FOIA requests to the additional agencies. This complicated system unduly burdens individuals' access to critical files and hampers their ability to receive fair hearings.

Other unnecessary hurdles that hinder the ability of individuals to obtain documents necessary to defend themselves include the following:

- The judiciary has found that USCIS incorrectly redacted factual material in response to a non-citizen's FOIA request. Instead, the Court found that USCIS only should have removed its own analytical section from the documents.[35]
- If the USCIS incorrectly applies the FOIA exemptions and, accordingly, does not provide the non-citizen with the requested documents, the only relief is appealing to USCIS's administrative FOIA appeals office. On its face, this process is structurally unfair. Unlike in a court of law where a party can bring discovery disputes to a neutral third party (i.e., the judge), non-citizens must make their FOIA appeals to the same agency that originally denied the request. In general, appealing the denial is difficult because USCIS does not provide explanation for its denial in the first place.
- To obtain all of the relevant government files to a removal case (e.g., A-file, visa application records, EOIR court file), a non-citizen must make a request to three separate agencies. Plus, sub-agencies within DHS each hold relevant documents.

The result of all of these unnecessary roadblocks is an unfair system that can delay or deny justice.

30 USCIS FOIA Request Guide, *supra* note 24, at 7-8.
31 *Id.*
32 *Id.* at 8-9.
33 *Id.* at 5, 10.
34 2012 DHS FOIA Report, *supra* note 16, at 4 (reporting that 14,574 requests were specifically deemed "improper").
35 *Hajro v. U.S. Citizenship & Immigration Servs.*, 832 F. Supp. 2d 1095,1114 (N.D. Cal. 2011); *Martins v. U.S. Citizenship & Immigration Servs.*, 2013 WL 3361269, No. C 13-00591 LB, *15 (Order granting plaintiff's motion for a preliminary injunction) (N.D. Cal. July 3, 2013).

CONCLUSION

Applying simplified civil litigation document disclosure principles to removal proceedings is a common-sense solution to the problems caused by FOIA—a statute and process that were never intended for immigration court litigation. Appleseed urges DHS to take immediate administrative action to implement these in order to better ensure that removal proceedings are conducted fairly and efficiently.

We look forward to the opportunity to meet with you to discuss how DHS can contribute to a more equitable and efficient immigration court system.

Respectfully Submitted,

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APPENDIX B

Sample Letter to DHS Requesting Pre-Hearing Conference and Stipulations

Sample Letter to DHS Requesting
Pre-Hearing Conference and Stipulations

[DATE]

[NOTE: It is advisable to follow this letter by email, if available, or by phone within 48 hours of delivery to reiterate and discuss the requests.]

[Name of Immigration Court]
[DHS Office of the Chief Counsel]
[Address]

Re [Respondent's name and A-number]; [Hearing date]

Dear DHS Counsel:

I am serving as [*pro bono*] counsel for Respondent [*name*], A XXX XXX XXX. Enclosed is the Respondent's pre-hearing [*filing/brief*]. I would like to respectfully request an opportunity to discuss with you the merits of his/her claim for [*e.g., asylum*] and procedural matters prior to our hearing before Judge [*name*] on [*date*].

The purpose of this pre-hearing meeting is to allow the parties to narrow the issues to be litigated and streamline the presentation of evidence in advance of the hearing. Specifically, I ask that DHS consider stipulating to the following *[choose any which may apply, and explain briefly]*:

1. Country conditions [*e.g.*, that the Taliban is able to attack its opponents throughout Afghanistan];
2. Particular Social Group [*e.g.*, married women in Honduras who are unable to leave their relationship safely];
3. Identity of Respondent [*e.g.*, that Respondent is the person identified in the Notice to Appear, and is a national of Somalia];
4. Past persecution [*e.g.*, that Respondent's imprisonment and torture, as described in the enclosed declaration, constitutes past persecution by the Government of Ethiopia];
5. Resettlement in a third country [*e.g.*, that none of Respondent's travels since departing China constitute "firm resettlement"];
6. Expert witness reports / related evidence [*e.g.*, that Dr. Rawley Eastwick is an expert in the country conditions in Pakistan]; or
7. Admissibility of specific documents into evidence [*e.g.*, that Exhibits A-H are admissible into evidence].

Furthermore, as referenced in our witness list, please note that I am planning to provide the following witness testimony by declaration:

1. Name 1

2. Name 2

Because of cost constraints, we do not plan to bring Witnesses A and C to the Court. We can have them available telephonically if you would like to examine them, though they have declarations in the record. *If you would like these witnesses available, please advise me by [date], or otherwise we will assume that DHS has no objection to their testimony solely by declaration.*

Please let me know whether DHS has any objection to presenting these witnesses by declaration by [*date in advance of the hearing*] so that we can discuss what arrangements can be made.

Respectfully yours,

[Undersigned counsel]

APPENDIX C

Instruction Sheet for Making a Request
for Accelerated Resolution (SmART)

Instruction Sheet for Making a Request for Accelerated Resolution (SmART)

1. **All items on the cover sheet applicable to your client MUST be addressed.**
2. **Be sure to include your name as well as your client's name AND Alien number at the top of the cover sheet.**
3. **Type of hearing, dates, and names of Immigration Judges are provided in drop down menus. When your cursor is over the words "choose an item" or "date" and a grey shadow appears, you can click on it and an arrow will appear which will allow you to choose the type of hearing, IJ name, or date from a drop down or calendar menu.**
4. **Be sure to select the type of upcoming hearing (master or individual) for your client from the drop down option.**
5. **By clicking on the box in front of each listed requirement, the box will change to a check mark. Please note in Item 4 on the list, that you will check only the box or boxes applicable to your client.**
6. **Please limit your discussion of the particulars of your client's case to the outlined area at the bottom of the form. If you cannot fit this information in this box, you may supplement it, but you are encouraged to keep the information to less than one full page.**
7. **A SmART application for lasting relief cannot be considered without current fingerprints.**

APPENDIX
Exhibit C

REQUEST FOR AN ACCELERATED RESOLUTION OF AN INDIVIDUAL OR MASTER CALENDAR HEARING SCHEDULED WITHIN THREE MONTHS

Attorney's Name: _____.

Client's Name and Alien Number: _____.

Dear Chief Counsel [**Insert Name Here**]:

I am requesting that my client's case be resolved under SmART (Smart Accelerated Resolutions Team). I hereby confirm the following:

- ☐ My client has been fingerprinted within the past four weeks on Date.
- ☐ My client's case is low priority;
- ☐ My client's case is currently scheduled for a [**master/merits**] hearing in **[Insert City Name]** within three months of this request. That [**master/merits**] hearing date is [**Insert Date Here**] with Immigration Judge [**Insert Name Here**].
- ☐ [**My client has an application for lasting relief**] **OR** [**my client requests prosecutorial discretion in the form of administrative closure or dismissal**]. (administrative closure not applicable to detained aliens)
- ☐ (Where lasting relief is sought) I do not wish to have a full merits hearing and I believe my client's case can be resolved on a written record or with very limited questions to reach a final resolution of the matter.
- ☐ I am willing to assist in obtaining as quickly as possible any additional written documents such as background evidence, affidavits, taxes, police reports, etc.
- ☐ I understand that this is merely a request for an expedited resolution of my client's case, but this request does not guarantee any results, nor does it bind the immigration court in any way.
- ☐ If the OCC agrees to resolve this case, and the immigration court agrees to an accelerated resolution, I realize that I may be required to appear in person and with my client on very short notice.

Summary of my client's case and why I feel it can be resolved in an accelerated manner:

[Insert Description Here]

APPENDIX D

Advancing Merits Proceedings for Efficient Docketing (AMPED) Request Instructions

APPENDIX
Exhibit D

U.S. Immigration and Customs Enforcement

OFFICE OF THE CHIEF COUNSEL · CHICAGO, ILLINOIS

AMPED

ADVANCING MERITS PROCEEDINGS FOR EFFICIENT DOCKETING (AMPED) REQUEST INSTRUCTIONS

Description: In 2014, a case docketing pilot program was implemented in Chicago with the goal of promoting docket efficiency. As part of the pilot, OCC Chicago identified appropriate cases and motioned the Chicago Immigration Court to advance the cases. In order to improve and expand the pilot program, OCC Chicago will now accept requests from respondents' representatives to consider a case for motioning by OCC Chicago to advance merits proceedings.

Types of cases: The AMPED requests should consist of cases OCC Chicago will agree can be conducted in an expedited fashion (an hour or less). At this time, the forms of relief that OCC Chicago will consider for an AMPED request are the following: Adjustment of Status (without a waiver), Cancellation of Removal under INA §§ 240A(a) and (b), TPS, NACARA, and stand-alone waivers under INA §§ 212(h) and (c). Only non-detained cases will be considered.

Requirements:

- **One Hour:** Presentation of all evidence and testimony will take no more than one hour.
- **Merits:** The case must be fully prepared for a final merits hearing on the application for relief. This means that pleadings have been taken, and all issues of removability have been resolved. The case must be documented showing that the respondent has clearly met his or her burden of proof. All biometric requirements must be current and complete prior to the case being advanced.
- **Docket:** The case must be scheduled before the Immigration Judge and docketed not more than 18 months from the date of request. No cases scheduled within 3 months of request will be considered.
- **One Request Only:** OCC Chicago will consider only one AMPED request to advance a merits hearing. Once OCC Chicago makes a determination on a request, additional requests will not be considered.

How to Request: AMPED requests must be filed electronically with OCC Chicago by submitting a completed AMPED Request and necessary attachments to chicagooccfilings@ice.dhs.gov. Requests filed directly with EOIR will not be considered by OCC Chicago. Applications and supporting documents must not exceed 100 pages. All submissions must be indexed and paginated in accordance with the Immigration Court Practice Manual. OCC Chicago will respond to each request within 90 days. If more than 90 days have elapsed since request, please contact the appropriate OCC Team Duty Attorney via email for a status update.

Disclaimer: The submission of this Request to OCC Chicago does not guarantee the case will be selected for motioning by OCC Chicago to advance the merits proceedings; nor does it guarantee that EOIR will grant the motion to advance. Also, please note that nothing in these procedures affect a respondent's ability to move to advance a case under the current Immigration Court Manual. Further, submission of the Request does not create any right or benefit, substantive or procedural, enforceable at law by a party against DHS or the United States.

March 6, 2015

APPENDIX
Exhibit D

U.S. Immigration and Customs Enforcement

OFFICE OF THE CHIEF COUNSEL · CHICAGO, ILLINOIS

ADVANCING MERITS PROCEEDINGS FOR EFFICIENT DOCKETING (AMPED) REQUEST

1. Immigration Judge assigned to the non-detained case:
2. Alien registration number: A
3. Alien name:
4. Date of current hearing:
5. Form(s) of Relief Sought:

☐ Adjustment of Status (no waiver needed)	☐ 212(h)
☐ Cancellation of Removal 240(a)	☐ 212(c)
☐ Cancellation of Removal 240(b)	☐ NACARA
☐ Temporary Protected Status	

6. Has removability been previously established? ☐ Yes ☐ No
7. Fingerprints taken? ☐ Yes, Date fingerprints were processed: ☐ No
8. Has the respondent ever been arrested? ☐ Yes ☐ No

Any requests must be accompanied by a packet containing a completed application for relief and all supporting documents; any request that does not contain a completed application will be immediately rejected. Requests are only accepted electronically via the Office of Chief Counsel electronic mailbox (CHICAGOOCCFILINGS@ice.dhs.gov) and must include the following documents:

- Signed DHS Form G-28, Notice of Entry of Appearance (www.uscis.gov/g-28)
- Complete application for relief with fee receipt
- Supporting documents, indexed and paginated. In conjunction with all documents showing eligibility for relief, the following documents **must** be included:
  - ✓ Birth Certificate(s).
  - ✓ Documents relating to medical conditions (in cancellation of removal cases where medical condition of qualifying relative is an issue). Letter from treating physician that includes diagnosis and prognosis is preferred.
  - ✓ Copies of income tax returns for the last three years and/or IRS transcripts.
- Criminal history chart including name of offense(s), arrest date, conviction date, sentence, time served, and immigration consequences
- Certified criminal complaint/indictment(s) & disposition(s)
- The respondent's affidavit detailing what the respondent would testify to regarding his eligibility for relief
- Witness list with affidavits from each potential witness

March 6, 2015

APPENDIX E

Memorandum : Full and Complete Interpretation

U.S. Department of Justice

Executive Office for Immigration Review

Office of the Chief Immigration Judge

5107 Leesburg Pike, Suite 2500
Falls Church, Virginia 22041
February 11, 2013

MEMORANDUM

TO: All Immigration Court Personnel

FROM: Brian M. O'Leary
Chief Immigration Judge

SUBJECT: Full and Complete Interpretation

I. Introduction

The immigration court's mission is to provide fair, impartial, and timely adjudication of immigration proceedings. To provide a fundamentally fair hearing for persons with limited proficiency in the English language, the immigration court has historically provided interpreter services.

On June 28, 2010, the Attorney General directed each Departmental component to prepare a Language Access Plan (LAP). The purpose of the LAP is to ensure that DOJ components comply with Executive Order 13166, which directs each federal agency to examine the services it provides and develop and implement a system by which limited English proficient (LEP) persons can meaningfully access those services consistent with, and without unduly burdening, the fundamental mission of the agency. The DOJ LAP was approved on April 5, 2012. The DOJ plan includes the Executive Office for Immigration Review (EOIR) plan.

Fundamental to its mission, and in compliance with EOIR's LAP, the Office of the Chief Immigration Judge (OCIJ) seeks to provide all LEP persons meaningful access to immigration proceedings by expanding its interpretation services, regardless of the immigration court in which they are required to appear. This includes a firm commitment by the immigration court to provide "full and complete" interpretation during all immigration hearings.

This Memorandum provides initial guidance to all court personnel on the implementation of full and complete interpretation in the immigration court.

II. Terminology

A. Full & Complete

"Full and complete" describes the scope of the interpretation during a proceeding, and requires interpreters to convey accurate and complete messages between and among everyone in the courtroom. The respondent should be privy to everything that is said during the course of a courtroom proceeding. Full and complete interpretation ensures the Immigration Judge is fully apprised of everything said by a non-English speaker, and, conversely, ensures a non-English speaking respondent, through the use of a professional interpreter, can hear and understand what is being said at all times during the hearing.

The interpreter is required to render the form and content of the linguistic and para linguistic elements of the statements or testimony, including all the pauses, hedges, self corrections, hesitations, and emotion as they are conveyed through tone, word choice and intonation. The interpreter must interpret the original source material without editing, summarizing, deleting, or adding, while conserving the language level, style, tone, and intent of the speaker.

B. Simultaneous v. Consecutive

While "full and complete" describes what is interpreted, the terms "simultaneous" and "consecutive" explain how the content is interpreted (i.e., a mode of interpretation). Simultaneous interpreting is rendering an interpretation continuously at the same time someone is speaking. It is intended to be heard only by the person receiving the interpretation and is usually done by using specially designed electronic equipment[1]. Consecutive interpreting is rendering an interpretation intermittently after a pause between each completed statement. In consecutive interpretation, the interpreter should take notes and may need to signal the speaker to pause to permit the consecutive interpretation.

III. Full and Complete Interpretation Policy

A. Applicability

The full and complete interpretation policy applies to all immigration proceedings, regardless of whether a contract or staff interpreter is being utilized or whether the interpreter is present in the courtroom or appearing through video-teleconferencing or telephonically.[2]

---

[1] EOIR has purchased equipment for every courtroom which, except under extraordinary circumstances, should be utilized when doing simultaneous interpretation. Speaking in whispered tones strains an interpreter's voice; therefore, the equipment should be used in most situations.

[2] An alien's representative, however, may waive interpretation partially, or in its entirety, for a particular hearing. Such a waiver must be in writing or on the record.

- At the beginning of the first hearing in each case, the Immigration Judge should determine, on the record, what language the respondent speaks and understands best. As always, judges should remain vigilant throughout the proceedings for any indication that the best language of the respondent is something other than that initially identified.

- The interpreter shall interpret, in a full and complete manner:
  - All testimony.
  - Legal arguments, including objections of counsel.
  - The Immigration Judge's decision, in its entirety may provide case name in lieu of full citation.
  - All discussions on the record between the Immigration Judge and counsel (Government or private), must be interpreted for the respondent.
  - Exchanges between Immigration Judge and support staff that relate to the case, especially scheduling matters.

B. Modes

The proper mode of interpretation, simultaneous or consecutive depends on the part of the hearing being interpreted and the target language.[3]

- The determination of the appropriate mode of interpretation is the responsibility of the professional interpreter. Objections to the mode used will be resolved by the judge, after consultation with the interpreter.
- Consecutive interpretation is necessary when using the services of a telephonic interpreter.

C. Additional Considerations

- The interpreter should remain vigilant to keep the respondent informed as to courtroom activity regarding the case, including discussions of legal, procedural, or administrative matters.
- Interpretation of social or extraneous matters not substantively related to the case need not be provided. The judge should explain through the interpreter that the conversation is not related to the respondent's case.
- The interpreter must inform the Immigration Judge whenever he/she believes that the quality of interpretation is about to falter due to fatigue, and a recess should be taken. Interpreting is very taxing and judges should be aware that interpreters need periodic recesses, and should be given at least a 30 minute lunch break.

[3] The appropriate modes of interpretation to use during the course of the proceeding are found in Appendix A.

IV. Effective Date

The policy will be effective May 1, 2013. This will allow court personnel, especially immigration judges and interpreters, ample time to familiarize themselves with the details of the new policy.

Several court locations have been conducting proceedings for many years using full and complete interpretation. Among the courts currently using full and complete interpretation are Los Angeles, San Diego, Imperial, Phoenix, Florence, Eloy, Tucson, El Paso, El Paso SPC, Tacoma, Denver, and Baltimore. It is recommended that courts not yet performing full and complete interpretation should begin to do so to allow for a smooth transition.

Further detailed guidance will be forthcoming in the near future.

V. Conclusion

Implementation of the full and complete policy will enhance access to justice and ensure uniformity nationwide by requiring that the entire immigration proceeding be interpreted for all LEP respondents. Full and complete interpretation will ensure that LEP respondents appearing before an immigration judge are afforded an opportunity to participate fully in their hearing, as if no language barrier existed. This effort requires the attention, commitment, and participation of all court personnel. OCIJ will monitor the effect of this policy on case disposition. Working together, we can continue to accomplish our primary mission, to provide for the fair, expeditious, and uniform interpretation and application of immigration law.

Should you have any questions concerning full and complete interpretation or this policy, please contact Ms. Karen Manna, Chief, Language Services Unit, at (703) 605-1387.

APPENDIX
Exhibit E

Full and Complete Interpretation[1]	
Simultaneous Mode	**Consecutive Mode**
Any instructions given by the judge to the respondent	*
Testimony of English speaking witnesses	*
Testimony of witnesses who speak a language different than that spoken by the respondent	*
Objections of counsel	*
Exchanges between counsel and the Judge related to the case	*
Legal arguments	*
Discussions related to legal, procedural & administrative matter	*
Immigration Judge's decision	*
Exchanges between counsels	*
	Direct Examination
	Re-Direct
	Cross Examination
	Question and answers
	Questions by the Judge

Represented only
Both unrepresented and represented

* While simultaneous mode is preferred, consecutive mode is also permissible, especially if circumstances require it (e.g., malfunctioning equipment).

[1] Table is based on generally accepted judicial standards for interpreted proceedings.

APPENDIX F

Sample Motion for In-Person Hearing

Sample Motion for In-Person Hearing

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
[ ]

In the Matter of:)
)
_____) A# _____
)
)
)
In removal proceedings)
)

Immigration Judge _____ Next Hearing: _____

RESPONDENT'S MOTION FOR IN-PERSON HEARING

Respondent, by and through counsel, hereby submits the following request to appear in-person rather than via video teleconferencing ("VTC") for the scheduled [*type of hearing, e.g., merits, bond, master calendar*] hearing on _____. In support of this request, Respondent states the following:

1. [State any and all factual reasons why you want an in-person hearing, *e.g.*, to be able to confer with Respondent, to allow Respondent to show the Court physical injuries, to permit Respondent to see family in audience, to overcome problems with translation by video.]

2. The Immigration Court has the authority to order an in-person hearing and require the Department of Homeland Security to bring Respondent to the Court for his/her hearing. While the Immigration and Naturalization Act (the "INA") expressly authorizes hearings by videoconference, immigration proceedings must nevertheless "accord with the constitutional requirements of the Due Process Clause." *Aslam v. Mukasey*, 537 F.3d 110, 115 (2d Cir. 2008); *see also Rusu v. U.S. I.N.S.*, 296 F.3d 316, 320 (4th Cir. 2002) ("Deportations and asylum hearings . . . are subject to the requirements of procedural due process."); *Vilchez v. Holder*, 682 F.3d 1195, 1199 (9th Cir. 2012) ("Immigration proceedings must provide the procedural due process protections guaranteed by the Fifth Amendment.").

3. In assessing whether an immigration proceeding comports with due process, courts are guided by the principles articulated by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See, e.g.*, *Aslam*, 537 F.3d at 114; *Rusu*, 296 F.3d at 321. In *Mathews*, the Supreme Court recognized that "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." 424 U.S. at 333. Thus, in order to comport with due process, this Court must adopt procedures that will not prevent the Respondent

from being heard in a meaningful manner, but rather will ensure a "full and fair hearing." *Rusu*, 296 F.3d at 321-22.

4. Consistent with the foregoing, and pursuant to 8 U.S.C. § 1229a(b)(4), the Respondent is entitled to 1) representation by effective counsel; 2) a reasonable opportunity to examine evidence against him; 3) a reasonable opportunity to present evidence on his own behalf; and 4) a reasonable opportunity to cross examine witnesses. The purpose of these protections is to ensure that the Respondent receives a meaningful hearing. *Id*. at 321, n.7.

5. Courts have recognized that the use of VTC can interfere with a party's rights under 8 U.S.C. § 1229a(b)(4) and undermine the requirements of due process. *See Viclehz v. Holder*, 682 F.3d 1195, 1199 (9th Cir. 2012) ("We recognize . . . that in a particular case video conferencing may violate due process or the right of a fair hearing guaranteed by 8 U.S.C. § 1229a(b)(4)(B)."); *Raphael v. Mukasey*, 533 F.3d 521 (7th Cir. 2008) (holding that a video-conference hearing violated the petitioner's right to a fair hearing where the petitioner had been unable to review key documents during a VTC hearing); *Rusu*, 296 F.3d at 322, 323 ("[V]ideo conferencing may render it difficult for the fact finder in adjudicative proceedings to make credibility determinations and to gauge demeanor . . . A second problem inherent in the video conferencing . . . is its effect on a petitioner's lawyer."). And indeed, another difficulty resulting from VTC is the fact that it can handicap the communication between non-English speaking respondents and their interpreters.

6. Respondent's procedural due process and rights under 8 U.S.C. § 1229a(b)(4) will likely be compromised in a hearing by VTC. Respondent's credibility and demeanor, which are significant in determining whether relief from removal is appropriate, have the potential to be diminished by VTC. In determining Respondent's credibility and demeanor, "all aspects . . .

including the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination," are relevant factors to be utilized by the Court. *Paredes-Urrestarazu v. I.N.S.*, 36 F.3d 801, 818 (9th Cir. 1994). These important factors may be lost or greatly weakened by VTC. *See United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001) ("[V]irtual reality is rarely a substitute for actual presence and . . . even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it.") (discussing VTC usage in sentencing proceedings).

7. Further, the use of VTC will interfere with the Respondent's right to effective counsel, as Respondent will not be able to have privileged consultation with counsel through VTC. Similarly, Respondent will not be able to inspect and present evidence in a manner consistent with his rights under 8 U.S.C. § 1229a(b)(4). For example, Respondent will have difficulty showing the extent of his physical injuries over VTC and should be afforded the opportunity to show the Court these injuries first-hand, *i.e.*, in a meaningful manner.

8. Lastly, Respondent will be providing his testimony through the use of a language interpreter. Accordingly, there are concerns that using an interpreter in addition to testifying by video will impede Respondent's ability to convey the circumstances and facts underlying his claim for non-removal. Respondent's testimony is sensitive in nature, as it involves repeated threats and acts of violence against him. It is important that Respondent be present in the Court so that he can most effectively testify about his experiences and his fear of returning to his country of origin.

9. Due to the above-stated issues posed by VTC, the scheduled individual hearing by VTC will likely affect the outcome of the immigration proceedings and thus cause prejudice to the Respondent.

Accordingly, Respondent requests that the Court conduct the scheduled individual hearing in-person rather than subject the Respondent to the inherent limitations of VTC.

Respectfully submitted this the ___ day of _____, 20___.

_____
[COUNSEL]

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served via HAND DELIVERY on _____, 20___.

[Name of Immigration Court]
[DHS Office of the Chief Counsel]
[Address]

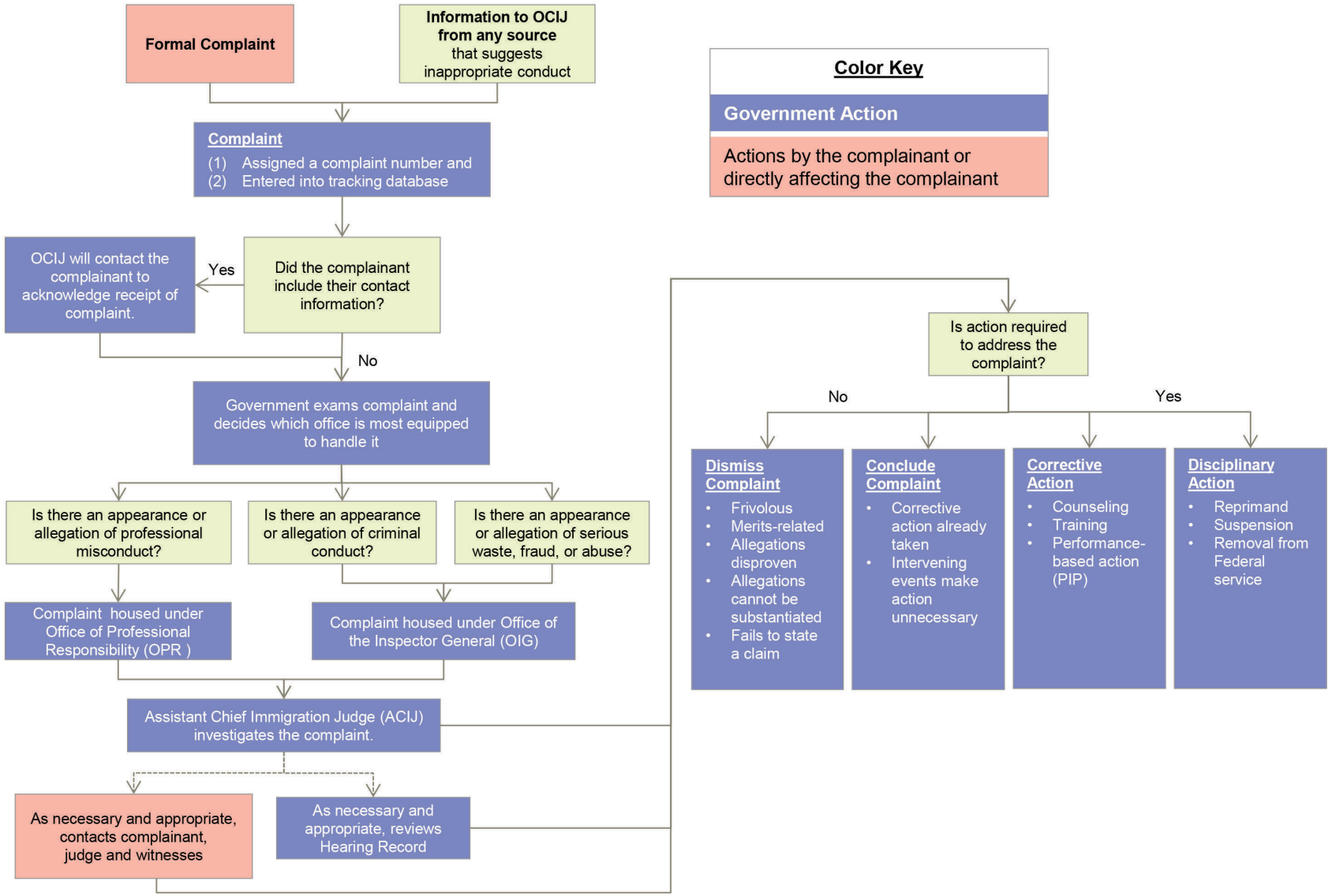
_____
[COUNSEL]

APPENDIX G

Office of the Chief Immigration Judge (OCIJ) Procedure for Handling Complaints Against Immigration Judges

Office of the Chief Immigration Judge (OCIJ) Procedure for Handling Complaints Against Immigration Judges

APPLESEED

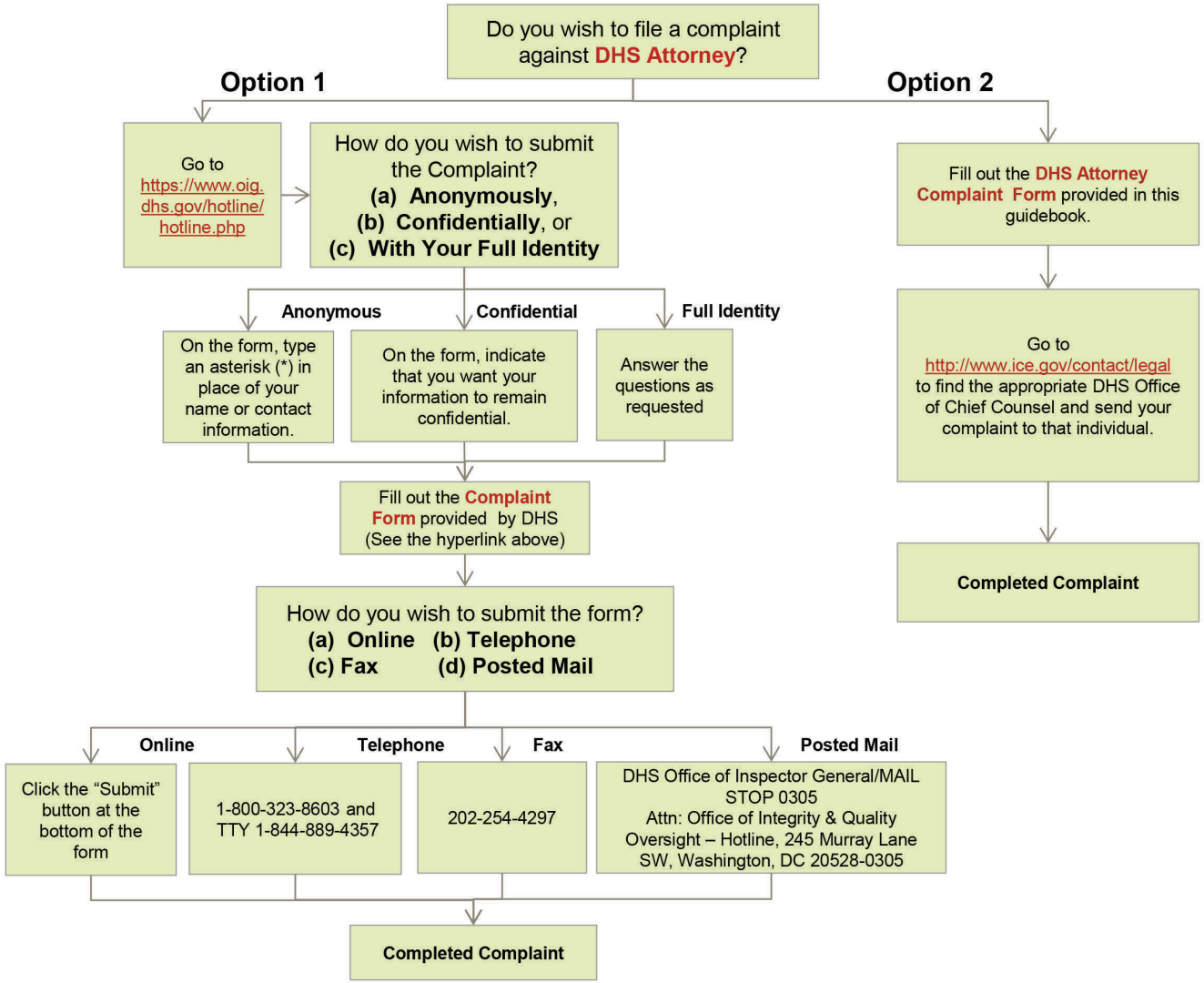


APPENDIX H

DHS Attorney Complaint Flowchart

DHS Attorney Complaint Flowchart

Since there are no clear instructions on the appropriate avenue for reporting DHS trial attorney misconduct, we have outlined two options below:

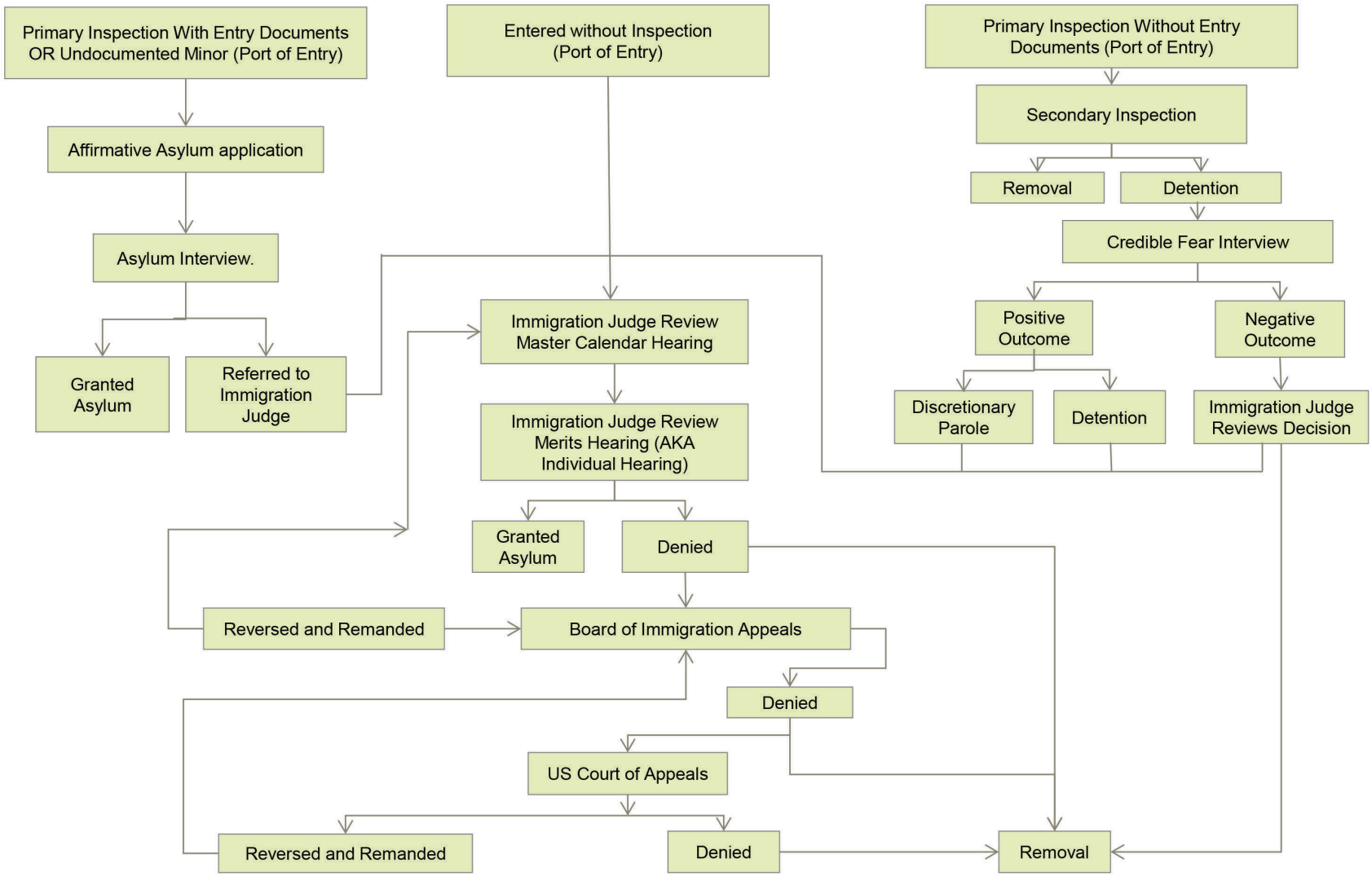


APPENDIX I

Asylum Flowchart

Asylum Flowchart

APPLESEED



APPENDIX J

Variance in Interpretation Procedures

Table 1. Variance in Interpretation Procedures[1]

Court Location	Local Immigration Court in Practice		Additional Comments from Local Immigration Court	Additional Comments from Local Practitioners
	Full and Complete Interpretation	Simultaneous or Consecutive		
Arlington, Virginia	No	Consecutive	*No information regarding interpretation was provided on the local court's website.*	*No additional information provided from surveyed practitioners.*
Baltimore, Maryland	Yes	*No Consensus*	*No information regarding interpretation was provided on the local court's website.*	Many times, interpreters do not interpret something unless it is said directly to the respondent.
Boston, Massachusetts	No	*No Consensus*	*No information regarding interpretation was provided on the local court's website.*	Many times, interpreters do not interpret something unless it is said directly to the respondent.
Charlotte, North Carolina	No	Consecutive	"All documents filed with immigration court must be in the English language or accompanied by a certified English translation. An affidavit or declaration in English by a person who does not understand English must include a certificate of interpretation stating that the affidavit or declaration has been read to the person in a language that the person understands prior to signing the document. The Practice Manual, Chapter 3, Section 3.3. Documents, further defines the requirements for language and certified translations."	Some interpreters provide incorrect translations. Many times, judges do not provide the interpreters with enough time to translate, so the interpreters must paraphrase and/or skip some of what has been said.

Table 1. Variance in Interpretation Procedures[1]

Court Location	Local Immigration Court in Practice		Additional Comments from Local Immigration Court	Additional Comments from Local Practitioners
	Full and Complete Interpretation	Simultaneous or Consecutive		
Chicago, Illinois	No	Simultaneous	"All documents filed with immigration court must be in the English language or accompanied by a certified English translation. An affidavit or declaration in English by a person who does not understand English must include a certificate of interpretation stating that the affidavit or declaration has been read to the person in a language that the person understands prior to signing the document. The Practice Manual, Chapter 3, Section 3.3. Documents, further defines the requirements for language and certified translations."	*No additional information provided from surveyed practitioners.*
Cleveland, Ohio	No	Consecutive	*No information regarding interpretation was provided on the local court's website.*	*No additional information provided from surveyed practitioners.*
Dallas, Texas	No	*No Consensus*	"At your first master calendar hearing, a Spanish speaking interpreter will be available to translate for you. If you need an interpreter for another language, the Immigration Judge may use a telephonic interpreter or may have to adjourn your case in order to obtain an interpreter. After your first hearing, the Court will ensure that a court interpreter in your native language is available."	Not all of the conversations in the courtroom are translated.

Table 1. Variance in Interpretation Procedures[1]

Court Location	Local Immigration Court in Practice		Additional Comments from Local Immigration Court	Additional Comments from Local Practitioners
	Full and Complete Interpretation	Simultaneous or Consecutive		
Elizabeth, New Jersey	No	Consecutive^!	No information regarding interpretation was provided on the local court's website.	*No additional information provided from surveyed practitioners.*
Houston, Texas	No	*No Consensus*	"At your first master calendar hearing, it is likely that there will be a Spanish interpreter available to translate for you. After your first hearing, the Court will arrange for a certified interpreter in your native language to be available at any subsequent hearings."	The court provides some very good Spanish-English interpreters.
Los Angeles, California	Yes	Simultaneous	"The Los Angeles Immigration Court will provide an interpreter in the language that you speak and understand best."	*No additional information provided from surveyed practitioners.*
Los Fresnos, Texas *(AKA Port Isabel)*	No	Consecutive	"At your fist master calendar hearing, it is likely that there will be an interpreter available to translate for you. However, depending on the language and/or dialect you speak, the Immigration Judge may adjourn your case in order to obtain an interpreter."	*No additional information provided from surveyed practitioners.*
New Orleans, Louisiana	Yes	Simultaneous	No information regarding interpretation was provided on the local court's website.	To increase clarity, some attorneys request that court interpreters speak slowly or employ consecutive interpretation instead of simultaneous interpretation.

Table 1. Variance in Interpretation Procedures[1]

Court Location	Local Immigration Court in Practice		Additional Comments from Local Immigration Court	Additional Comments from Local Practitioners
	Full and Complete Interpretation	Simultaneous or Consecutive		
New York, New York	No	Simultaneous	"At your first master calendar hearing, it is likely that there will be an interpreter available to translate for you. However, depending on the language and/or dialect you speak, the Immigration Judge may have to adjourn your case in order to obtain an interpreter. If possible, you may want to bring a relative or friend who can translate into English for you. After your first hearing, the Court will ensure that a certified interpreter in your native language will be available at any subsequent hearings."	It is difficult to obtain indigenous language speakers from Central America. Sometimes the client cannot understand the interpreter or the interpreter's English is extremely limited, and as a result, the hearing must be adjourned.
Portland, Oregon	No	*No Consensus*	No information regarding interpretation was provided on the website.	Sometimes interpreters don't understand regional vocabulary, resulting in inaccurate translations.
San Antonio, Texas	No	*No Consensus*	"At your first master calendar hearing, it is likely that there will be an interpreter available to translate for you. However, depending on the language and/or dialect you speak, the Immigration Judge may adjourn your case in order to obtain an interpreter."	Spanish is the only language that employs full and complete interpretation.

Table 1. Variance in Interpretation Procedures[1]

Court Location	Local Immigration Court in Practice		Additional Comments from Local Immigration Court	Additional Comments from Local Practitioners
	Full and Complete Interpretation	Simultaneous or Consecutive		
Seattle, Washington	No	Consecutive	*No information regarding interpretation was provided on the website.*	*No additional information provided from surveyed practitioners.*
York, Pennsylvania	No	Consecutive	*No information regarding interpretation was provided on the website.*	*No additional information provided from surveyed practitioners.*

Endnote

1 Information regarding local immigration court comments was gathered from the EOIR regional websites. See Arlington Immigr. Ct., EOIR (Jan. 11, 2016), https://www.justice.gov/eoir/arlington-immigration-court: Baltimore Immigr. Ct., EOIR (Jan. 5, 2016), https://www.justice.gov/eoir/baltimore-immigration-court: Boston Immigr. Ct., EOIR (Feb. 10, 2016), https://www.justice.gov/eoir/boston-immigration-court: Charlotte Immigr. Ct., EOIR (Jan. 5, 2016), https://www.justice.gov/eoir/charlotte-immigration-court: Chicago Immigr. Ct., EOIR (Jan. 4, 2016), https://www.justice.gov/eoir/chicago-immigration-court: Cleveland Immigr. Ct., EOIR (Jun. 14, 2016), https://www.justice.gov/eoir/cleveland-immigration-court: Dallas Immigr. Ct., EOIR (Mar. 3, 2016), https://www.justice.gov/eoir/dallas-immigration-court, Elizabeth Immigr. Ct., EOIR (Jan. 5, 2016), https://www.justice.gov/eoir/elizabeth-immigration-court: Houston Immigr. Court, EOIR (Jan. 4, 2016), https://www.justice.gov/eoir/houston-immigration-court: Los Angeles Immigr. Ct., EOIR (Jul. 26, 2016), https://www.justice.gov/eoir/los-angeles-immigration-court: Port Isabel Immigr. Ct., EOIR (Jun. 30, 2016), https://www.justice.gov/eoir/los-fresnos-immigration-court: New Orleans Immigr. Ct., EOIR (Jan. 4, 2016), https://www.justice.gov/eoir/new-orleans-immigration-court: New York Immigr. Ct., EOIR (Jan. 5, 2016), https://www.justice.gov/eoir/new-york-city-immigration-court: San Antonio Immigr. Ct., EOIR (Jun. 14, 2016), https://www.justice.gov/eoir/san-antonio-immigration-court: Seattle Immigr. Ct., EOIR (Jan. 4, 2016), https://www.justice.gov/eoir/seattle-immigration-court: York Immigr. Ct., EOIR (Jun. 30, 2016), https://www.justice.gov/eoir/york-immigration-court.

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