

March 25, 2020

Mr. James R. McHenry III  
Director  
Executive Office for Immigration Review  
5107 Leesburg Pike  
Falls Church, VA 22041

Mr. Matthew T. Albence  
Deputy Director  
U.S. Immigration and Customs Enforcement  
500 12th St., SW  
Washington, D.C. 20536

Dear Director McHenry and Deputy Director Albence:

I write on behalf of the American Bar Association (ABA) to urge that the Executive Office for Immigration Review (EOIR) and Immigration and Customs Enforcement (ICE) take several steps to further protect the health and safety of individuals working in and appearing before the immigration courts that remain open during the COVID-19 pandemic.<sup>1</sup> While we appreciate the guidance that has been provided by EOIR and ICE to date,<sup>2</sup> we believe that additional, uniform measures are necessary to ensure the protection of individuals, while preserving non-citizen respondents' access to legal representation and legal information.

The American Bar Association is the largest voluntary association of lawyers and legal professionals in the world. The ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, and works to build public understanding around the world of the importance of the rule of law. Through its Commission on Immigration, the ABA provides continuing legal education and develops and assists in the operation of *pro bono* legal representation programs along the southwest border.

The ABA understands EOIR's concern for the efficient functioning of the immigration adjudication system. However, the fair and efficient operation of the immigration court system is

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<sup>1</sup> On March 13, 2020, President Trump declared that the COVID-19 outbreak in the United States constitutes a national emergency. *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak* (March 13, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

<sup>2</sup> James R. McHenry, III, PM 20-10, *Immigration Court Practices During the Declared National Emergency Concerning the COVID-19 Outbreak* (March 18, 2020), <https://www.justice.gov/eoir/file/1259226/download> (noting that immigration judges have the authority to waive the presence of represented non-citizens, grant continuances for good cause, issue standing orders regarding telephonic appearances, and conduct hearings by video teleconference); U.S. Immigration and Customs Enforcement, *ICE Guidance on COVID-19*, <https://www.ice.gov/covid19>.

fundamentally linked to the issue of access to counsel and legal information, as well as the health and safety of all who work in and appear before the courts.

The ABA operates two direct service projects in California and Texas that have extensive experience providing Legal Orientation Program (LOP) services in detention settings. These two projects also appear on EOIR's list of organizations qualified to provide *pro bono* legal services in immigration proceedings. On any given day, at least one ABA employee is typically present at one or more immigration detention facilities providing legal information and services to non-citizens in immigration proceedings, and ABA employees also appear frequently in immigration courts. The health and safety of our employees is of utmost importance to the ABA, as is the well-being of attorneys, judges, court staff, immigration enforcement officers and detained individuals. We seek to ensure continued access to *pro bono* legal services and legal information for non-citizens in immigration proceedings in a manner that provides appropriate protections for all those involved in the detention and adjudication systems.

Like many programs throughout the country, our two direct service projects had to suspend all in-person services at detention centers last week due to safety concerns surrounding the COVID-19 pandemic. However, our staff remains committed to providing critical legal information and services to non-citizens in detention. To ensure that our projects, as well as other legal organizations and representatives, can continue to provide these services in a safe manner, we urge ICE to:

- Provide space for non-contact visits between legal representatives and detained non-citizens at each facility, and establish procedures for detained individuals to sign applications and other documents prepared by their legal representative.
- Provide all detained non-citizens with free, regular access to a confidential form of communication with attorneys and legal service providers (such as via video teleconference (VTC) or telephone).
- Work with organizations that provide LOP or know-your-rights services at detention centers to establish protocols for providing services remotely (ideally via VTC and confidential phone lines), where requested by the organization, and to update the detention center's library with up-to-date written, electronic, and audio resources.
- Establish a confidential fax line at every detention center to facilitate the exchange of confidential written communications between non-citizens and legal representatives.
- Accept forms such as the G-28 (DHS Notice of Entry of Appearance as Attorney or Legal Representative,) and ICE privacy waivers without client signature (or allow the legal representative to sign for the client).

In addition, to ensure that attorneys and legal representatives can continue to fulfill their professional duty to clients in removal proceedings, while protecting the safety of all who work in and appear before the immigration courts, we urge EOIR to issue additional guidance that:

- Authorizes all legal representatives to appear telephonically at any hearing, provided that they have notified the clerk of the relevant court.
- Encourages the liberal granting of requests for a continuance, without the need to adhere to the requirements set forth in the Practice Manual.

- Authorizes waiving the presence of represented respondents for bond and master calendar hearings, where requested.
- Arranges for telephonic or VTC appearance by non-represented respondents at bond and master calendar hearings, where requested by the respondent.
- Prioritizes the scheduling of bond hearings, to allow for timely release of eligible individuals.
- Encourages the liberal tolling of deadlines created by statute, regulation, local rule, standing order or policy guidance.

Implementing these measures is critical to ensuring that detained non-citizens continue to have access to legal information, services, and representation, without compromising the safety of legal representatives, court and detention center personnel, or the public.

Thank you for considering our recommendations. If you have any questions or need additional information, please contact Kristi Gaines in our Governmental Affairs Office at [kristi.gaines@americanbar.org](mailto:kristi.gaines@americanbar.org).

Sincerely,

A handwritten signature in black ink, appearing to read "Judy", with a long, sweeping horizontal line extending to the right.

Judy Perry Martinez  
President