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February 17, 2012

Administrative Conference of the United States
Committee on Adjudication
1120 20th Street, NW
Suite 706 South
Washington, DC 20036

RE: Committee on Adjudication Comments

Dear Members of the Committee on Adjudication:

The American Bar Association commends the Conference for undertaking a study of immigration adjudication and welcomes the draft report, *Taking Steps to Enhance Quality and Timeliness in Immigration Removal Adjudication*, dated January 12, 2012 (“draft report”). As you know, the ABA Commission on Immigration published a detailed report on the immigration removal adjudication system in 2010 (“ABA report”).¹ While the ABA report differs from the draft report in certain significant ways, both devote considerable attention to the related goals of ensuring fairness and promoting efficiency in the adjudication removal system. The ABA agrees with a number of the draft report’s recommendations; however we have serious concerns with the Executive Office of Immigration Review’s (EOIR) current use of video hearings and stipulated removal orders, as well as the draft report’s recommendation regarding asylum application filing fees.

Video Hearings

The ABA opposes using videoconferencing (or VTC) in immigration hearings, except in procedural matters in which the noncitizen has given consent. We have serious concerns with EOIR’s increased use of videoconferencing in immigration hearings, which according to the draft report has been on the rise in spite of a lack of information regarding its possible effect on case outcomes. Our concerns are compounded by the serious challenges confronting the immigration adjudication system, including the persistent lack of adequate representation.

The Conference’s Recommendation 2011-4, Agency Use of Video Hearings, recommended that federal agencies consider whether VTC can be used without affecting the outcome of cases; whether VTC adversely affects representation; and whether communication is adversely

¹ ABA Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* (“ABA report”), available at www.americanbar.org/immigration.

affected.² The Conference also recommended as a best practice that agencies use VTC on a voluntary basis and allow parties to have an in-person hearing if they so choose. The immigration adjudication draft report follows on these recommendations, calling for further study of videoconferencing. Data in the draft report indicate that, at best, the effect of VTC on case outcomes is unclear. It is regrettable that EOIR is moving to such wide use of VTC before such study has been undertaken. We urge that the Conference recommend, similar to the best practice included in the 2011 recommendation, that noncitizens in the immigration adjudication system be allowed to request in-person hearings.

We have written to EOIR on two occasions to express our serious concerns with videoconferencing use. ABA staff provide legal rights presentations and, in certain cases, legal representation to individuals in detention in Seattle, San Diego, and South Texas, and in those contexts have had the opportunity to observe and participate in videoconference hearings firsthand. In addition, we have observed several videoconference proceedings at the immigration court in Arlington, Virginia, in recent months. Findings from the ABA report and our direct observations are worth some discussion here.

During a proceeding videoconferencing makes it difficult if not impossible for attorneys to consult confidentially with their clients. The draft report states that in some detention facilities counsel is required to attend the hearing with the judge and may only communicate with clients through video technology during the hearing. In other cases, counsel must make the decision whether to be with a client or in court with the judge, which, as the Fourth Circuit Court of Appeals has noted, means that the attorney “simply must choose the least damaging option.”³

The immigration context raises interpretation as a particular concern. Videoconferencing may make it difficult for respondents to understand interpreters and, practically speaking, may discourage them from asking questions. In San Diego, bilingual ABA staff physically located with the client at the detention facility were unable to follow portions of a proceeding because the proceeding and translation were broadcast simultaneously, at the same level of volume. In video hearings, as in some other hearings, important information may not be translated at all. In one master calendar hearing in Arlington this month, we observed that the interpreter failed to translate new charges that were added to the Notice to Appear. We have also observed an interpreter who failed to translate the judge’s statement that the respondent had the right to an attorney.

Many detainees do not understand the roles of individuals in the courtroom, or which person on the screen was the judge. We recently observed a hearing where the judge maintained the

² ACUS Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices And Possibilities for Expansion* (Adopted June 17, 2011), Recommendation 2, at 4-5

³ As the U.S. Court of Appeals for the Fourth Circuit stated: “Because video conferencing permits the petitioner to be in one location and an IJ in another, its use results in a ‘Catch 22’ situation for the petitioner’s lawyer. While he can be present with his client — thereby able to confer privately and personally assist in the presentation of the client’s testimony — he cannot, in such a circumstance, interact as effectively with the IJ or his opposing counsel. Alternately, if he decides to be with the IJ, he forfeits the ability to privately advise with and counsel his client. Therefore, under either scenario, the effectiveness of the lawyer is diminished; he simply must choose the least damaging option.” *Rusu v. INS*, 296 F.3d 316, 323 (4th Cir. 2002).

camera focus in the courtroom on the detainee's attorney and the ICE trial attorney; at no point was the detainee able to see the immigration judge who was making a ruling in the case.

Videoconferencing also can make it difficult for immigration judges to see respondents, raising obstacles to making credibility determinations and gauging demeanor. An image on the screen is a poor substitute for testimony given in person. Videoconferencing can prevent parties and the immigration judge from observing facial expressions. In Arlington, master calendar proceedings take place with the courtroom video monitor divided into quarters, one for each broadcasting detention facility, so each individual respondent appears on only one-quarter of the screen. The reduction in size of each individual's image makes it difficult to see their faces well. Also in Arlington we observed that camera focus was not adjusted during master calendar proceedings, so the detainee's image was out of focus. If the camera is close enough to show facial expressions (and the video screen close enough to the immigration judge and trial attorney to be observed closely), it may not show body language.

Videoconferencing makes it difficult for parties, attorneys, and the immigration judge to communicate and connect emotionally. This may compound difficulties faced by vulnerable individuals, including juveniles and individuals diagnosed with severe mental illnesses. In short, it makes it harder for respondents to present their cases effectively, compromising fairness.⁴

We reiterate that it is the ABA's position that immigration hearings should not be conducted by videoconference, except in procedural matters where the noncitizen has given consent. In the first instance, EOIR should work with ICE to ensure that every new detention facility includes a courtroom and that detainees who are in removal proceedings are housed in facilities with courtrooms or provided transportation to an immigration court for non-procedural matters.

If EOIR continues to use videoconferencing for substantive matters, then certain safeguards should be put into place. EOIR should provide the respondent and the respondent's counsel with private rooms and a dedicated private phone line—with a translator on the line, if necessary—to enable them to communicate effectively during proceedings. We agree that EOIR should provide more guidance to judges, attorneys, and pro se respondents (Recommendation 54), and would suggest including court staff in the recommendation as well. EOIR should certainly undertake a more formal evaluation of videoconferencing (Recommendation 56) and provide surveys or questionnaires to parties and witnesses to gather information about how VTC may impair hearings (Recommendation 58).

The draft report could also encourage EOIR to establish clear standards for immigration judges and other personnel using video technology, including: standards to ensure that proceedings remain confidential; guidance regarding the appropriate angle and focus for the video camera; image size; standards to ensure sound quality; standards for the documentation of any technical difficulties in the court record; and standards that ensure quality and scope of interpretation. Finally, the draft report should encourage EOIR to carefully consider the appropriateness of using of VTC for proceedings for individuals with vulnerabilities, such as those diagnosed with severe mental illnesses, or for juveniles.

⁴ The draft report notes that VTC has been resisted in the criminal context, where the ABA also opposes its use.

We note that the draft report discusses several possibilities for utilizing technology to enhance access to legal representation. Attorney communication with detained clients to prepare for hearings can be difficult at best; detainees are ordinarily not permitted to receive phone calls and must pay high rates to make calls, which are limited in duration and may be very poor in quality. People are often detained at great distances from counsel, making in-person consultation difficult if not impossible. For these reasons, the draft report's recommendation to that DHS provide video technology in all detention facilities allowing private consultation between detainees and counsel is important (Recommendation 33).

Stipulated Removal Orders

The ABA has serious concerns with the use of stipulated removal orders, particularly in the case of pro se respondents who have not participated in a legal rights presentation. We support providing legal rights presentations to all respondents before they are offered stipulated orders. It would be useful for the draft report to offer some additional recommendations regarding stipulated removal orders, such as requiring judges to see respondents in person to verify that respondents voluntarily and knowingly signed the order and asking respondents to initial each page confirming that they have understood and agreed to its content. The report also might consider whether it would be useful to develop a standardized stipulated order form, written in English and Spanish. We agree that EOIR should assess the contexts in which the use of stipulated removals might diminish due process protections (Recommendation 15).

Asylum Filing Fees

The ABA does not agree with Recommendation 11, calling for an evaluation of whether fees may be appropriate for defensive asylum filings. The ABA opposes charging fees for applications for humanitarian forms of immigration relief and associated benefits.

Additional Recommendations

The ABA supports a number of the draft report's recommendations or parts thereof, including establishing a pilot program requiring DHS attorney approval prior to issuance of discretionary NTAs by DHS officers (Recommendation 5).⁵ We also support the due process right to counsel for all persons in removal proceedings; establishment of a system to screen and to refer indigent persons with potential relief from removal to attorneys including government-funded counsel; and establishment of a system to provide legal representation, including appointed counsel and guardians ad litem, to mentally ill and disabled persons in all immigration processes and procedures, whether or not potential relief may be available to them (related to Recommendation

⁵ The ABA has made additional recommendations regarding prosecutorial discretion, including that it be increased to reduce the number of NTAs served on noncitizens who are prima facie eligible for relief from removal, that DHS attorneys be given greater control over the initiation of removal proceedings and cease issuing NTAs to noncitizens who are prima facie eligible to adjust to lawful permanent resident status. We also made several recommendations to ICE following the release of its prosecutorial discretion memos in 2011. *See* ABA Letter to John Morton (Dec. 15, 2011), available at http://www.americanbar.org/content/dam/aba/uncategorized/2011/gao/2011dec15_prosecdiscretion_1.authcheckdam.pdf.

25). We support expanding the Legal Orientation Program to all persons in removal proceedings, both detained and non-detained (related to Recommendations 28-30).

We also support authorizing USCIS asylum officers to grant asylum claims in expedited removal proceedings if warranted, as well as to grant admission when the asylum officer is satisfied that an individual has a well-founded fear of persecution (Recommendations 6-7).⁶ We support encouraging immigration courts to hold pre-hearing conferences as a matter of course, in order to narrow the issues and provide clearer guidance to noncitizens and their counsel on evidentiary issues, and the draft report's proposed pilot project may be useful in that regard (Recommendation 41). We support assigning one DHS trial attorney to each removal proceeding, to the extent possible, which comports with the draft report's recommendation regarding vertical prosecution (Recommendation 45).

Finally, we appreciate the draft report's call for assistance in translating the ABA Know Your Rights video into additional languages (Recommendation 32). The video is in final production, and will be available in English, Spanish, and French. Translating the video into additional languages would provide a great benefit, particularly to individuals who are not represented and do not have the benefit of live rights presentations.

We appreciate your consideration of these comments, and look forward to seeing the final report. Please contact Kristi Gaines, ABA Governmental Affairs Office, at 202-662-1763 with any questions or if you require additional information.

Sincerely,



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⁶ Recommendation 7 is more detailed than the relevant ABA policy, which supports enabling asylum officers to “grant asylum administratively after the ‘credible fear’ interview.”