

**American Immigration Lawyers Association
EOIR Stakeholder Meeting Agenda
Thursday November 17, 2016**

***** UNOFFICIAL AILA Notes*****

Prolonged Detention

1. The circuit courts have differed with respect to when and how individuals subject to prolonged detention can seek release on bond. Some circuits have drawn a bright line rule, whereas others have held that a case-by-case examination is appropriate to determine what qualifies as unconstitutionally prolonged detention. Understanding that the issue of the rights of noncitizens subject to prolonged detention to seek release on bond in removal proceedings is now before the U.S. Supreme Court in *Jennings v. Rodriguez*,¹ what guidance has EOIR provided Immigration Judges (IJs) regarding the *current* implementation of the relevant case law in the different circuits?

EOIR RESPONSE: EOIR has provided guidance to personnel within the Second and Ninth Circuits as well as in Boston/Hartford. EOIR has provided training to judges during the past two IJ training conferences. No specific guidance has been provided in jurisdictions where the Circuit Court adopts a case-by-case analysis.

2. AILA has received reports that individuals detained at the Eloy Detention Center are routinely experiencing delays of up to six to nine months in the scheduling of their merits hearing, after filing applications for relief at master calendar hearings. These kinds of delays are extremely problematic in the detained context.
 - a. Please provide statistics for the past three years on the length of time it takes for individuals detained at Eloy Detention Center to obtain a merits hearing after having filed an application for relief at their master calendar hearing.

EOIR RESPONSE: Eloy Detention Center is not a statistical anomaly. The average time for an Individual Hearing following the Master Calendar hearing is 116 days.

- b. Are there similar delays at other detention facilities?

EOIR RESPONSE: No direct response provided.

- c. What steps has EOIR taken to determine the cause of these delays?

EOIR RESPONSE: No direct response provided.

- d. Please describe any steps that EOIR has taken to resolve these delays.

¹ See <https://www.supremecourt.gov/qp/15-01204qp.pdf>.

EOIR RESPONSE: Staffing at Eloy Detention Center is being monitored to meet the needs of detainees. This issue has been previously addressed by detailing IJs to Eloy, hiring new immigration judges, and providing immigration hearings via televideo conferencing systems.

Consistency in Following the Practice Manual

3. AILA recognizes that the Immigration Court Practice Manual (ICPM) is not binding and IJs retain discretion to deviate from the practice manual, including imposing earlier filing deadlines. However, in addition to setting earlier filing deadlines, many IJs have implemented their own local rules, such as requiring written pleadings, the content of bond requests, the allowance of telephonic hearings/testimony, and motions for change of venue. For example, AILA has received reports that some IJs require completed relief applications to accompany bond requests and change of venue motions, which is not required under the ICPM. It is very difficult for attorneys, particularly those from other jurisdictions, to adhere to the particular preferences of individual IJs.
 - a. What steps can be taken by EOIR to promote uniformity among IJs and their staff in regard to following the ICPM?

EOIR RESPONSE: EOIR emphasized that although IJs retain discretion to deviate from the ICPM in an individual case, including imposing earlier filing deadlines, they should not be adopting their own local rules that affect groups or classes of respondents appearing before the court. The rules in the ICPM are binding on all parties unless the IJ directs otherwise in an individual case. If an IJ adopts local rules that affect groups or classes of respondents, EOIR is interested in knowing about it. The issue should first be raised to the Assistant Chief Immigration Judge (ACIJ) overseeing that particular court.

- b. AILA requests that when an immigration court or judge adopts local rules that deviate from the ICPM, EOIR require the court to post the rules on the section of EOIR's [webpage](#) specific to that immigration court.² Local rules also should be posted at the clerk's window and printed copies provided at the respondent's table in immigration court.

EOIR RESPONSE: EOIR once again emphasized that there are no "local rules", and thus there is no need to post these rules or provide them accordingly.

- c. AILA members report that the ICPM is not enforced equally with DHS Counsel. Concern has been raised that Respondents' filings are commonly rejected for issues such as improper exhibit tabbing/pagination, while similarly deficient filings from DHS Counsel are routinely accepted. Members welcome the Court exercising discretion in regard to accepting filings which might have minor tabbing/pagination errors, but the same standard must be consistently applied to both parties. Can EOIR emphasize to its immigration courts that the ICPM must be applied and enforced consistently to all parties?

² See <https://www.justice.gov/eoir/eoir-immigration-court-listing>.

EOIR RESPONSE: EOIR agrees that the ICPM should be applied equally and consistently to all parties and will continue to stress this to its immigration courts. If this is not happening in a particular court, it should be brought to the attention of the ACIJ with specific case examples.

Disparity in Service of Documents by Immigration Courts

4. Members report that immigration courts in some jurisdictions hand-deliver documents such as orders, calendars, and correspondence to local Office of Chief Counsels (OCC), while it serves those same documents on respondent's counsel by regular U.S. Postal Service (USPS). This disparity that can result in prejudice to the respondent and all parties appearing before a Court, should be treated equally. Though AILA is aware that EOIR is not a Court bound by the Code of Conduct for United States Judges (Code of Conduct), the code provides a useful framework for a neutral factfinder. Under Canon 3 of the Code of Conduct, "A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently."³ AILA respectfully requests EOIR instruct its judges and court administrators to employ the same means of service on OCC and counsel and/or respondent to avoid the appearance of impropriety.

EOIR RESPONSE: EOIR agrees that the ICPM should be applied equally and consistently to all parties and will continue to stress this to its immigration courts. If this is not happening and there are problems within a particular court, it should be brought to the attention of the ACIJ with specific case examples.

Delayed Service by DHS Office of Chief Counsel

5. Attorneys have reported that they are experiencing significant delays in obtaining service of documentation from local Office of Chief Counsels' (OCC) submitted via USPS compared to the timely hand-delivered filing of routine motions, memos, briefs, and other documents that OCC files with the immigration court. Moreover, once the documents arrive, attorneys have reported that the envelopes are often postmarked on a later date than the date provided on the certificate of service. As a result of this process, judges are receiving documents days before counsel and/or respondents, and in some situations making important decisions before counsel and/or respondent is aware that OCC filed a motion with the immigration court. The consequence of immigration judges receiving filings well in advance of counsel and/or respondents can be a significant violation of due process.

³ See <http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges>; see also Canon 3(B)(2) ("A judge should not direct court personnel to engage in conduct on the judge's behalf or as the judge's representative when that conduct would contravene the Code if undertaken by the judge.").

- a. AILA respectfully requests that EOIR revise the Immigration Court Practice Manual (ICPM),⁴ requiring OCC to provide equivalent service to counsel/respondent as is provided to EOIR, in order to ensure an approximately simultaneous filing and service.

EOIR RESPONSE: EOIR does not anticipate revising the ICPM regarding this matter. Accordingly, DHS may continue to deliver filings at the window and serve respondent's counsel by regular mail. If there are concerns, these should be addressed with DHS or local ICE counsel. Any issues arising from a particular pending case should be raised with the assigned IJ.

- b. Please provide an update on what progress has been made on implementing electronic filing with the immigration courts and electronic service of documents.

EOIR RESPONSE: EOIR strives to achieve its goal of providing electronic filing and electronic service of process. EOIR recognizes the importance of these objectives. However, there is no definitive date or deadline by which these objectives will be achieved.

Increased Security Measures

6. Members report formal and informal changes to immigration court security measures that negatively impact respondents and the private bar. Among the courts that have bailiffs, attorneys report that the role of the bailiff seems to differ from court to court and courtroom to courtroom. AILA encourages EOIR to provide public notice of any significant changes to court personnel in the future to ensure attorneys and respondents are aware of new procedures and attorneys can properly advise clients on what to expect during an immigration court hearing. This is particularly important for vulnerable populations such as asylum seekers and children. Please describe any instructions and/or protocol that has EOIR provided the bailiffs and immigration court personnel (including judges) regarding the role of the bailiffs in the courtroom.

EOIR RESPONSE: In an effort to enhance security protocols, EOIR has contracted with the Federal Protection Services for the non-detained courts. These individuals are primarily located at the points of entry. EOIR anticipates that Federal Protection Services will be located inside more courtrooms in the future. Please notify your ACIJ if any issues arise related to these officers.

7. Although the issuance of [EOIR Security Directive 01-2015: Public Use of Electronic Devices in EOIR](#)⁵ (2015 EOIR Security Directive) states that attorneys and representatives of record are permitted to use electronic devices in EOIR space, members report that bailiffs and security guards have grown more restrictive regarding attorney use of electronic devices. in

⁴ See Chapter 3.2, "Method of Service," available at https://www.justice.gov/sites/default/files/pages/attachments/2016/02/04/practice_manual_-_02-08-2016_update.pdf#page=44.

⁵ See EOIR Security Directive 01-2015: Public Use of Electronic Devices in EOIR Space, AILA Doc. No. 15082102, available at <http://www.aila.org/infonet/eoir-security-directive-use-of-electronic-devices>.

violation of the security directive. For example, members have reported that bailiffs and security guards regularly order attorneys to turn off their cell phones when they are conducting business-related activities both in and outside of the courtroom. Attorneys increasingly maintain electronic files, and research on laptops, iPads, even phones. This is consistent with the Administration's goals of environmental sustainability, and helps increase courtroom efficiencies. AILA requests that EOIR remind security personnel that attorneys are allowed to discretely utilize electronic devices in all areas, including both the courtroom and the common areas.

EOIR RESPONSE: As noted, there is a security directive addressing this issue. EOIR is also finalizing a poster to be placed in all courtrooms related to this directive that will plainly state electronics may only be used for clear and immediate business purposes. EOIR knows that different courts may be interpreting "business purpose" in different ways and asks for AILA's patience with this until the posters are released. If attorneys have concerns related to a specific court and an attorney's inability to use technology, please contact EOIR or the ACIJ. EOIR does not want to restrict an attorney's ability to use technology for a business purpose.

Docketing Practices Related to EOIR Priority Cases

8. On February 3, 2016, EOIR issued a [memorandum](#)⁶ on revised docketing practices relating to previously designated priority cases. According to the memorandum, EOIR executes a "monthly reconciliation program" with DHS to reflect those who are "actually enrolled in the ATD program." The memorandum does not provide for any consultation with respondents or counsel. Other than the scheduling of the initial master calendar hearing, there is also no other specific guidance as to how IJs should treat priority cases, other than the reaffirmation that immigration judges possess discretion to continue cases for good cause.
 - a. Please clarify how these revised docketing practices are intended to be applied by local immigration courts.

EOIR RESPONSE: The February 3, 2016 memo needs to be read in conjunction with the March 24, 2016, memo. The application of these revised docketing practices in local immigration courts are described in both memoranda.

- b. What is the immigration courts' procedure for notifying respondents of "de-prioritization?"

EOIR RESPONSE: There is no procedure to notify respondents if a case will be taken out of the priority docket or if one will be considered a priority case. If a case will no longer be considered a priority, the respondent will then receive a new hearing notice reflecting the new date or will be notified when respondent appears in court. Any questions should be addressed with DHS.

⁶ EOIR Revises Docketing Practices Related to Certain Priority Cases, AILA Doc No. 16020406, *available at* <http://www.aila.org/infonet/eoir-released-memo-revised-docketing-practices>.

- c. Please describe EOIR's "monthly reconciliation program" with DHS.

EOIR RESPONSE: Since February 2016, EOIR has been working with DHS to reconcile data. This information for all cases will be more accurate in months to come and the new numbers should reflect the actual category of cases (priority/non-priority). EOIR's communication with DHS is to verify whether cases filed AWC/ATD involved adult respondents. All cases with AWC/ATD remained a priority. Cases not part of ATD were removed as a priority.

- d. AILA has received reports that DHS is providing immigration courts with a list of "de-prioritized" respondents. To whom should respondents direct an inquiry about cases that are erroneously prioritized or de-prioritized?

EOIR RESPONSE: No official list exists for respondents to check which cases are designated a priority and which cases are not. EOIR referenced the possibility of a list on the date of hearings. However, attorneys should address DHS as to priority classification.

EOIR OPPM 16-01: Filing Applications for Asylum

9. AILA commends EOIR for issuing its new memorandum on September 14, 2016, [Operating Policies and Procedures Memorandum \(OPPM\) 16-01: Filing Applications for Asylum](#).⁷ This memorandum announced that all Form I-589 applications may be filed at the immigration court window or by mail, for purposes of fulfilling the one-year filing deadline and the "asylum clock." This will allow many individuals to timely file their asylum applications pursuant to the statutory deadline. Please clarify how the new OPPM will affect Form I-589 applications previously lodged, but not yet filed prior to this new procedure coming into effect. Specifically, will attorneys now be expected to also file their I-589 application prior to the master calendar hearing or has their previously lodged I-589 application satisfied the one-year filing deadline?

EOIR RESPONSE: EOIR did not answer this question due to pending litigation.

Cap-Subject Cancellation of Removal Cases

10. Members continue to report practical problems for respondents who have cap-subject cancellation cases, where a decision has been reserved but no formal notice has been provided by the court. In April 2016, AILA informed EOIR that some Respondents were having difficulty renewing employment authorization in the absence of a written notice from the Court that states the proceedings remain pending. Additionally, some cancellation matters may be denied due to the aging-out of children or the terminal illness of the qualifying relative. EOIR previously stated that it would review this issue discuss with its ACIJs and USCIS.

⁷ EOIR OPPM 16-01: Filing Applications for Asylum, AILA Doc. No. 16091500, available at <http://www.aila.org/infonet/eoir-oppm-16-01-filing-applications-for-asylum>.

- a. How can respondents properly document the pendency of their cases for USCIS? Has EOIR discussed this issued with USCIS?

EOIR RESPONSE: EOIR has been in contact with USCIS regarding this interagency problem. USCIS stated that its adjudicators would look at the supporting documentation first and then call the EOIR automated case processing information line. USCIS noted the addition of many new officers in late spring 2016 likely contributed to an increase in Requests for Additional Evidence (RFE). EOIR believes the problem is now resolved. However, attorneys should bring the issue to [AILA's EOIR Liaison Committee](#) if the issue persists.

- b. Can EOIR provide guidance as to how courts should uniformly address expedite requests based on special humanitarian considerations?

EOIR RESPONSE: The Office of the Chief Immigration Judge will be issuing a new OPPM regarding the handling of cancellation/suspension cases.

11. EOIR [OPPM 12-01](#) states the procedures for applications for suspension of deportation/cancellation of removal in non-detained cases when numbers are no longer available in a fiscal year.⁸ Cases in which decisions are reserved pending the availability of a number are placed in a queue according to the date and time of the decision.

- a. Please provide an update on the number of cancellation of removal cases awaiting decision.

EOIR RESPONSE: As of November 2016, 40,895 cancellation and suspension cases are awaiting a decision.

- b. Please describe/explain how EOIR is currently processing the queue.

EOIR RESPONSE: The Office of the Chief Immigration Judge will be issuing a new OPPM regarding the handling of cancellation/suspension cases.

Staffing at the Board of Immigration Appeals (BIA)

12. On June 3, 2015, the Department of Justice (DOJ) issued an [interim rule](#), expanding the overall size of the Board of Immigration Appeals (BIA) from 15 to 17 permanent board members.⁹ In February of 2016, Attorney General Loretta Lynch [appointed](#) three new Members, increasing the number of Board Members to 15.¹⁰ As of April 16, 2016, four temporary Board Members were authorized to serve for a term not to exceed six months.¹¹

⁸ AILA EOIR/OCAHO Liaison Meeting Minutes (10/22/15), Q14, AILA Doc. No. 15122107, available at <http://www.aila.org/infonet/eoir-ocaho-liaison-meeting-minutes-10-22-15>.

⁹ 80 FR 31461 (June 3, 2016), available at <https://www.federalregister.gov/documents/2015/06/03/2015-13459/expanding-the-size-of-the-board-of-immigration-appeals>.

¹⁰ See https://www.justice.gov/eoir/AG_Appoints_Three_New_Board_Members_to_AGO_02262016.

¹¹ See 8 CFR §1003.1(a)(4).

- a. Please provide any updates on the hiring of any additional permanent board members or the designation of additional temporary board members.

EOIR RESPONSE: There are currently 17 permanent judges. 2 of the 17 judges are in the process of retiring. EOIR is in process of hiring 2 additional board members to fill the vacancies.

- b. In light of the increasing case backlog at the Board, how are temporary Board Members being utilized?

EOIR RESPONSE: There are 3 temporary board members. The duties of the temporary members include the adjudication of assigned cases but they do not vote.

- c. Have there been situations where temporary board members have remained in place past the required six months? If so, pursuant to what authority is EOIR reappointing or extending the terms of temporary board members?

EOIR RESPONSE: The duties of the temporary board members are assigned by regulation. The assignments of the temporary board members are six-month terms, however, they can be appointed for additional six-month terms.

BIA Processing Times

13. How much of an impact do the BIA case backlog and current staffing levels have on the timing of the Board's issuance of precedent decisions and the scheduling of oral arguments?

EOIR RESPONSE: The Board is careful which cases it publishes. Additionally, the Board makes the decision as to which cases it will take up for oral arguments but the case load is not impacted by this.

14. Several AILA members report delays in the adjudication of BIA appeals for detained individuals. What is the average processing time for the Board to adjudicate detained appeals?

EOIR RESPONSE: Processing times vary case-by-case. The timeframe for appeals on detained cases is on average 100 days. Adjudication of appeals on non-detained cases is averaging around 430 days.

Implementation of "Phase I Guidance" for Mentally Incompetent Respondents

15. In 2013, EOIR released its final [Phase I Guidance](#) outlining EOIR's nationwide plan to provide protections to detained, unrepresented aliens who may be mentally incompetent to represent themselves.¹² The Phase I Guidance states that EOIR will provide a qualified legal

¹² See DOJ/DHS Announce Safeguards for Immigration Detainees with Serious Mental Conditions, AILA Doc. No. 13042253 (posted 4/22/13), available at <http://www.aila.org/infonet/doj-dhs-safeguards-imm-detainees-special->

representative to any detained, unrepresented alien in a removal or custody redetermination proceeding who is found to be incompetent to represent him or herself.

During AILA's liaison [meeting](#) with EOIR on December 12, 2013, EOIR indicated that it had initiated training for IJs on the issues addressed in the Phase I Guidance and planned to continue this training for IJs on a rolling basis in 2014.¹³ EOIR explained that IJs would not have the authority to implement the Phase I Guidance until after they attended training, and received notification from EOIR that they are authorized to do so.¹⁴

- a. Please provide any updates on the implementation of this policy and provide a list of locations participating in this program.

EOIR RESPONSE: See response to 15.b.

- b. During AILA's Liaison [meeting](#) in October 2014, EOIR explained that qualified representatives who participate in the National Qualified Representatives Program (NQRP) are selected by the Vera Institute of Justice, a GSA contractor who has contracts with NGOs and a few law firms.¹⁵ Have there been any updates regarding the administration of this program?

EOIR RESPONSE: EOIR is to implement the program in all required jurisdictions and is awaiting final guidelines for full implementation. EOIR is in the process of hiring more doctors and anticipate that the program will be in full effect by the end of 2017.

- c. Please explain the mechanism through which interested attorneys can be designed as a qualified representative.

EOIR RESPONSE: All qualified representatives are qualified through a contract with the Vera Institute of Justice.

- d. AILA members report that individual Immigration Courts utilize different methods, including the use of various nonprofit organizations, to select attorneys. What guidance has EOIR provided to immigration judges regarding this appointment process?

EOIR RESPONSE: IJ's are not involved with the selection of qualified representatives.

[needs](#); ICE Memo on Safeguards for Immigration Detainees with Serious Mental Conditions, AILA Doc. No. 13042259 (posted 4/22/13), available at <http://www.aila.org/infonet/ice-safeguards-imm-detainees-serious-medical>; EOIR Publishes "Phase I Guidance" Regarding Protections for Detained, Unrepresented Aliens Who May Be Mentally Incompetent, AILA Doc. No. 13123160 (posted 1/2/14), available at <http://www.aila.org/infonet/eoir-phase-i-guidance-protections-for-detained>.

¹³ See AILA/EOIR Liaison Meeting Minutes (12/12/13), AILA Doc. No. 14031743, available at <http://www.aila.org/infonet/eoir-liaison-minutes-12-12-13>.

¹⁴ See AILA/EOIR Liaison Meeting Minutes (4/10/14), AILA Doc. No. 14082243, available at <http://www.aila.org/infonet/eoir-liaison-minutes-04-10-14>.

¹⁵ See AILA/EOIR Liaison Meeting Minutes (10/23/14), AILA Doc. No. 15022663, available at <http://www.aila.org/infonet/eoir-ocaho-liaison-minutes-10-23-14>.

- e. In how many cases has EOIR approved the use of qualified representatives to date? In how many cases have qualified representatives been assigned to these cases to date? Please provide those numbers by detainee location.

EOIR RESPONSE: As of November, 2016 EOIR has approved the use of a qualified representative in 703 cases.

- f. What is the mechanism in place for compensating the qualified representative for legal representation?

EOIR RESPONSE: EOIR contracts with the Vera Institute of Justice. Vera subcontracts qualified representatives.

Recognition & Accreditation (R&A)

16. On October 1, 2015, EOIR published the [proposed rule](#) titled, “Recognition of Organizations and Accreditation of Non-Attorney Representatives,” transferring recognition and accreditation (R&A) responsibilities from the BIA to the Office of Legal Access Programs (OLAP).¹⁶ The purpose of the transfer is to promote the effective and efficient administration of justice before DHS and EOIR by increasing the availability of competent non-lawyer representation for underserved populations. AILA submitted [comments](#) in response to the proposed rule on November 30, 2015.¹⁷

- a. According to [regulations.gov](#), the proposed rule is in the final rule stage of review. Please provide a current estimated timeframe for when EOIR will publish the final rule.

EOIR RESPONSE: The final regulations go into effect on January 1, 2017. The final regulations relating to R & A can be found at <http://www.aila.org/infonet/copy-of-proposed-rule-on-recognition-of-organization>.

- b. How is OLAP preparing for the transfer of the R&A program?

EOIR RESPONSE: EOIR is vetting staff and looking for space to accommodate the new program.

- c. Does OLAP intend to hire additional staff in order to handle the responsibilities of the R&A program?

RESPONSE: Training is very important and EOIR intends to hire additional staff to carry out the transfer of responsibility and implement the program under the new regulations. Current staff will also be reassigned.

¹⁶ Proposed Rule, “Recognition of Organizations and Accreditation of Non-Attorney Representatives,” (Oct. 1, 2015) AILA Doc. No. 15091706, available at <http://www.aila.org/infonet/copy-of-proposed-rule-on-recognition-of-organizati>.

¹⁷ AILA Comments on EOIR’s Proposed Rule on Recognition of Organizations and Accreditation of Non-Attorney Representatives, (Nov. 30, 2015), AILA Doc. No. 15120204, available at <http://www.aila.org/infonet/aila-comments-eoir-proposed-rule-11-30-15>.