



**STATEMENT**  
of  
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on behalf of the  
**AMERICAN BAR ASSOCIATION**  
for a briefing before the  
**UNITED STATES COMMISSION ON CIVIL RIGHTS**  
on  
**“THE STATE OF CIVIL RIGHTS IN  
IMMIGRATION DETENTION”**

January 30, 2015

On behalf of the American Bar Association, I would like to thank members of the Commission for the opportunity to share our views on several important issues as a part of this briefing on “The State of Civil Rights in Immigration Detention.” My name is Karen Grisez and I currently serve as Special Advisor to, and formerly was the Chair of, the American Bar Association’s Commission on Immigration. With the recent influx of families and unaccompanied children from Central America and the renewed emphasis on family detention, along with historically high rates of immigration detention in general, there is a serious need to evaluate the United States’ system of immigration detention and the deleterious impacts it has on individuals and families.

With nearly 400,000 members, the American Bar Association (ABA) is one of the largest voluntary professional membership organizations in the world. The ABA Commission on Immigration coordinates the Association’s efforts to help ensure fair treatment and full due process rights for immigrants and refugees within the United States. The Commission advocates for modifications in immigration law and policy; provides continuing education to the legal community, judges, and the public; and develops and operates pro bono legal representation programs that encourage volunteer lawyers to provide high quality representation for immigrants, with a special emphasis on the needs of the most vulnerable immigrant and refugee populations.

The Department of Homeland Security’s Immigration and Customs Enforcement (ICE) is one of the nation’s largest law enforcement agencies. ICE annually detains over 400,000 foreign nationals in facilities throughout the United States at a cost of approximately \$2 billion per year. Of the more than 33,000 daily detention beds available to ICE, over half are rented from private prisons and state and local jails. In recent years, immigration detainees have represented the fastest growing segment of the U.S. incarcerated population and many individuals are detained for months or even years awaiting the outcome of their immigration cases. The loss of liberty has punitive effects and works to undercut rights on many levels, including the right to counsel. The impact of detention is particularly negative for certain vulnerable groups, such as families enduring indefinite separation, asylum-seekers and victims of crime suffering from trauma and fearful of government authority, and those with physical or mental conditions that may be exacerbated by the lack of adequate medical care.

The significant obstacles to obtaining legal representation faced by immigrants in detention, and the frequent reports we receive about serious deficiencies in conditions of detention, are key reasons why the ABA opposes the detention of noncitizens in removal proceedings except in extraordinary circumstances, such as when the individual presents a threat to national security or public safety, or presents a substantial flight risk. The ABA instead supports the use of humane alternatives to detention, for individuals who would otherwise be detained, that are the least restrictive necessary to ensure appearance in court. For those that are detained, it is essential to provide uniform and consistent standards to ensure that the facilities housing immigration detainees are safe and humane and protect all detainees’ statutory and constitutional rights.

### **Implementation and Enforcement of Robust National Detention Standards**

During the late 1990’s, the ABA, along with several other organizations, engaged in a lengthy negotiation process with the then-Immigration and Naturalization Service to develop what are now called the 2000 National Detention Standards. The Standards, which originally took effect in January 2001, encompass a diverse range of issues, including access to legal services. The ABA was instrumental in developing the “legal access” standards, which address law libraries and legal materials, legal rights presentations, telephone access, visitation and correspondence. Since that time there have been two revisions of the

Standards, now known as the 2008 and 2011 Performance Based National Detention Standards, which have increased protections based on the experience of detainees and ICE as it oversees detention facilities. While we commend ICE's efforts to improve the Standards over time, there has been significant delay in transitioning facilities to the most recent and more protective Standards. In fact, as of January 2014, the improved 2011 Standards applied to only 25 facilities housing about 54 percent of ICE's average daily population.<sup>1</sup>

As a key stakeholder in the development of the Standards, the ABA is committed to their full and effective implementation. To help facilitate that goal, the Commission on Immigration established the Detention Standards Implementation Initiative. Through this project, the Commission recruits and trains lawyers to participate on a pro bono basis in special delegations to tour selected detention facilities, and report their observations on the facilities' implementation of the Standards, with an emphasis on the legal access standards. In addition to making first-hand observations through the tour of the facility, delegation members also examine materials such as detainee handbooks and interview both facility staff members and detainees. The delegation reports are then presented to the ICE Field Office and the findings discussed in regular meetings between ICE and the ABA. Since 2002 there have been more than 110 site visits.

Apart from the Detention Standards Implementation Initiative, the ABA regularly receives information on detention issues through reports from our own pro bono projects in Harlingen, Texas and San Diego, California, as well as from individual attorneys representing detained immigrants, national and local immigrant advocacy groups, and direct letters and phone calls from detained immigrants around the country. For more than ten years, the ABA has operated a telephone hotline through which detainees in every facility in the country can make free calls to seek information on their legal rights or their case, and to report complaints about violations of the detention standards or the manner in which they were treated. The detainee hotline in our office receives calls from three to four hundred unique callers each month, with a significant number of those calls raising a question of violation of the standards.

When a complaint is received by the ABA, we simultaneously file it with the appropriate Field Office Director, with a copy to the staff responsible for implementation of the standards at ICE Headquarters, and when appropriate, to the DHS Office for Civil Rights and Civil Liberties. Representative examples of the types of complaints our office has forwarded are attached to the end of this statement, but they include: not allowing extra time in the law library when a legal brief deadline is approaching; not allowing a detainee to call a court where they have a case pending; refusing to take telephone messages asking detainees to call their attorney to discuss their case; placement in disciplinary segregation without the required hearing; collective punishment of an entire housing unit due to the actions of a few individuals; assaults by guards; failure to make religious accommodations; complaints of delayed or inadequate medical treatment.

In the more than 14 years since the original ICE detention standards went into effect, it has become clear that the lack of a legal enforcement mechanism has seriously undermined their effectiveness. As evidenced by the continuing complaints that the ABA receives from detainees and other sources, it appears that ICE's annual inspection process alone is not an adequate mechanism for ensuring full detention standards compliance by all facilities.

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<sup>1</sup> Government Accountability Office, "Additional Actions Needed to Strengthen Management and Oversight of Facility Costs and Standards," GAO15-153, October 2014. See: <http://www.gao.gov/assets/670/666467.pdf>

## **Detention and Due Process - Access to Legal Representation**

Aside from our strong interest in ensuring fair treatment and humane conditions for those in immigration detention, the ABA supports full implementation and enforcement of the Detention Standards because they have a significant impact on whether detainees are able to access legal representation.

A core principle of the U.S. legal system is the right to counsel, particularly in complex proceedings that have significant consequences. Meaningful access to legal representation for persons in immigration proceedings is particularly important. The consequences of removal can be severe, resulting in separation from family members and communities, or violence and even death for those fleeing persecution. Yet, immigrants have no right to appointed counsel and must either try to find lawyers, which is particularly difficult for those in detention, or represent themselves. Legal assistance is critical for a variety of reasons, including a lack of understanding of our complex immigration laws and procedures due to cultural, linguistic, or educational barriers. Statistics show that asylum seekers and others who have legal representation are significantly more likely to succeed in their immigration cases. Representation is therefore crucial – the outcome of an immigration case should not be determined by a person’s ability to secure counsel, but on the merits of his or her claim.

About 50 percent of noncitizens in immigration proceedings lack legal counsel; the percentage rises to more than 80 percent for those in detention. The reasons vary, but for many the cost of retaining counsel presents an insurmountable obstacle, and free or low-cost legal services simply may not be available to them. For those in detention, remote facility locations and communication barriers may impede such access. Under U.S. law, noncitizens have a right to counsel in removal proceedings, but at “no expense to the government.” This provision does not necessarily preclude government-funded counsel; it merely provides that counsel need not be provided as a matter of right.

Beyond the obvious interest of affected noncitizens, legal representation also benefits the government and the administration of justice through improved appearance rates in court, fewer requests for continuances, and shorter periods in detention at significant financial savings. It also deters frivolous claims. Above all, increased representation serves the government’s interest in seeing that its decisions in these consequential cases turn on U.S. legal standards and merit, and not on an individual’s ability to secure and afford paid counsel.

One of the ways that detained immigrants can be provided with relevant legal information is through Legal Orientation Programs (LOP). The federal LOP program is administered by the Department of Justice’s Executive Office for Immigration Review, which contracts with nonprofit organizations to provide LOP services at 30 detention facilities around the country. Under this program, an attorney or paralegal meets with the detainees who are scheduled for immigration court hearings to educate them on the law and to explain the removal process. Based on this orientation, the detainee can decide whether he or she potentially qualifies for relief from removal. While not a substitute for legal representation, the LOP program provides critical information and services to detainees; yet the majority of immigration detainees don’t have access to the program.

According to the Department of Justice, LOPs improve the administration of justice and save the government money by expediting case completions and leading detainees to spend less time in detention. In fact, reports have shown that cases for persons participating in LOPs move an average of 12 days faster through the immigration court system. Since the inception of the program, the ABA has

provided LOPs at the Port Isabel Detention Center in South Texas and can unequivocally attest to the benefits that these presentations bring to detainees, the facility, and the immigration court system. Legal orientation presentations facilitate noncitizens' access to justice, improve immigration court efficiency, and save government resources. To maximize these benefits, the Legal Orientation Program should be expanded nationwide to all detained persons in removal proceedings.

### **Transitioning to a Civil Immigration Detention System**

Under the law, removal proceedings are civil in nature and the detention of immigrants serves to ensure their appearance at court and to effectuate their removal, not to punish them. Despite ICE's civil legal authority, the U.S. immigration detention system has traditionally held detainees in jails and in jail-like facilities that are administered according to American Correctional Association (ACA)-based standards for persons awaiting criminal trials.

In recent years ICE has initiated a process to reform its detention system and has developed civil detention principles — distinct from standards — which have been incorporated into its statements of objectives used to solicit proposals for select new detention facilities. However, ICE has not adopted or crafted detention standards that would require a transition to a civil immigration detention system. In 2012, the ABA developed and adopted Civil Immigration Detention Standards (Civil Standards)<sup>2</sup> in order to promote access to justice and fair and humane treatment of persons in the immigration detention system. The Civil Standards include a set of guiding principles that reflect the conviction that civil detention facilities and programs should approximate normal living conditions to the extent possible, while ensuring that residents appear at court hearings, can be removed (if so ordered) from the country, and do not present a danger to themselves or to others. The principles provide: 1) that any conditions placed on noncitizens to ensure court appearances or to effect removal should be the least restrictive necessary to further these goals; 2) describe a system that would offer a continuum of strategies, programs and alternatives to meet these goals, up to and including detention; 3) provide that residents should not be held in jails or jail-like settings; 4) highlight the importance of access to legal counsel, materials and courts; and 5) emphasize the need for rigorous oversight by DHS/ICE to ensure compliance with the standards.

We urge additional measures to transition the immigration detention system to a truly civil system and, in the meantime, to provide full implementation and enforcement of the 2011 Performance-Based National Detention Standards at all facilities that currently hold immigration detainees.

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<sup>2</sup> Available at [http://www.americanbar.org/groups/public\\_services/immigration/civilimmidetstandards.html](http://www.americanbar.org/groups/public_services/immigration/civilimmidetstandards.html)

**Attachment:**

The following is a representative selection of the types of complaints the ABA receives in our office from detainees regarding conditions in immigration detention facilities:

**Telephone:**

- Each facility provides a pre-programmed calling platform on which detainees are able to make free calls to entities identified in the detention standards including, the immigration courts, federal and state courts where the detainee has a case pending, the Executive Office for Immigration Review, consular offices, government offices to obtain documentation, the Office of the Inspector General, Department of Justice, etc.
- When these preprogrammed numbers are not working facilities may refuse to accommodate the calls as required by the standards.
- Denial of telephone access while in segregation.
- Refusing to take and deliver telephone messages from lawyers asking the detainee to return the call to discuss an aspect of their case. When the facility will not pass the message to the detainee it imposes an undue burden on lawyers who must then drive to the detention center to ask a simple question.

**Law library:**

- Failing to provide extra time in the law library for detainees who must meet a briefing deadline.
- Failing to provide the required five hours per week in the law library.
- Persistent problems with computers, printers, and copiers in the law library making it difficult to send out briefs.

**Discipline and the use of Segregation**

- Being placed in disciplinary segregation without the disciplinary hearing required by the Standards.
- Locking down an entire housing unit because of a problem caused by a few individuals.
- Assaults by guards both in the detention centers and by agents attempting to force a detainee on to an airplane have been reported.
- Denial of access to the law library, telephones, religious services or recreation to detainees in disciplinary segregation.

**Religion**

- Failing to make religious accommodations if they conflict with standard operating procedures of a facility such as allowing Muslims to congregate for Friday prayers.
- Retaliation for filing religious grievances.
- Refusing to allow religious headwear to be worn throughout the facility as required by the Standards.
- Detainees other than those of Christian or Jewish faiths have reported difficulty in exercising the religious activities of their faith.

**Medical**

- Disabled detainees have reported lack of accommodation. Two blind detainees were provided with no accommodation and had to be cared for by other detainees; however, one blind detainee in California was provided access to the library with accommodations.
- Failure to provide a wheelchair to a detainee who could not walk.
- Detainees who are in the process of having a medical condition diagnosed, and who have had a treatment protocol established, have reported being told they must start the process all over when they are transferred.
- Failure to transfer the complete medical record with the detainee, creating a lag in on-going treatments which one detainee reported lead to the loss of sight in one eye.

**Transfers**

- Detainee transfers have been reported to result in loss of legal paperwork, the money deposited by their lawyers into an account for telephone calls being no longer accessible, and the loss of personal property
- Frequent transfers between detention facilities within the same ICE Field Office area of responsibility which prove disruptive to the detainee and to legal representation.