

AMERICAN BAR ASSOCIATION
COMMISSION ON IMMIGRATION
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED, that the American Bar Association supports the issuance of federal regulations that
2 codify the Department of Homeland Security Immigration and Customs Enforcement (ICE)
3 National Detention Standards as in effect in October 2007 (the “Detention Standards”).
4

5 FURTHER RESOLVED, that the American Bar Association urges that:
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- 7 (a) The Detention Standards and any future standards that incorporate the improvements
8 set forth in this recommendation be applied and enforced at all facilities where
9 noncitizens are detained for immigration purposes, including ICE-operated facilities,
10 contract detention facilities, state, county and local jails, Bureau of Prisons facilities;
11 and other facilities; and
- 12 (b) To the extent that immigrants are subject to detention, individuals and families be
13 detained in the least restrictive setting and not be housed with criminal inmates.

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15 FURTHER RESOLVED, that the American Bar Association supports improvement, periodic
16 review, and increased oversight of the Detention Standards to ensure that detained noncitizens
17 and their families are treated humanely and have effective access to counsel and to the legal
18 process.
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20 FURTHER RESOLVED, that improvements to the Detention Standards should include the
21 following provisions:
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- 23 (a) Independent observers, including nongovernmental organizations, shall be permitted
24 to visit and tour all facilities where ICE detainees are held, and meet privately with
25 detainees, to monitor compliance with the detention standards. These organizations
26 should be able to issue public reports of the information gathered during their visits.
- 27 (b) Legal materials shall be provided in hard copy. If materials are provided on CD-ROM
28 or in another computer format, training must be provided and personnel must be
29 available to assist detainees with legal research.
- 30 (c) Family and friends of immigration detainees shall be permitted to have contact visits
31 with detainees.

- 32 (d) Reasonable and equitable access to telephones shall be provided at commercially
33 competitive toll charges from which the institution does not, directly or indirectly,
34 derive a profit or recoup overhead for phone equipment costs.
- 35 (e) Detainees shall not be required to wait before they are declared “indigent” and
36 eligible for free stamps, envelopes, and other writing supplies, as well as eligible to
37 make free legal telephone calls, calls upon transfer, and calls in case of emergency.
- 38 (f) Detainees shall be provided with a continuum of prompt, quality medical and dental
39 care, which shall include medically necessary treatment and preventive services at no
40 cost to the detainee.
- 41 (g) Grievance procedures shall include provisions for filing a grievance with ICE officers
42 directly, without first going through a facility’s grievance process. In addition, contact
43 information shall be provided to ensure that detained noncitizens are able to contact
44 government offices, including the DHS Office of the Inspector General, DHS Office
45 for Civil Rights and Civil Liberties, DHS Joint Intake Center, and DHS Office of
46 Internal Audit.
- 47 (h) Involuntary transfer of immigration detainees to remote facilities shall be prohibited
48 if such transfer would impede an existing attorney-client relationship, or impede case
49 preparation and defense or financing of such preparation and defense due to
50 remoteness from legal counsel, family members, health care providers, other
51 community support and material witnesses and/or evidence, or if appropriate counsel
52 is not available near the proposed transfer site. Irrespective of whether the individual
53 has already obtained counsel, detained noncitizens shall not be transferred to remote
54 locations where legal assistance generally is not available for immigration matters.

55

56 FURTHER RESOLVED, that the American Bar Association urges that the following actions be
57 taken in order to ensure appropriate implementation of the detention standards:

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- 59 (a) A DHS oversight office should review all detention facility inspection reports
60 produced by ICE, and prepare reports of their reviews at least twice each year, which
61 should promptly be released to the public; and
- 62 (b) All individuals who supervise, are responsible for, or otherwise come into regular
63 contact with immigration detainees, including ICE officers, contractors, and state,
64 local, and federal corrections and related personnel, should receive in-depth training
65 on the detention standards, as well as periodic training updates.

REPORT

I. Introduction

The ABA is committed to defending liberty and advancing the rule of law, and opposes detention of noncitizens except in extraordinary circumstances.¹ The ABA favors humane alternatives to detention that are the least restrictive necessary to ensure that noncitizens appear in their immigration proceedings, including pre-hearing release and bond. However, we recognize that detention of noncitizens is likely to continue, and have worked for many years to ensure that foreign nationals in detention in the United States are treated humanely. For those individuals and families in immigration detention, the ABA supports the issuance of federal regulations codifying the ICE National Detention Standards as in effect in October 2007 (the “Detention Standards”), and supports improvement, periodic review, and increased oversight of the detention standards in order to ensure detained noncitizens and their families are treated humanely and have effective access to counsel and to the legal process. The ABA supports applying and enforcing the detention standards at all facilities where noncitizens are detained, including ICE-operated facilities; contract detention facilities; state, county, and local jails; Bureau of Prisons (BOP) facilities; and other facilities. Further, the ABA urges that to the extent that immigrants are subject to detention, individuals and families be detained in the least restrictive setting, and not be housed with criminal inmates. Finally, the ABA supports steps to ensure appropriate implementation of the detention standards, including DHS oversight and review of all inspection reports, with periodic reporting to the public, and in-depth training and updates for all individuals who supervise, are responsible for, or otherwise come into regular contact with immigration detainees.

II. The ABA Supports the Issuance of Regulations Codifying the ICE Detention Standards As In Effect in October 2007, and Urges that the Detention Standards be Applied and Enforced Wherever Noncitizens Are Detained

The ICE National Detention Standards are the result of a collaboration between the Department of Justice, the former INS, the ABA, and other organizations and advocates. The ABA met extensively with DOJ and INS officials over the course of several years and reviewed drafts of the detention standards before they were released and implemented. The majority of the standards were issued and signed on September 20, 2000, and there have been a few updates and standards added in 2002, 2003, and 2004.² The Detention Standards are ICE policy and procedures; they have not been codified into regulations. As a key stakeholder in developing the Standards, the ABA is committed to their full and effective implementation. The ABA launched the Detention Standards Implementation Initiative in a spirit of cooperation with ICE, to visit, tour, and report on observations of facilities across the country. To date, ninety-nine ABA delegations have visited sixty-three different facilities holding ICE detainees. The ABA Commission on Immigration (Commission) submits detailed, confidential reports on these visits

¹ Such extraordinary circumstances may include a specific determination that the individual presents a threat to national security, presents a threat to public safety, presents a threat to another person or persons, or presents a substantial flight risk.

² The ICE National Detention Standards are available in the ICE Detention Operations Manual (DOM) at <http://www.ice.gov/partners/dro/opsmanual/index.htm>. This Recommendation refers to the standards that are available in the DOM and are in effect as of October 2007; the ABA has not reviewed any DHS or ICE detention standards or revisions that may be issued in the future.

to the ICE DRO Detention Standards Compliance Unit (DSCU), and meets regularly with the DSCU to discuss the report findings. In addition, the Commission corresponds with noncitizens in detention across the United States, and solicits information from them regarding legal access conditions of detention. Finally, the Commission assists the operation of pro bono programs that represent noncitizens in detention and learns of problems in immigration detention from these programs, which include the South Texas Pro Bono Asylum Representation Project (ProBAR) in Harlingen, Texas, and Volunteer Advocates for Immigrant Justice (VAIJ) in Seattle, Washington.

Despite the existence of the Detention Standards, and the efforts of ICE, UNHCR, the ABA, and others to oversee their implementation, the ABA is well aware that immigration detainees continue to struggle with lack of access to representation and legal materials and other issues. In a letter to DHS Secretary Michael Chertoff in January 2007, ABA President Karen Mathis documented complaints the ABA had received from immigration detainees. The letter identified the following concerns: (1) telephone calls, including legal calls, are prohibitively expensive, and technology for pre-programmed, free calls to consulates and pro bono legal service providers is confusing or does not work;³ (2) mail does not arrive or is delayed, legal mail (“special correspondence”) is opened outside the presence of detainees, and outgoing legal mail is inspected; (3) law libraries have insufficient or outdated materials, or detainees do not have access to law libraries;⁴ (4) detainees are housed with criminals and are treated like criminals; (5) information about complaint processes and grievance procedures is not available, and grievance procedures are not followed (including complaints not being answered, and detainees being threatened with losing privileges or being reclassified for filing grievances); (6) medical and dental complaints, including medication not being received in a timely fashion, delayed treatment, pain relievers offered in response to any complaint regardless of its nature; (7) unsanitary conditions, including rodents in housing areas; (8) insufficient food, or food not meeting medical or religious diet needs; (9) facility staff problems, including verbal and physical abuse, discriminatory comments based on race, nationality, or sexual orientation, lack of sensitivity to language needs of non-native speakers, lack of awareness of or sensitivity to trauma experienced by asylum seekers, and staff unwillingness to break up fights; and (10) abuse by inmates or other detainees.⁵ The concerns identified by the ABA very closely resemble issues raised in the 2006 report of the DHS Office of the Inspector General (OIG): “Treatment of Immigration Detainees Housed at Immigration and Customs Enforcement Facilities.”⁶ Clearly,

³ In a July 2007 report, the Government Accountability Office found “pervasive” violations of the telephone access standard at immigration detention facilities, and documented underreporting of these violations by the DHS personnel who monitor compliance with the standards. See Government Accountability Office, “Alien Detention Standards: Telephone Access Problems Were Pervasive at Detention Facilities; Other Deficiencies Did Not Show a Pattern of Noncompliance,” GAO-07-875 (July 2007), at 10-17, 33, available at <http://www.gao.gov/new.items/d07875.pdf> (hereinafter GAO 2007 report).

⁴ These statements are consistent with the report of the United States Commission on International Religious Freedom (USCIRF) report, which indicated that not one of the 18 facilities the Commission visited contained all the materials (or updates) listed in DHS detention standards. See United States Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal* (2005) at 186 (hereinafter USCIRF report), available at http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/index.html.

⁵ ABA letter to DHS Secretary Michael Chertoff, dated January 31, 2007, available at http://www.abanet.org/publicserv/immigration/jan3107_ltrto_departofhomelandsecurity.pdf.

⁶ The OIG report, “Treatment of Immigration Detainees Housed at Immigration and Customs Enforcement Facilities” (OIG-07-01, Dec. 2006) (hereinafter OIG 2006 report, is available at http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_07-01_Dec06.pdf. For more detail regarding immigration detention

even six years after the initial Detention Standards were implemented, there are problems with their enforcement that must be addressed through promulgating regulations and through improved oversight and training.

In addition to problems with enforcement, there are many noncitizens who are held for long periods in immigration detention to whom the Detention Standards do not apply at all. The ABA supports applying and enforcing the Detention Standards, and any future standards that incorporate the improvements set forth in this recommendation, at all facilities where noncitizens are detained, including ICE-operated facilities; contract detention facilities; state, county, and local jails; Bureau of Prisons facilities; and other facilities. ICE does not apply or enforce the Detention Standards at Bureau of Prisons facilities, in spite of the fact that hundreds of immigration detainees are held in these facilities every day. This creates an egregious gap in implementation and enforcement of the Detention Standards. While these BOP and other facilities may be accredited by the American Correctional Association (ACA),⁷ the ACA standards were not designed for immigration detention, and do not include the detailed provisions for access to legal counsel and legal materials that are essential for noncitizens in detention.⁸ Unlike criminal inmates, immigration detainees are not entitled to free counsel. Their cases may move very quickly and be finalized before they have an opportunity to secure representation. In 2006, ICE detained over 283,000 people, 75% of whom were held for more than forty-four days.⁹ This is well over the entire length of time (thirty days) that is available for detainees to file an appeal of their immigration case. Without the access to legal visits, telephones, correspondence, legal materials, and group legal rights presentations that the Detention Standards were designed to ensure, individuals and families have little hope of being able to secure counsel or prepare their own cases. It is for this reason that it is essential that the standards apply at all facilities, including BOP facilities.¹⁰ Promulgating the existing Detention Standards into regulations that apply to all immigration detainees would help ensure that noncitizens have the effective legal access that the standards were designed to protect.

complaints, see *Orantes-Hernandez v. Gonzales*, 504 F.Supp.2d 825 (C.D. Cal. Jul. 26, 2007) (upholding nationwide injunction based on record documenting violations of provisions of the injunction concerning detention conditions problems including problems with access to law libraries and legal materials, telephone use, attorney visits, and other detention standards issues).

⁷ ICE Assistant Secretary Julie Myers has stated that the National Detention Standards “are consistent with industry standards such as those established and promoted by the American Correctional Association (ACA)” OIG 2006 report, Appendix C, Management Response to Draft.

⁸ In the ACA standards, the Access to Courts, Access to Counsel, and Access to Law Library are written in a total of five sentences that occupy a single page. The entire Access to Counsel standard reads: “Written policy, procedure, and practice ensure and facilitate inmate access to counsel and assist inmates in making confidential contact with attorneys and their authorized representatives; such contact includes, but is not limited to, telephone communications, uncensored correspondence, and visits.” American Correctional Association, *Standards for Adult Correctional Institutions* (4th ed., 2003), Section E, 4-4275. By contrast, the ICE National Detention Standards have three standards that detail the provisions compressed here: Visitation, Telephone Access, and Correspondence and Other Mail. These standards detail essential requirements that were included because access to legal assistance was so poor before the standards were implemented.

⁹ GAO 2007 report, Highlights and Appendix II: Alien Detention Population Statistics.

¹⁰ According to document the ABA received via a FOIA request, as of March 12, 2007, ICE detained 666 individuals at BOP facilities for 72 hours or more. If these individuals were housed elsewhere, the detention standards would apply to them.

III. The ABA Supports Using the Least Restrictive Detention Setting

The ABA urges that immigration detainees, who are civil detainees, should be housed in the least restrictive setting possible to the extent that they are subject to detention. The ABA opposes detention except in extraordinary circumstances, which may include a specific determination that the individual presents a threat to national security; presents a threat to public safety; presents a threat to another person or persons; or presents a substantial flight risk.¹¹ Existing standards should be modified and regulations promulgated in order to promote non-punitive, less restrictive facilities for immigration detainees and asylum seekers. Because ICE enters into agreements with county jails and other facilities to house immigration detainees, detainees are housed with criminal inmates and treated the same as inmates.¹² The concerns over mental and physical abuse, the ability for immigrant families to stay together, and the problems that arise when immigration detainees, including asylum seekers suffering from post-traumatic stress disorder, are treated as criminals, warrants serious attention to this issue.

IV. The ABA Supports Improvements to the Detention Standards

Based on its analysis of reports from attorneys, other advocates, and detainees, the ABA supports improvement, periodic review, and increased oversight of the Detention Standards in order to ensure noncitizens and their families are treated humanely and have effective access to counsel and to the legal process. Improvements should include the following provisions:

A. Independent Observer Tours of Detention Facilities

Independent observers, including nongovernmental organizations, shall be permitted to visit and tour all facilities where ICE detainees are held, and meet privately with detainees, to monitor compliance with the Detention Standards. These organizations should be able to issue public reports of the information gathered during their visits. Currently, nongovernmental organizations and advocates have difficulty gaining access to detention facilities, even though the Detention Standards envision NGO tours of facilities, and state that “[a]ll efforts will be made to accommodate NGO requests for facility tours in a timely manner.”¹³ Even if ICE may encourage a state or local jail to allow NGO visits, it does not require them to do so in order to house immigration detainees. The observations that NGOs have been able to make in facilities like the T. Don Hutto Family Residential Facility in Taylor, Texas, and the ability to publish a report regarding conditions there, have been crucial to improving detention conditions.¹⁴ Given ICE’s increasing reliance on detention, ICE should facilitate and encourage efforts by independent observers to ensure detention standards enforcement.

¹¹ Under these extraordinary circumstances, the decision to detain a noncitizen should be made only in a hearing that is subject to judicial review.

¹² Some individuals who are held in immigration detention have been convicted of crimes in the past, but they are not transferred to ICE custody until their criminal sentence, if any, has been served. ICE reports that 58 % of immigration detainees are “noncriminal.” GAO 2007 report at 48.

¹³ ICE Detention Operations Manual (DOM) Detainee Services Standard 17, Visitation, Section III.L.

¹⁴ See Women’s Commission for Refugee Women and Children and Lutheran Immigration and Refugee Service, *Locking Up Family Values: The Detention of Immigrant Families* (Feb. 2007), available at <http://www.womenscommission.org/pdf/famdeten.pdf>.

B. Legal Materials and Computer Assistance

Legal materials shall be provided to immigration detainees in hard copy in order to provide effective access to these materials. If materials are provided on CD-ROM or in another computer format, training must be provided and personnel must be available to assist detainees with legal research. Current ICE policy permits CD-ROMs to be used to fulfill the requirement that certain legal materials be provided to immigration detainees. However, the Detention Standards themselves do not contemplate use of CD-ROMs,¹⁵ and do not require appropriate training and assistance in order to make access to these materials meaningful.

C. Contact Visits with Family and Friends

Family and friends of immigration detainees shall be permitted to have contact visits with detainees. The Detention Standards defer to state and local jail practice when it comes to permitting contact visits for friends and family, stating simply that “[w]ritten procedures shall detail the limits and conditions of contact visits in facilities permitting them.”¹⁶ The lack of contact with loved ones can be devastating to noncitizens in detention, who are unable to touch or hug a spouse or child who comes to visit. The Detention Standards must be improved to adopt a less punitive stance toward immigration detention, which is civil in nature.¹⁷

D. Telephone Access Includes Reasonable Charges

Reasonable and equitable access to telephones shall be provided at commercially competitive toll charges from which the institution does not, directly or indirectly, derive a profit or recoup overhead for phone equipment costs. This requirement is essential for immigration detainees to obtain legal representation and to be able to communicate with their legal representatives. One of the most common complaints the ABA receives from noncitizen detainees is that telephone calls are prohibitively expensive. The Detention Standards require that facilities permit detainees to have “reasonable and equitable access to telephones,”¹⁸ but this has not prevented ICE from contracting with state, local, and other jails that charge exorbitant fees for phone cards. Detainees are required to use the jail’s preferred phone service and cards in order to make calls; they are not able to use less expensive calling cards available to the general public. The general public can readily make inexpensive phone calls for a reasonable annual fee (under \$50.00) and \$.05 per minute. By contrast, immigration detainees may be charged \$3.00 to \$5.00 for the first three minutes of a call, and \$1.00 per minute thereafter, so each fifteen-minute call to a lawyer or family member costs \$17.00. Without the ability to earn money in jail (though some may earn \$1.00 per day or so for work), immigration detainees are unable to afford telephone calls to seek counsel and legal advice. Although the standards provide for free calls to free legal services providers on a set list, if a detainee is unable to secure counsel from among those organizations he or she must pay to try to find another attorney. Detainees who are fortunate enough to have an attorney must still pay to discuss their case with their attorney; many

¹⁵ DOM Detainee Services Standard 1, Access to Legal Material, Section III.C (“The law library shall contain the materials listed in Attachment A. INS shall provide an initial set of these materials.”)

¹⁶ DOM Detainee Services Standard 17, Visitation, Section III.H.4.

¹⁷ Craig Haney, “Conditions of Confinement for Detained Asylum Seekers Subjected to Expedited Removal,” USCIRF report at 200. (“Broward detainees were regarded less as criminals and more as human beings whose past trauma and future transition into free society warranted caring, respectful treatment.”), available at http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/conditionConfin.pdf.

¹⁸ DOM Detainee Services Standard 16, Telephone Access, Section I.

facilities do not take messages from attorneys, and many are located in remote locations far from legal representation.

E. Indigence

Detainees shall not be required to wait before they are declared “indigent” and thus eligible for free writing supplies and free telephone calls. The Detention Standards permit indigent detainees to be provided with free envelopes and stamps for legal mail, as well as free legal telephone calls under certain circumstances,¹⁹ but they do not define indigence. State and local jail definitions may vary, such that detainees, like inmates, are not declared indigent until they are without funds for thirty or more days. Since the entire time for appeal in immigration cases is only thirty days, it is essential that detained noncitizens be able to establish indigence quickly so that they may qualify for free writing supplies, stamps, and legal calls in order to secure representation and properly prepare their cases.

F. Medical Care

Detainees shall be provided with a continuum of prompt, quality medical and dental care, which shall include medically necessary treatment and preventive services at no cost to the detainee.

Recognizing that timely, quality medical care remains deficient in our immigration detention system, the ABA supports compliance with the existing standards, and supports improving the standards to ensure prompt delivery of quality medical care at no cost to detainees. The standards should address all detainee health needs including preventive care, dental care, eye care and provision of eye glasses, mental health care, individual and group counseling, medical dietary needs, and other specialized care.

In December 2006, the DHS OIG identified several instances of non-compliance with medical care standards at four of the five facilities it investigated.²⁰ Non-compliance included failure to consistently conduct the initial medical screening required for new detainees or the health appraisal and physical exam required within fourteen days, failure to timely respond to sick call requests, failure to comply with hunger strike standards, and failure to provide documentation regarding suicide prevention and intervention.²¹ According to the GAO 2007 report, the U.S. Public Health Service staff providing medical services for the San Diego Correctional Facility was cited by ICE reviewers for “failing to administer the mandatory 14-day physical exam to approximately 260 detainees.”²² The process for responding to requests for medical care can be cumbersome, time-consuming, and dangerous to those who are waiting for care.²³ Reports of inadequate medical care that the ABA receives, and recent hearing testimony,²⁴ are extremely troubling, and require sustained attention to these issues.

¹⁹ DOM Detainee Services Standard 1, Access to Legal Material, Section III.N, and Standard 16, Telephone Access, Section III.E.

²⁰ OIG 2006 report at 4.

²¹ OIG 2006 report at 3-4, 5, 5-6.

²² GAO 2007 report at 18.

²³ See *Castaneda v. U.S.*, Complaint and Demand for Jury Trial, C.D. Cal. (Oct. 31, 2007), available at [http://www.bibdaily.com/pdfs/Castanada%20Complaint%20\(10.31.07\).pdf](http://www.bibdaily.com/pdfs/Castanada%20Complaint%20(10.31.07).pdf).

²⁴ See Testimony for the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law Hearing, “Detention and Removal: Immigration Detainee Medical Care” (Oct. 4, 2007), available at <http://judiciary.house.gov/oversight.aspx?ID=377>; see also *Castaneda v. U.S.*, *supra* note 22.

Dental care continues to be inadequate for noncitizens in detention. The Detention Standards do not require preventive care to be provided in any circumstances; the standards simply provide that “routine dental treatment may be provided to detainees for whom dental treatment is inaccessible for prolonged periods because of detention for over six months.”²⁵ The ABA receives complaints that serious tooth pain, gum problems, or other issues are treated with pain relievers or tooth extraction rather than preventive care and routine treatment. Immigration detainees frequently complain that the only options provided for tooth pain or complaints are over-the-counter pain relievers or tooth extraction. Since 5,660 individuals are held in immigration detention for more than six months (210 days or more),²⁶ lack of preventive care may be a wide-reaching problem.

G. Grievance Procedures and Communication With ICE

Grievance procedures shall include provisions for filing a grievance with ICE officers directly, without first going through a facility’s grievance process. The Detention Standards provide for communication between immigration detainees and ICE staff, but specifically require that the communication procedure “is not to be used for submitting formal grievances” (emphasis omitted).²⁷ This policy should be revisited. Individuals who are in immigration detention are ICE’s responsibility and should be able to speak to ICE officers on any subject without having to pass through the intermediary of jail officials. They should not have to fear that jail staff will fail to report their grievances appropriately,²⁸ or will retaliate against them for complaining about jail conditions.

In addition, contact information shall be provided to ensure that detained noncitizens are able to contact government offices including the DHS Office of the Inspector General, DHS Office for Civil Rights and Civil Liberties, DHS Joint Intake Center, and DHS Office of Internal Audit. While contact information for the DHS Office of the Inspector General is apparently provided in all facilities, other offices may be able to respond more quickly to detainee complaints, and their contact information should be provided.

H. Detainee Transfers

Involuntary transfer of immigration detainees to remote facilities shall be prohibited if such transfer would impede an existing attorney-client relationship, or impede case preparation and defense or financing of such preparation and defense due to remoteness from legal counsel, family members, health care providers, other community support and material witnesses and/or evidence, or if appropriate counsel is not available near the proposed transfer site. Irrespective of whether the individual has already obtained counsel, detained noncitizens shall not be transferred to remote locations where legal assistance generally is not available for immigration matters.

The Detention Standards address the transfer of immigration detainees, but fall short of existing ABA policy and the expanded policy recommended here. The Detainee Transfer standard requires ICE to “*consider* ... whether the attorney of record is located within reasonable

²⁵ DOM Health Services Standard 2, Medical Care, Section III.E.2.

²⁶ GAO 2007 report, Appendix II.

²⁷ DOM Detainee Services Standard 15, Staff-Detainee Communication, Section III.B.

²⁸ According to the 2007 GAO report, four out of the twenty-three facilities that were investigated failed to meet the ICE detainee grievance standard. Issues of noncompliance included failure to provide all immigration detainees with information regarding the grievance procedure, and failure to maintain a grievance log. GAO 2007 report at 27.

driving distance of the detention facility and where immigration court proceedings are taking place” (emphasis added).²⁹ The ABA has observed that this consideration has not prevented transfers of even represented detainees, or those seeking representation, or those with imminent hearing dates, from Massachusetts, New York, and Florida to south Texas, or from southern California to Texas, Washington, and Arizona, such that access to counsel is severely impaired, court dates are missed, cases are delayed, and detention is prolonged.³⁰ It is clear that stronger language and regulations are required to ensure that detainees are not transferred to the detriment of their legal rights, depriving them of ready access to counsel and legal service providers that may be able to represent them, or access to family members, health care providers, or material witnesses or evidence that would assist with case preparation or defense. The Detainee Transfer standard provides a start, but it should prohibit transfer when it impedes the detainee’s access to legal representation and to those other individuals and services that are so important to securing due process.

V. Detention Standards Implementation: Oversight and Training

Although the Detention Standards were implemented on January 1, 2001, and ICE intended to phase them in at all of its contract facilities as well as state and local jails holding noncitizens pursuant to an Intergovernmental Service Agreement (IGSA) with ICE, detention standards compliance remains a concern. The ABA continues to receive very serious complaints from attorneys, advocates, and noncitizens and their families regarding treatment in detention facilities. While the issuance of regulations and the recommended improvement of the Detention Standards are important steps in addressing these problems, it also is imperative that oversight of detention standards implementation be improved. Currently, ICE inspects facilities once per year, using a multi-point checklist. Inspections are reviewed by a newly-created Detention Facilities Inspection Group (DFIG) within the ICE Office of Professional Responsibility.³¹ However, the DFIG is understaffed and lacks the resources to review more than a selection of inspection reports, and must prioritize the facilities that hold larger numbers of detainees. This leaves an enormous gap in oversight, at facilities such as remote local jails that may be particularly in need of oversight and review. The ABA supports creation of an oversight office

²⁹ DOM Security and Control Standard 4, Detainee Transfer, Section I.

³⁰ Testimony of Christina Fflis On Behalf of the American Bar Association, before the House Subcommittee on Border, Maritime and Global Counterterrorism, hearing entitled “Crossing the Border: Immigrants in Detention and Victims of Trafficking” (Mar. 15, 2007) (ICE transferred hundreds of immigration detainees who already had retained counsel from Massachusetts, New York, Virginia, and Florida, to Port Isabel Detention Center in South Texas, where local immigration judges regularly deny motions by counsel to appear telephonically); *see also* Senator Daniel K. Akaka, Additional Questions for the Record, Nomination Hearing of Julie Myers (Sept. 12, 2007), at 12 (“ICE prefers to avoid transferring cases where an alien is represented by counsel.... Due to operational needs, however, on some occasions, it may become necessary to transfer an alien who is represented by counsel.”). *See also* ABA letter to Assistant Secretary Myers regarding transfers from San Pedro Processing Center, San Pedro, CA (Oct. 24, 2007), available at http://www.abanet.org/publicserv/immigration/san_pedro_transfers_ltr102407.pdf; *see also* Senator Edward M. Kennedy Follow-up Questions on Nomination of Julie Myers to be Assistant Secretary, Immigration and Customs Enforcement, Department of Homeland Security (Oct. 23, 2007) (hereinafter Senator Kennedy Follow-up Questions), at 7 (stating detainees from San Pedro were transferred to Field Offices in California, Washington, Texas, and Arizona).

³¹ U.S. Senate Committee on Homeland Security and Governmental Affairs Pre-hearing Questionnaire For the Nomination of Julie Myers to be Assistant Secretary, Department of Homeland Security, at 59.

within DHS to review *all* detention facility inspection reports, and to prepare reports of their reviews at least twice per year, which shall promptly be released to the public.³²

The ABA also supports providing in-depth training on the Detention Standards, as well as periodic training updates, to all individuals who supervise, are responsible for, or otherwise come into regular contact with immigration detainees, including ICE officers, contractors, and state, local, and federal corrections and related personnel. These training measures must be implemented to guarantee consistent compliance with the Detention Standards. Although ICE has agreed to train ICE personnel to enforce the Detention Standards, and, together with the DHS Office for Civil Rights and Civil Liberties, has prepared a CD-ROM training on select Detention Standards, ICE has not undertaken to train non-ICE personnel who are charged with care of ICE detainees, including wardens and staff at state and local jails—the IGSA facilities.³³ Since these facilities house 65%³⁴ of immigration detainees, this gap in training must be corrected. If ICE is unable to ensure that facility staff charged with supervision and care of immigration detainees are trained in how to follow the Detention Standards, it must seek alternatives to detaining noncitizens in these facilities.

VI. Conclusion

The ABA has worked extensively with federal officials to develop the Detention Standards, and has tried to ensure their appropriate implementation through visits to detention facilities and reports on the conditions it has found there. These experiences have demonstrated the serious shortcomings of the immigration detention system and the urgent need for the changes called for by this report. By adopting the recommendation, the House of Delegates will help ensure that our nation provides immigration detainees with due process of law and treats them with the dignity and respect to which they are entitled.

Respectfully Submitted,

Mark D. Agrast, Chair
Commission on Immigration
February 2008

³² ICE Assistant Secretary Myers has indicated that “ICE is developing a semi-annual report of findings and corrective actions [regarding detention facility reviews] that will be made public.” Senator Kennedy Follow-up Questions, at 2-3. Assistant Secretary Myers stated that the first report, covering the period from July to December 2007, will be issued after January 1, 2008.

³³ Senator Kennedy Follow-up Questions, at 2.

³⁴ Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law Hearing, “Detention and Removal: Immigration Detainee Medical Care,” (Oct. 4, 2007), comments of Representative Steve King on information provided to the Committee by ICE.

EXECUTIVE SUMMARY

1. Summary of the Recommendation

This recommendation supports the issuance of federal regulations that codify the Department of Homeland Security (DHS) Immigration and Customs Enforcement (ICE) National Detention Standards, and supports improvement, periodic review, and increased oversight of detention standards implementation in order to ensure that detained noncitizens and their families are treated humanely and have meaningful access to counsel and to the legal process. The recommendation supports enforcing the detention standards at all facilities where noncitizens are detained for immigration purposes. Further, the recommendation urges that the least restrictive detention setting be used for individuals and families in immigration detention, and that immigration detainees not be housed with criminal inmates.

The recommendation supports specific improvements to the Detention Standards based on reports that the Commission on Immigration receives from detained noncitizens, attorneys, and advocates. Recommended improvements include: permitting independent observers to visit detention facilities; requiring legal reference materials in hard copy or assistance with materials on computers; permitting contact visits from family and friends; providing reasonable and equitable access to telephones; permitting indigent detainees to have prompt access to free stamps, envelopes, legal telephone calls and emergency calls; providing a continuum of prompt, quality medical and dental care; providing for filing of grievances with ICE officers directly, without first going through a facility's grievance process; and prohibiting involuntary transfer of immigration detainees to remote facilities if such transfer would impede an existing attorney-client relationship, or impede case preparation.

The recommendation also provides for two means of ensuring appropriate detention standards implementation: a DHS oversight office to review all ICE detention facility inspection reports and report to the public; and in-depth training for all individuals who come into regular contact with detainees.

2. Summary of the Issue that the Recommendation Addresses

ICE detained more than 283,000 noncitizens in 2006, and the number is increasing. The ABA worked extensively with the Department of Justice and the former Immigration and Naturalization Service to draft the existing Detention Standards, which went into effect in 2001. However, the ABA has repeatedly expressed its concerns about poor conditions at detention facilities—conditions that persist despite the existence of the Detention Standards. Noncitizens, including families, continue to be detained in criminal settings, and housed with criminals, even though they are civil detainees.

3. Explanation of How the Proposed Policy Position Will Address the Issue

Current ABA policy addresses only select Detention Standards pertaining to access to counsel and legal information. The proposed recommendation supports the issuance of federal regulations to codify all of the Detention Standards so that they will be legally enforceable, and

addresses specific improvements that are needed in the existing Detention Standards in areas including medical access and grievance procedures. The recommendation also provides for improved oversight, including DHS review of detention facility inspection reports and in-depth training for relevant officials. Finally, the recommendation urges that the least restrictive detention setting be used for individuals and families in immigration detention, and that detainees not be housed with criminals.

4. Summary of Any Minority Views

None to date.

GENERAL INFORMATION FORM

Submitting Entity: Commission on Immigration

Submitted By: Mark D. Agrast, Chair

1. Summary of Recommendation(s).

This recommendation supports the issuance of federal regulations that codify the Department of Homeland Security (DHS) Immigration and Customs Enforcement (ICE) National Detention Standards, and supports improvement, periodic review, and increased oversight of detention standards implementation in order to ensure that detained noncitizens and their families are treated humanely and have meaningful access to counsel and to the legal process. The recommendation supports enforcing the detention standards at all facilities where noncitizens are detained for immigration purposes. Further, the recommendation urges that the least restrictive detention setting be used for individuals and families in immigration detention, and that immigration detainees not be housed with criminal inmates.

The recommendation supports specific improvements to the detention standards based on reports that the Commission on Immigration receives from detained noncitizens, attorneys and advocates, and the ABA's pro bono projects: the South Texas Pro Bono Asylum Representation Project (ProBAR) in Harlingen, Texas, and Volunteer Advocates for Immigrant Justice (VAIJ) in Seattle, Washington. Recommended improvements include: permitting independent observers to visit detention facilities; requiring legal reference materials in hard copy or assistance with materials on computers; permitting contact visits from family and friends; providing reasonable and equitable access to telephones; permitting indigent detainees to have prompt access to free stamps, envelopes, legal telephone calls and emergency calls; providing a continuum of prompt, quality medical and dental care, which shall address all detainee health needs, at no cost to detainees; providing for filing of grievances with ICE officers directly, without first going through a facility's grievance process; and prohibiting involuntary transfer of immigration detainees to remote facilities if such transfer would impede an existing attorney-client relationship, or impede case preparation.

The recommendation also provides for two important means of ensuring appropriate implementation of the detention standards: a DHS oversight office to review all detention facility inspection reports produced by ICE and report to the public; and in-depth training for all individuals who come into regular contact with immigration detainees.

2. Approval by Submitting Entity.

On November 12, 2007, the Commission approved this recommendation.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The recommendation would build on existing Association policies and further the Association's commitment to providing legal protections and due process rights to noncitizens in detention.

- Detention by the INS: urges protection of the constitutional and statutory rights of detainees, and supports promulgating into regulation the four ICE detention standards relating to access to counsel and legal information and permitting independent organizations to visit detention facilities and meet privately with detainees to monitor compliance (02A115B).
- Detention: opposes detention of noncitizens in removal proceedings except in extraordinary circumstances. Supports use of humane alternatives to detention; the provision of prompt hearing for aliens denied release; mechanisms to ensure complete and accurate information for administrative review and judicial oversight; mechanisms to ensure full compliance with two Supreme Court decisions on indefinite detention (06M107E).
- Involuntary Transfer of Detained Immigrants and Asylum Seekers: opposes involuntary transfers of detained immigrants and asylum seekers to remote facilities if it would impede access to counsel (01M106B).
- Improving Asylum Process: asylum seekers should be detained only in extraordinary circumstances, and in the least restrictive environment necessary to ensure appearance at court proceedings; encourages ICE to explore alternative means to ensure appearance at court proceedings, such as supervised pretrial release or bond (2/90).
- Alien Children: addresses the psychological, legal, medical, mental health, educational, and other basic needs of unaccompanied immigrant children in federal custody (04A117).

5. What urgency exists which requires action at this meeting of the House?

The rapidly expanding use of immigration detention, increasing reports of unduly harsh conditions at detention facilities, and the failure of government agencies to comply with existing custody review procedures, make this an urgently needed recommendation. DHS is currently revising the existing National Detention Standards and has created family detention standards. Without this policy recommendation, the ABA is only able to comment on, and urge a legally enforceable mechanism for select provisions of these new detention standards.

6. Status of Legislation. (If applicable.)

Senator Joseph Lieberman (I – CT) has expressed interest in re-introducing his Safe and Secure Detention and Asylum Act, which was amended to the Senate immigration bill in 2007. The bill contains several provisions related to detention conditions. Congresswoman Zoe Lofgren (D – CA) recently offered an amendment to the Death in Custody Reporting Act of 2007 to require state and local agencies to report deaths in detention to state attorneys general. Congressional hearings have recently been held on detention conditions and deaths in detention, including one in March 2007 that the ABA testified for.

On the regulatory front, in early 2007 several organizations filed a Petition for Rulemaking to have the ICE National Detention Standards promulgated into regulation. The ABA wrote a letter

to DHS Secretary Michael Chertoff in support of the petition, specifying our support for promulgation of the legal access standards into regulation; the petition is still pending. On all of these fronts, the ABA is currently only able to comment on a limited set of issues.

7. Cost to the Association. (Both direct and indirect costs.)

Existing Commission and Governmental Affairs staff will undertake the Association's promotion of this recommendation, as is the case with other Association policies.

8. Disclosure of Interest. (If applicable.)

No known conflict of interest exists.

9. Referrals.

This recommendation is currently being circulated to Association entities and Affiliated Organizations including:

Section of Administrative Law and Regulatory Practice

Business Law Section

Criminal Justice Section

Commission on Domestic Violence

Section Family Law

Government and Public Sector Lawyers Division

Section of Individual Rights and Responsibilities

Section of International Law

Judicial Division

Section of Labor and Employment Law

Commission on Law and Aging

Commission on Law and National Security

Section of Litigation

Standing Committee on Legal Aid and Indigent Defendants (SCLAID)

Section of Science and Technology Law

Young Lawyers Division

American Immigration Lawyers Association (AILA)

National Legal Aid and Defender Association

10. Contact Person. (Prior to the meeting.)

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11. Contact Person. (Who will present the report to the House.)

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