AMERICAN BAR ASSOCIATION

Patricia Lee Refo
President
321 N. Clark Street, Chicago, IL 60654-7598
T 312.988.5109 • F 312.988.5100
abapresident@americanbar.org
americanbar.org

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Ms. Lauren Alder Reid
Assistant Director, Office of Policy
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2616
Falls Church, VA 22041

RE: Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 52491 (Aug. 26, 2020); EOIR Docket No. 19-0022

Dear Assistant Director Alder Reid:

On behalf of the American Bar Association (ABA), I submit the following comments in response to EOIR Docket No. 19-0022, Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 52491 (Aug. 26, 2020) (the Proposed Rule). The ABA urges the Department of Justice (DOJ) to reconsider major aspects of the Proposed Rule, for the reasons described in detail below.

The ABA is the largest voluntary association of lawyers and legal professionals in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law. Working with and through its Commission on Immigration, the ABA advocates for improvements to immigration law and policy; provides continuing education to the legal community, judges, and the public on immigration law issues; and develops and assists in the operation of pro bono legal representation programs for immigrants and asylum seekers, with a special emphasis on the needs of the most vulnerable.

Our views are informed in part by our experience in operating two direct representation immigration projects at the border (ProBAR in Harlingen, Texas and the Immigration Justice Project in San Diego, California) that serve detained (and some non-detained) adult and unaccompanied minor immigrants and asylum seekers,[1] as well as the Children's Immigration Law Academy (CILA), a legal resource center in Houston that serves children's immigration legal services programs throughout Texas.

The ABA has long supported an agency structure that provides non-citizens due process of law in the conduct of their immigration court proceedings, including in administrative appeals before

[1] IJP attorneys also serve as appointed Qualified Representatives, through the National Qualified Representative Program, to detained clients who have been adjudicated incompetent to represent themselves due to mental illness or disability.

the Board. The ABA is concerned that, rather than improving the efficiency and quality of Board adjudications, the Proposed Rule would undermine the neutrality and independence of Board members, interfere with the traditional adjudication process, reduce the quality of Board decisions, and vitiate some of the few remaining safeguards meant to ensure that non-citizens receive due process in removal proceedings. We are particularly concerned about the impact these changes will have on unrepresented respondents. While the ABA recognizes the importance of the efficient processing of immigration cases, any efforts to improve efficiency must not compromise the quality and fairness of the administrative adjudication process. Therefore, we urge the Executive Office for Immigration Review (EOIR) to reconsider major aspects of the Proposed Rule, as discussed in more detail below.[2]

The Proposed Rule Would Impose Strict Appeal Timelines that Undermine Due Process Without Enhancing Efficiency

The ABA is concerned that EOIR's proposal to alter briefing schedules and add even more strict timelines for appeal processing will undermine due process for respondents (particularly those who are unrepresented), infringe on the independence of Board members, and negatively impact the quality of decisions. The proposed changes also are unlikely to meaningfully improve the efficiency of adjudications. We urge EOIR to reconsider these changes.

Under the Proposed Rule, the parties in all appeals (for both detained and non-detained cases) would have 21 days to file simultaneous briefs. Reply briefs would be permitted by leave of the Board if filed within 14 days of the deadline for initial briefs, and one 14-day extension of the period for filing simultaneous or reply briefs would be permitted upon good cause shown.[3] Under current practice, briefing is consecutive in non-detained appeals and extensions are limited to 21 days. While these proposed changes are meant to make adjudications of appeals more efficient, they would save fewer than 30 days and create serious due process concerns.

The current 21-day period for filing initial briefs is not sufficient, and the proposal to limit extensions to 14-days, rather than the current 21-days, will give respondents and their counsel even less time to brief appeals. Respondents and counsel often do not know in advance when briefing schedules will be issued. Most briefing schedules are issued months (or more) after a notice of appeal has been filed, once transcripts of proceedings have been compiled. As a result, an attorney may receive a briefing schedule from the Board on a notice of appeal filed nine months before, and then only have 21 days from the date the briefing schedule was mailed by the Board to file the initial brief. Under these circumstances, the difference between a 14-day extension and a 21-day extension of time can be significant. This reality also disproportionately impacts pro se respondents, who may file notices of appeal on their own, and then search for counsel while waiting for a briefing schedule. If the pro se respondent procures counsel, that attorney will not be familiar with the proceedings below, and thus will not be able to begin meaningful preparation of an appeal brief until the transcript of proceedings below has been

[2] We would note that EOIR provided a truncated 30-day notice period for the submission of comments, rather than the customary 60-day notice. Exec. Order 12866, 58 C.F.R. § 190 (1993); Exec. Order 13563, 75 C.F.R. § 3821 (2011) (saying "to the extent feasible," a period of "at least 60 days" should be provided for comments on proposed rules). EOIR has not indicated any reason that the 60-day time period would not be feasible here.
[3] 85 Fed. Reg. at 52498-99; proposed 8 C.F.R. § 1003.3(c).

prepared and a briefing schedule has been issued. Where the 21-day period for filing initial briefs already is too short, reasonable extensions of time that are liberally granted are essential to fair proceedings when the parties cannot predict briefing schedules ahead of time. They also facilitate access to counsel by providing counsel obtained for appeal purposes with adequate time to review the record and develop the appeal brief.

The proposed change from consecutive to simultaneous briefing in non-detained appeals is also problematic. Simultaneous briefing disadvantages the appellee, and this disadvantage would be particularly acute for pro se respondents charged with defending an immigration judge's decision granting her relief from removal. On appeal, where simultaneous interpretation is not provided, a pro se respondent would be required to draft and file a brief without knowing what the Department of Homeland Security (DHS) intends to argue to the Board. Notices of appeal contain at most a summary of the reasons for the appeal, and the appellant may not pursue all arguments at the briefing stage. Therefore, notices of appeal are not sufficient to enable respondents to craft their initial briefs.

A change to simultaneous briefing also will almost certainly lead more parties to seek leave to file a reply brief, because they will not have had an opportunity to respond to the other side's arguments. More reply briefs would in turn lengthen the adjudication timeline. An increased reliance on reply briefs also would underscore that 14 days from the filing of initial briefs is not sufficient for the filing of reply briefs under the current filing system. Because the Board has no electronic system for submitting filings and receiving rulings or filings, the party will need to receive the opposing party's brief in the mail, file a motion for leave to submit a reply, mail that motion to the Board, and draft the reply brief all within 14 days of the filing of simultaneous briefs. The proposed changes therefore would impact a respondent's access to a full, fair, and meaningful hearing on their claims.

Simultaneous briefing also may result in Board members routinely requesting supplemental briefing to address issues that are not sufficiently discussed during briefing, eliminating any efficiency gained from imposing simultaneous briefing in the first instance. The changes to the briefing schedule in the Proposed Rule are not worth the ensuing due process implications given that the current briefing deadlines do not meaningfully add to appeal processing times.

The Proposed Rule also would impose new, strict deadlines on every stage of the appeals adjudication process, including deadlines for ordering a transcript, issuing briefing schedules once the transcript has been completed, assignment to a single board member for review, determination by an individual Board member as to whether to designate the case for decision by a three-member panel, and adjudicating summary dismissals and interlocutory appeals.[4] Current regulations only provide that appeals assigned to a single Board member should be decided within 90 days of the completion of the record on appeal and that appeals assigned to a three-member panel should be decided within 180 days of assignment to the panel.[5] In addition, the Proposed Rule would refer any appeals pending a decision for more than 335 days to the EOIR Director for adjudication.[6]

[4] 85 Fed. Reg. at 52507-08; proposed 8 C.F.R § 1003.1(e)(1), (e)(8).
[5] 8 C.F.R § 1003.1(e)(8)(i).
[6] Proposed 8 C.F.R. § 1003.1(e)(8)(v).

Meaningful administrative review is a fundamental component of due process, and the imposition of these strict timelines could compromise quality in the interest of speed. We also have concerns about the proposal to delegate to the Director the Board's authority to adjudicate appeals that are not completed within the time limit in the Proposed Rule.[7] The ABA has long supported extending existing regulatory time limits so that the Board is able to issue thoughtful, well-reasoned decisions. Such decisions enhance the perceived legitimacy and fairness of the Board by assuring noncitizens and their counsel that their arguments were fully considered. However, rather than providing the Board with more flexibility to make such decisions, the Proposed Rule would truncate the traditional administrative review process by referring cases pending decision for more than 335 days to the EOIR Director – an official who is appointed by the Attorney General and is not required to be an attorney.

The Proposed Rule's delegation of authority to the Director also is concerning because it provides the Director authority identical to that of the Board.[8] This includes the authority to refer a pending case for review and adjudication to the Attorney General, and to issue a precedent decision.[9]

The ABA has expressed concern about the process for referral of cases to the Attorney General set forth in 8 C.F.R. § 1003.1(h) because it does not provide clear standards for the types of cases that can be referred, nor ensure adequate notice and input from parties and the public. For these reasons, the ABA has urged DOJ to engage in formal rulemaking to establish certain standards and procedures governing the process by which the Attorney General may certify cases. We also have cautioned that the referral authority should be used sparingly, and only to review Board decisions issued in the ordinary course of the administrative appeals process.

The ABA is therefore troubled by the authority delegated to the EOIR Director by the Proposed Rule, because it allows EOIR to pre-empt the process of full agency review by referring cases to the Director that have not been decided by the Board. As the administrative body responsible for providing clear and uniform guidance to DHS, immigration judges, the immigration bar, and the public on the relevant law, the Board, not the EOIR Director (or the Attorney General), should be responsible for issuing appellate decisions. This is especially true for decisions that have the potential to create new precedent or revisit longstanding doctrine. Based on current appeal timelines, appeals often would be referred to the Director under the Proposed Rule.[10] Making such referrals a routine practice would undermine the legitimacy of the immigration adjudication process.[11]

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[7] 85 Fed. Reg. at 52508.

[8] Proposed 8 C.F.R. § 1003.1(e)(8)(v).

[9] Given the binding nature of its decisions, 8 C.F.R. § 1003.1(g), only the Board should decide whether a decision is precedential.

[10] 85 Fed. Reg. at 52508 n.39 (saying that the median time to completion for case appeals in fiscal year 2019 was 323 days, when excluding interlocutory appeals, appeals from custody redetermination decisions, and appeals from decisions on a motion to reopen).

[11] The ABA expressed similar concerns about the Attorney General's recent delegation of authority to the EOIR Director to adjudicate appeals that have exceeded the existing 90- and 180-day regulatory time limits. *See* Organization of the Executive Office for Immigration Review, 84 Fed. Reg. 44537 (Aug. 26, 2019).

For these reasons, the ABA urges that, rather than implementing strict timelines for the briefing and processing of appeals that implicate core due process protections, a more prudent course would be to equip the Board with the resources necessary to adjudicate the current volume of decisions in a timely manner.

The Proposed Rule Would Interfere with the Adjudication Process in Other Ways

The ABA is troubled by other aspects of the Proposed Rule that similarly would compromise the integrity and fairness of the immigration adjudication system without improving efficiency.

For example, the Proposed Rule would permit immigration judges to bypass the process of full agency review by certifying to the Director Board decisions reopening or remanding proceedings where the immigration judge alleges that the Board made an error in doing so.[12] These "[q]uality assurance certifications" are extremely concerning for the same reasons as the proposal to refer appeals to the Director, and give immigration judges an inappropriate oversight role over the Board.

The Proposed Rule claims that these certifications are only for errors "within a narrow set of criteria" and are not "a mechanism solely to express disagreements with Board decisions."[13] Nevertheless, it is troubling that DOJ proposes to give immigration judges the ability to question a decision made by the administrative appellate body charged with reviewing their decisions by referring the decision to an official who is not a part of the traditional administrative review process. If such referrals become common, they have the potential to undermine the real and perceived legitimacy and fairness of the Board.

Nor would the proposed "narrow" substantive and procedural criteria for such certifications ensure that the process will not be used simply to express displeasure with an appellate decision. For example, immigration judges may refer a case where the Board's decision is "vague, ambiguous, internally inconsistent, or otherwise did not resolve the basis for the appeal."[14] This is a subjective standard and thus has the potential for inconsistent and broad application.

The Proposed Rule also would compromise the integrity and fairness of the immigration system by codifying the Attorney General's recent decision in *Matter of Castro-Tum*.[15] That decision overruled the Board's 2012 decision in *Matter of Avetisyan*,[16] which held that immigration judges and Board members have the general authority to administratively close a case even if one party objects to closure. Since *Castro-Tum,* two courts of appeal have disagreed with the Attorney General's decision and held that existing regulations authorize immigration judges and Board members to administratively close cases.[17]

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[12] 85 Fed. Reg. at 52502; proposed 8 C.F.R § 1003.1(k).
[13] 85 Fed. Reg. at 52502, 52503.
[14] Proposed 8 C.F.R § 1003.1(k)(1)(iii).
[15] 27 I&N Dec. 271 (A.G. 2018) (immigration judges and Board members may only administratively close a case where a regulation or judicially approved settlement expressly authorizes closure).
[16] 25 I&N Dec. 688 (BIA 2012).
[17] *Meza Morales v. Barr*, 963 F.3d 629 (7th Cir. 2020); *Zuniga Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019).

The ABA supports the authority of immigration judges and Board members to administratively close cases, and filed an amicus brief in *Matter of Castro-Tum* opposing revocation of that authority.[18] Administrative closure is a crucial docket management tool that allows immigration judges and the Board to prioritize more urgent cases, while removing from the active docket others that are not as urgent. As we explained in our amicus brief, administrative closure is also an important tool because it enables those respondents with prima facie cases for relief in another forum to defer the adjudication of their removal proceedings while they pursue that relief. This is especially important for unaccompanied children in removal proceedings for whom U.S. Citizenship & Immigration Services (USCIS) has approved a petition for special immigrant juvenile status as an abused, neglected, or abandoned child, but who do not qualify to adjust their status to that of a permanent resident because a visa number is not yet available.[19]

In addition, even after the Attorney General's decision in *Matter of Castro-Tum*, some immigration judges have agreed that administrative closure can be an appropriate procedural safeguard in cases involving mentally incompetent respondents. Administrative closure was specifically and explicitly addressed in *Matter of M-A-M-*,[20] as an alternative when "even where the court and the parties undertake their best efforts to ensure appropriate safeguards, concerns … remain."[21] As an example, the Board mentioned "seeking treatment for the respondent" as something that could be pursued during a period of administrative closure.[22] *M-A-M-* had been decided when the settlement was reached in the *Franco-Gonzalez v. Holder* case,[23] so there was no need for express authorization of administrative closure in that case.

The Proposed Rule would allow for administrative closure when it is authorized by settlement but does not delineate specific categories of cases. While we continue to believe that immigration judges and the Board have the general authority to administratively close cases, we ask that the agency make explicit the authority to administratively close cases involving mentally

[18] Brief for the American Bar Association as Amicus Curiae, *Matter of Reynaldo Castro-Tum*, Department of Justice Office of the Attorney General (Feb. 16, 2018), *available at* https://www.americanbar.org/content/dam/aba/administrative/amicus/matter-of-reynaldo-castro-tum-office-of-the-attorney-general-february-16-2018.pdf.

[19] Congress has imposed annual numerical limits on the issuance of immigrant visas. The limits are imposed by category (i.e., employment-based, family-based, or other special immigrants) with each country subject to additional limitations. For example, as of September 2020, an unaccompanied child from Guatemala, El Salvador, or Honduras whose petition for special immigrant juvenile status was accepted for filing on or earlier than April 1, 2017 was eligible to adjust status to that of a permanent resident.

[20] 25 I&N Dec. 474 (BIA 2011) (articulating the test for determining whether a non-citizen is competent to participate in immigration proceedings, holding that, if there are indicia of incompetency, the Immigration Judge must make a further inquiry to determine whether the non-citizen is competent for purposes of the immigration proceeding, and stating that, if the non-citizen lacks sufficient competency to proceed, the Immigration Judge must evaluate appropriate safeguards).

[21] *Id*. at 483.

[22] *Id*.

[23] No. CV 10-02211 DMG (DTBx) (C.D. Cal.) (The *Franco* lawsuit alleged that individuals in immigration detention in Arizona, Washington, and California who are incompetent to represent themselves because of a serious mental disorder are entitled to legal representation in their immigration cases. The court held that such individuals are entitled to legal representation in their immigration cases, and the partial settlement related to class members who had already been ordered removed).

incompetent respondents when concerns remain despite attempts to implement other procedural safeguards.

Finally, the data does not support EOIR's claim that the use of administrative closure exacerbated the backlog of immigration court cases.[24] Rather, the data shows that the availability of administrative closure has helped to reduce the backlog of pending cases.[25] Administrative closure enhances the efficiency of the immigration adjudication system and allows those respondents who have a reasonable likelihood of obtaining immigration relief to avoid removal, as provided in the Immigration and Nationality Act. The ABA urges EOIR not to undermine the fairness of the immigration adjudication system by withdrawing this authority from immigration judges and Board members.

The Proposed Rule Would Undermine Due Process by Further Limiting Avenues for the Consideration of New Evidence or Changes in the Law that Favor Respondents

The Proposed Rule would remove or circumscribe some of the only remaining procedural mechanisms for a respondent who argues that a Board appeal cannot be resolved without additional factfinding. EOIR proposes to do this by preventing the Board from receiving or reviewing new evidence on appeal, remanding a case for consideration of new evidence received on appeal, or considering a motion to remand based on new evidence, except in limited circumstances;[26] preventing the Board from *sua sponte* remanding a case (whether for further factfinding or otherwise) unless it is necessary to determine whether the immigration judge had jurisdiction over the case;[27] limiting when the Board can remand a case for further factfinding (including requiring the party seeking remand to have preserved the issue before the immigration judge);[28] and permitting the Board to qualify or limit the scope or purpose of a remand order without retaining jurisdiction over the case.[29]

The Proposed Rule also would make it more difficult for the Board to remand a case based on a change in the law that affects a respondent's eligibility for relief by preventing the Board from remanding a case based on a legal argument not presented below, unless the argument relates to the immigration judge's jurisdiction or substantial evidence indicates that a material change in fact or law has vitiated all grounds of removability applicable to the respondent.[30]

In addition, the Proposed Rule would rescind the Board's, as well as an immigration judge's, ability to *sua sponte* re-open a case where the Board or the immigration judge has rendered a

[24] 85 Fed. Reg. at 52504.
[25] TRAC Immigration, *The Life and Death of Administrative Closure* (Sept. 10, 2020), https://trac.syr.edu/immigration/reports/623/ (analyzing EOIR data to show that administrative closure has helped to reduce the backlog of pending cases, rather than contributed to it, and that respondents whose cases are administratively closed are likely to have followed legal requirements and obtained legal status).
[26] Proposed 8 C.F.R. § 1003.1(d)(7)(v). A motion to remand is filed while an appeal is pending before the Board and seeks to return jurisdiction of the pending case to the immigration judge. 85 Fed. Reg. at 52495.
[27] Proposed 8 C.F.R § 1003.1(d)(3)(iv)(C), (d)(7)(ii)(D).
[28] Proposed 8 C.F.R § 1003.1(d)(3)(iv)(D).
[29] Proposed 8 C.F.R. § 1003.1(d)(7)(iii).
[30] Proposed 8 C.F.R. § 1003.1(d)(7)(ii)(C).

decision in the case.[31] Together these changes would make it much more difficult for non-citizen respondents to benefit from changes in factual circumstances or the law that make them eligible for relief from removal. This is concerning for the reasons described below.

The ability of the Board to remand proceedings for the consideration of new evidence or for additional factfinding is very important to protecting the due process rights of non-citizen respondents, particularly unrepresented individuals. New factual developments that have the potential to change the outcome of proceedings are more common in immigration cases than in many other areas of the law. For example, a non-citizen may become eligible to legalize through a new U.S. citizen spouse, or conditions in the non-citizen's country of nationality could change and make it much more dangerous for her to return.

The ability of the Board to remand for consideration of changed factual circumstances, or the ability of an immigration judge to consider changed factual circumstances on remand, even if that was not the initial reason for the remand, are uniquely important here given the consequences of immigration proceedings, which include removal from the United States and potential permanent separation from family members. Eligibility for relief from removal should be decided based on the facts at the time of adjudication, and EOIR should not restrict the ability of adjudicators to consider such facts if they are relevant to the non-citizen's eligibility for relief. This opportunity is especially critical for pro se respondents, where there is no counsel to ensure that the immigration judge properly develops the factual record regarding all relevant legal issues.

EOIR's proposal to remove the authority of immigration judges and the Board to *sua sponte* re-open proceedings will further compound this problem. In general, existing regulatory and statutory provisions provide that a non-citizen respondent can only file one motion to reconsider or re-open the decision of an immigration judge or the Board. Motions to reconsider generally must be filed within 30 days and motions to reopen must be filed within 90 days, with some exceptions.[32] Taking away the authority of immigration judges and the Board to *sua sponte* reconsider or re-open a case removes their ability to address changes in factual circumstances, policy, or the law that occur outside of the time limitations required for filing a motion to reconsider or re-open, or in situations where the non-citizen respondent already has filed one motion to reconsider or re-open.

This is significant because current adjudication timelines, as well as the current time and numerical limitations on motions to reconsider and motions to re-open, do not account for the long periods of time that some of the most vulnerable non-citizens, such as abused, neglected, or abandoned children, or victims of crime, must wait for visas to become available based on applications for special immigrant juvenile status or U visa petitions that have been granted by USCIS. When combined with the proposed removal of the authority to administratively close cases, immigration judges and the Board will have no ability to keep removal proceedings pending, or re-open proceedings, when there is reasonable evidence that a non-citizen respondent

[31] Proposed 8 C.F.R. §§ 1003.2(a), 1003.23(b)(1). A motion to reopen is typically filed after agency review of the case has concluded. 85 Fed. Reg. at 52495.
[32] 8 C.F.R. §§ 1003.2, 1003.23.

is prima facie eligible for relief that is not yet available due to annual restrictions in the number of visas.

The proposal also would prevent non-citizens from benefiting from a change in the law that makes them eligible for relief. For example, two courts recently enjoined an interim final rule[33] that barred asylum seekers who entered or attempted to enter the United States at the Southern border on or after July 16, 2019 from asylum eligibility unless they also applied for and were denied asylum in at least one country of transit on the journey to the United States (with limited exceptions).[34] Many non-citizen respondents may have been denied any form of relief, or been granted a form of relief with fewer protections and benefits, such as withholding of removal, based on this interim final rule. If the decision was issued more than 90 days ago and there are no proceedings pending, under the Proposed Rule the immigration judge and the Board would be prevented from *sua sponte* re-opening the case to consider the respondent's eligibility for asylum. In addition, if an unrepresented respondent failed to preserve an argument that she would have been granted asylum but for the interim final rule (because she was not aware of the rule or the legal challenges to it), she could not ask the Board to remand a pending appeal denying her any relief so that the immigration judge could decide whether she is eligible for asylum based on the court decisions.

We urge the Board to reconsider these aspects of the Proposed Rule and retain the safety valve that motions to remand and *sua sponte* motions to reopen provide for non-citizens, particularly those who are unrepresented.

The Proposed Process for Allowing the Board to Grant Voluntary Departure Does Not Contain Sufficient Due Process Safeguards

The Proposed Rule would allow the Board to issue orders such as orders of removal, orders granting relief from removal, and orders granting voluntary departure with an alternate order of removal, without remanding the case to the immigration judge to enter such an order.[35] The process set forth in the Proposed Rule for the granting of voluntary departure by the Board in the first instance does not contain sufficient protections for pro se and non-English speaking respondents.

Among other things, the Proposed Rule would require the respondent to have requested voluntary departure before the immigration judge, but would not remand the case if the Board found that the immigration judge failed to provide the appropriate advisals regarding voluntary departure.[36] The Proposed Rule states that the Board can provide such advisals, but does not explain how such advisals would be made. This process does not contain sufficient safeguards to ensure that pro se and non-English speaking respondents will be properly advised of their rights and obligations regarding voluntary departure. Advisals given by the immigration judge during

[33] *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33829 (July 16, 2019).
[34] *E. Bay Sanctuary Covenant v. Barr,* 964 F.3d 832 (9th Cir. 2020); *Cap. Area Immigrants' Rts. Coal. v. Trump,* Civil Action No. 19-2117 (TJK), Civil Action No. 19-2530 (TJK), 2020 U.S. Dist. Lexis 114421(D.D.C. June 30, 2020).
[35] 85 Fed. Reg. at 52499-500; proposed 8 C.F.R. § 1003.1(d)(7)(i).
[36] 85 Fed. Reg. at 52499-500; proposed 8 C.F.R. § 1240.26(k).

court proceedings generally are communicated to a non-English speaking respondent via simultaneous interpretation. Pro se respondents can ask for clarifications from the immigration judge on the record when something is unclear. Without a similar process in place for voluntary departure orders issued by the Board, respondents are not guaranteed to have the information necessary to make an informed choice regarding their options and comply with the obligations in the order. For this reason, the ABA respectfully suggests that, without additional procedural safeguards, the authority to issue voluntary departure orders should be reserved for immigration judges.

The Proposed Rule's Changes to the Transcription Process Are Ill-Advised

Finally, the ABA recommends that EOIR revisit the changes in the Proposed Rule regarding the transcription process.[37] Existing regulations provide immigration judges with the opportunity to review the transcripts of oral decisions before they are incorporated into the record on appeal; the Proposed Rules would eliminate this provision. Proceedings can only comport with fundamental notions of due process if the record of the judge's decision is clear and accurate. Because most decisions issued by immigration judges are issued orally, providing immigration judges with the opportunity to review transcripts is an important component of ensuring the integrity and accuracy of the record on appeal. Given that the existing regulatory timeframe for immigration judge review of the transcript is generally 14 days,[38] the efficiencies to be gained from removing this step in the process are minimal.

Conclusion

For the reasons discussed above, the ABA is concerned that the adverse impacts the Proposed Rule is likely to have on the neutrality and independence of Board members, the fairness of the administrative review process, the quality of Board decisions, and the due process afforded to respondents far outweigh any efficiencies that would be gained. We respectfully urge EOIR to reconsider major aspects of the Proposed Rule, as discussed above.

Sincerely,

Patricia Lee Refo

Patricia Lee Refo
President

[37] 85 Fed. Reg. at 52508; proposed 8 C.F.R. § 1003.5(a).
[38] 8 C.F.R. § 1003.5(a) ("Where transcription of an oral decision is required, the immigration judge shall review the transcript and approve the decision within 14 days of receipt, or within 7 days after the immigration judge returns to his or her duty station if the immigration judge was on leave or detailed to another location.").