

Executive Office for Immigration Review
Handling Mental Competency Cases Under *Franco-Gonzales v. Holder*
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I. INTRODUCTION

Franco-Gonzales v. Holder is a class action lawsuit filed in the Central District of California on behalf of unrepresented individuals in the custody of the Department of Homeland Security (“DHS”), Immigration and Customs Enforcement (“ICE”), in Arizona, California, and Washington identified as having a serious mental disorder that may render them incompetent to represent themselves in immigration proceedings.

On April 23, 2013, the District Court issued a Permanent Injunction,¹ requiring the government to provide: (1) legal representation in the form of a Qualified Representative to all Class Members found mentally incompetent to represent themselves in immigration proceedings; and (2) bond redetermination hearings for all Class Members detained for more than six months.

On October 29, 2014, the District Court entered an Order further implementing the Permanent Injunction (“Implementation Order”),² which sets forth procedures and processes for identification of *Franco* Class Members and assessment of the mental competency of such Class Members to represent themselves in immigration proceedings. Specifically, the Implementation Order requires implementation of a screening and information gathering system to identify Class Members; an information sharing system to ensure that relevant documentation and information regarding Class Members is provided by ICE to the Executive Office for Immigration Review; and an evaluation system for Immigration Judges to follow in order to determine whether Class Members are mentally competent to represent themselves in immigration proceedings. Defendants have 90 days from the date of the Order, or until January 27, 2015, to implement the provisions set forth therein.³

¹ *Franco-Gonzales v. Holder*, CV 10-02211, Partial Judgment and Permanent Injunction (C.D. Cal. R. Apr. 23, 2013).

² *Franco-Gonzales v. Holder*, CV 10-02211, Order Further Implementing This Court’s Permanent Injunction (C.D. Cal. R. Oct. 29, 2014).

³ This document provides a summary of the obligations set forth in the Permanent Injunction and Implementation Order and is intended to serve as a supplemental training tool for EOIR personnel responsible for its implementation. To this end, this document focuses primarily on EOIR’s obligations and includes only limited details regarding ICE’s obligations. Nothing in this document is intended to negate or alter EOIR’s obligations under the Permanent Injunction and Implementation Order or any other orders of the Court in *Franco-Gonzales v. Holder*. In all instances, the obligations set forth in the Court orders control.

II. CLASS MEMBERSHIP CRITERIA AND DEFINITIONS

Main Class Members (or “Class Members”): [Implementation Order at 2; 6-7; 23-24.]

All individuals who –

- Are or will be in DHS (ICE) custody for immigration proceedings in Arizona, California, and Washington;
- Have been identified by or to medical personnel, DHS (ICE), or an Immigration Judge as having a serious mental disorder or defect that may render them incompetent to represent themselves in immigration proceedings;
- Presently lack counsel in immigration proceedings; *and*
- Meet at least one of the following criteria:
 1. A Qualified Mental Health Provider (“QMHP”)⁴ determines that the respondent:
 - a. has a mental disorder that is causing serious limitations in communication, memory, or general mental and/or intellectual functioning (*e.g.*, communicating, reasoning, conducting activities of daily living, social skills); or
 - b. has a severe medical condition (*e.g.*, traumatic brain injury or dementia) that is significantly impairing mental function; or
 - c. is exhibiting one or more of the following active psychiatric symptoms or behaviors: severe disorganization, active hallucinations or delusions, mania, catatonia, severe depressive symptoms, suicidal ideation and/or behavior, marked anxiety or impulsivity; OR
 2. A QMHP otherwise diagnoses the respondent as demonstrating significant symptoms of:
 - a. Psychosis or Psychotic Disorder;
 - b. Bipolar Disorder;
 - c. Schizophrenia or Schizoaffective Disorder;
 - d. Major Depressive Disorder with Psychotic Features;
 - e. Dementia and/or a Neurocognitive Disorder; or
 - f. Intellectual Development Disorder (moderate, severe, or profound);⁵ OR

⁴ A QMHP is defined in the Order as a licensed psychiatrist, physician, physician assistant, psychologist, clinical social worker, licensed nurse practitioner, or registered nurse. [Implementation Order at 6.]

⁵ The criteria referred to in 1. and 2. above are hereinafter referred to as “Medical Criteria for Class Membership.”

3. An Immigration Judge has a *bona fide* doubt about the respondent's competence to represent him- or herself based upon the evidence of record.

Sub-Class One Members:⁶ Main Class Members who have a serious mental disorder or defect that renders them incompetent to represent themselves in immigration proceedings. [\[Implementation Order at 2; 24.\]](#)

Sub-Class Two Members: Main Class Members who have been detained for more than six months. [\[Implementation Order at 2; 24.\]](#)

Covered Proceedings: The term "immigration proceedings" is limited to proceedings at which ICE appears on behalf of DHS before an Immigration Judge or the Board of Immigration Appeals ("BIA") that occur prior to the entry of a final administrative order of removal, deportation, exclusion, or a final administrative determination pursuant to 8 C.F.R. 1208.2(c)(3) (*i.e.*, asylum-only and withholding-only proceedings); custody and bond proceedings that occur prior to a final administrative order; and post-order bond hearings pursuant to 8 C.F.R. 1208.2(c)(3). [\[Implementation Order at 24-25.\]](#)

Termination of Proceedings: Once jurisdiction vests with the Immigration Court and a respondent is identified as a Class Member, proceedings shall not be terminated for the purpose of removing, deporting, or excluding the Class Member unless or until: (1) the Class Member is determined by an Immigration Judge to be mentally competent; or (2) the Class Member is determined by an Immigration Judge to be mentally incompetent and is provided a Qualified Representative. [\[Implementation Order at 3.\]](#)

Transfers: Any Class Member who entered ICE custody in Arizona, California, or Washington after November 21, 2011, and who is subsequently transferred out of Arizona, California, or Washington, remains a Class Member and is entitled to all benefits of Class membership, as set forth in the Permanent Injunction and the Implementation Order. [\[Implementation Order at 3.\]](#)

Mental Health Information: Includes any information expressly contained in or directly obtained from an Immigration Court's administrative inquiry into mental competency, a portion of a hearing in which mental competence is addressed, a mental health examination (*i.e.*, Forensic Competency Evaluation) of a respondent (including a request for such examination), and a report of such examination. [\[Implementation Order at 19.\]](#)

- Limited Use of Mental Health Information: Except as otherwise noted below, Mental Health Information can only be used to determine a respondent's mental competency to participate or represent oneself in an immigration proceeding, and may not be used

⁶ Note: Main Class Members can be both Sub-Class One and Sub-Class Two Members.

to establish the truth of the allegations or charges against the respondent, or to establish ineligibility for relief. [\[Implementation Order at 19-20.\]](#)

b. Exceptions:

1. The limited use provision does not apply to information independently submitted, obtained, or possessed by DHS (ICE); or
2. If a respondent “opens the door” by using such information for any purpose other than to inform on his or her mental competency;

c. Note: If a respondent uses part of a document or report, DHS (ICE) may request the production of the complete document or report. Granting such a request is within the Immigration Judge’s discretion upon consideration of all relevant factors.

III. DHS (ICE) SCREENING, INFORMATION-GATHERING, AND INFORMATION-SHARING PROCEDURES

1. Initial Screening – Absent emergency circumstances, all individuals detained in DHS (ICE) custody at any immigration detention facility in Arizona, California, or Washington must – *upon admission* – be screened for a “serious mental disorder or condition.” [\[Implementation Order at 4.\]](#)
2. Further Screening – Absent emergency circumstances, a QMHP must further screen or assess all such individuals for a “serious mental disorder or condition” *within 14 days* of admission into custody. A written questionnaire must be used, and the results must be documented. [\[Implementation Order at 4-5.\]](#)
3. Mental Health Assessment – Individuals identified through the “initial screening,” “further screening,” or at a later stage (such as at a hearing before an Immigration Judge or upon receipt of information provided by a third party) as exhibiting a “serious mental disorder or condition” must be referred to a QMHP for a mental health assessment.⁷ The mental health assessment must be completed as soon as practicable, ordinarily *within 14 days* after the individual is identified through the screening process as exhibiting evidence of a serious mental disorder or condition. The QMHP will make a determination as to whether a detainee meets one of the Medical Criteria for Main Class Membership.⁸ [\[Implementation Order at 5-6.\]](#)

⁷ The Mental Health Assessments are for the purpose of diagnosis, treatment, or stabilization of the individual and not for the purpose of assessing the individual’s legal competency. [\[Implementation Order at 5.\]](#)

⁸ Pursuant to the Implementation Order, ICE or detention facility personnel (including contract detention personnel) must accept any information or documentation relevant to competency and provide the information to the QMHP for consideration. ICE will maintain a toll-free hotline for detainees, family members, and others to report and provide

4. Notification to ICE Chief Counsel –If, on the basis of the mental health assessment, the QMHP determines that the assessed individual meets one of the Medical Criteria for Class Membership, the QMHP will notify ICE Chief Counsel of such *within 7 days* of completion of the mental health assessment. **[Implementation Order at 8.]**
5. Notification to EOIR – Upon notification that an individual is a Class member (*i.e.*, by notification from the QMHP that an individual meets one of the Medical Criteria for Main Class Membership, OR based on a finding of *bona fide* doubt by an Immigration Judge), ICE Chief Counsel must:
 - a. Gather any information or documentation in the possession of ICE or detention facility personnel that is relevant to the competence determination of the Immigration Judge, and provide all such information and documentation to EOIR for consideration **[Implementation Order at 11-12.]**; and
 - b. File a Notice of Class Membership with EOIR (*i.e.*, the Immigration Judge or the BIA, depending on where the case is pending) *within 21* days of (1) receiving notice from the QMHP or (2) the date of the Immigration Judge’s finding of *bona fide* doubt. **[Implementation Order at 12.]**
 - i. The Notice of Class Membership must include all documentation and information relevant to competency gathered by ICE Chief Counsel. Information received by ICE Chief Counsel after the Notice is filed must be provided to EOIR as soon as practicable. ICE must submit any other medical records in its possession upon request by the Immigration Judge. **[Implementation Order at 12.]**

relevant information regarding a detainee’s mental disorder or condition. Where, at any time, new information indicates that the detained respondent suffers from a serious mental disorder or condition, the detained respondent must be referred for a mental health assessment if not previously referred. **[Implementation Order at 8-10.]**

IV. OVERVIEW OF EOIR SYSTEM FOR EVALUATING COMPETENCY

1. Initial Identification – Initial identification of Class membership occurs when (1) an ICE QMHP notifies ICE OCC of his or her finding that an individual meets the Medical Criteria for Class membership or (2) the Immigration Judge makes a finding of *bona fide* doubt about the respondent’s competence to represent him- or herself based upon the evidence of record. [Implementation Order at 7; 12.]
2. Notification of Class Membership by ICE OCC – ICE OCC must file a Notice of Class Membership with EOIR (*i.e.*, the Immigration Judge or the BIA, depending on where the case is pending) *within 21 days* of (1) receiving notification from the QMHP or (2) the date of the Immigration Judge’s finding of *bona fide* doubt. [Implementation Order at 12.]
3. Judicial Competency Inquiry (“JCI”) – Within *21 days* of receiving ICE OCC’s Notice of Class Membership, the Immigration Judge must conduct a JCI to determine if the Class Member is competent to represent him- or herself. If there is insufficient evidence to determine competency, the Immigration Judge must order a Forensic Competency Evaluation. [Implementation Order at 15-17; 19.]
 - a. If the Immigration Judge finds the Class Member incompetent at the conclusion of the JCI, EOIR has *60 days* to provide a Qualified Representative (“QR”).⁹ [Implementation Order at 16-17.]
4. Forensic Competency Evaluation – The Forensic Competency Evaluation (“FCE”), must be conducted by a “Mental Health Professional,”¹⁰ who has *45 days* from the date of the Immigration Judge’s order to complete the FCE and provide the court and the parties with a report as to the results of the FCE. [Implementation Order at 17-19.]
5. Competency Review (“CR”) – The Immigration Judge must conduct a CR within *30 days* of receiving the FCE. The Immigration Judge must then make a finding of competency or incompetency. [Implementation Order at 15; 17-19.]
 - a. If the Immigration Judge finds the Class Member incompetent at the conclusion of the CR, EOIR has *21 days* to provide a QR. [Implementation Order at 17.]

⁹ A QR may be a licensed attorney, an Accredited Representative, or a supervised law student or graduate.

¹⁰ A “Mental Health Professional” is defined as a forensically trained and currently licensed psychiatrist, psychologist, or licensed clinical social worker. [Implementation Order at 18.] This “Mental Health Professional” is distinct from a QMHP used by ICE in its screening procedures.

V. DEFINITION OF COMPETENCE TO REPRESENT ONESELF (Pro Se Competency Standard) [Implementation Order at 13-14.]

When determining whether a respondent is competent to represent him- or herself, the Immigration Judge must consider **both** the respondent's ability to meaningfully participate in the proceedings as set forth in *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011), and the respondent's ability to perform additional functions necessary for self-representation.

1. To meaningfully participate in the proceedings as set forth in *M-A-M-*, the respondent must have a rational and factual understanding of:
 - a. the nature and object of the proceeding;
 - b. the privilege of representation by counsel;
 - c. the right to present, examine, and object to evidence;
 - d. the right to cross-examine witnesses; and
 - e. the right to appeal.
2. To perform additional functions necessary for self-representation, the respondent must have sufficient present ability to:
 - a. exercise the rights listed above;
 - b. make informed decisions about whether to waive the rights listed above;
 - c. respond to the allegations and charges in the proceeding;
 - d. present information and evidence relevant to eligibility for relief; and
 - e. act upon instructions and information presented by the Immigration Judge and government counsel.

A respondent is incompetent to represent him- or herself in an immigration proceeding if he or she, because of a mental disorder (defined as a significant impairment of the cognitive, emotional or behavioral functioning of a person, including Intellectual Disability), is unable to satisfy any of the provisions of the Pro Se Competence Standard.¹¹

3. Additional Guidance on the Application of the Pro Se Competence Standard:
[Implementation Order at 14-15.]

The following guidance is provided to assist Immigration Judges in applying the *pro se* competency standard.

- a. In applying the above definition, the presence of a legal guardian, near relative, friend, or custodian under 8 CFR § 1240.4 shall not affect the assessment of

¹¹ In other words, a respondent is incompetent to represent him- or herself if he or she is unable to satisfy one or more of the provisions of the Pro Se Competence Standard.

whether the respondent is competent or able to perform the additional functions necessary for self-representation.

- b. In assessing whether the respondent can respond to allegations and charges in the proceedings, the Immigration Judge should consider, among other things, the respondent's ability to evaluate and coherently discuss legal arguments.
 - c. In assessing whether the respondent can present information and evidence relevant to eligibility for relief, the Immigration Judge should consider, among other things, the respondent's ability to present rational and coherent testimony based upon adequate recall.
4. No Presumption of Competence: There is no presumption of competence or incompetence for Class Members. [\[Implementation Order at 15.\]](#)
 5. Burdens: There is no burden of production or persuasion at either the Judicial Competency Inquiry or the Competency Review. These are to serve as information-gathering hearings to inform the Immigration Judge's determination concerning the Class Member's competency to represent him- or herself. [\[Implementation Order at 15.\]](#)
 6. ICE's Role: ICE's interest in presenting evidence and argument at the Judicial Competency Inquiry and Competency Review is "in the law being observed" and not toward a particular result. [\[Implementation Order at 15.\]](#)

VI. JUDICIAL COMPETENCY INQUIRY ("JCI")

1. Timeline: The Immigration Judge shall hold the JCI *within 21 days* of receiving the Notice of Class Membership filed by ICE); [\[Implementation Order at 15.\]](#)
 - a. The Immigration Judge may grant one extension of this timeframe of no more than 30 days. Thereafter, extensions may be granted only in exceptional circumstances or where necessary to ensure fundamental fairness. [\[Implementation Order at 18.\]](#)
2. Recording: The JCI must be recorded. [\[Implementation Order at 19.\]](#)
3. Advisal and Questions: At the beginning of the JCI, the Immigration Judge must provide an advisal based on the "Suggested Advisal" contained in the document entitled "Process for Conducting a Judicial Inquiry" (attached as Appendix B to the Implementation Order). Thereafter, the Immigration Judge must assess the Class Member's competence to represent him- or herself based on the "Suggested Questions" from the same document. The Immigration Judge is neither required to ask every question listed nor prohibited from asking additional questions. [\[Implementation Order at 16.\]](#)

4. Submissions: At or before the JCI, ICE, the Class Member and third parties may submit any additional mental health information or other relevant information. [Implementation Order at 19.]
5. Findings: At the conclusion of the JCI, the Immigration Judge must make one of the following findings [Implementation Order at 16] and state on the record the reasoning supporting his or her finding [Implementation Order at 19]:
 - a. Competent: There is *no reasonable cause to believe* the Class Member is suffering from a mental disorder that impairs his or her ability to perform the functions listed in the definition of competence to represent oneself. The “reasonable cause” standard is equivalent to a “*bona fide* doubt” standard and is less onerous than a “probable cause” standard. [Implementation Order at 16.]
 - b. Incompetent: A *preponderance of the evidence* establishes that the Class Member is not competent to represent him- or herself in the proceedings. [Implementation Order at 16.]
 - i. EOIR has *60 days* from the date of the incompetency determination made at the conclusion of the JCI to provide a QR.¹² [Implementation Order at 16-17.]
 - c. Insufficient Evidence: The evidence is not sufficient to support a finding of incompetence, but the Immigration Judge has *reasonable cause to believe* that the Class Member is suffering from a mental disorder that may impair his or her ability to represent him- or herself. In this case, the Immigration Judge must order a Forensic Competency Evaluation and thereafter conduct a Competency Review. [Implementation Order at 16.]

VII. REFERRAL FOR A FORENSIC COMPETENCY EVALUATION (“FCE”)

1. Order: The Immigration Judge must *promptly* order a FCE at the conclusion of the JCI if the evidence is insufficient to determine competence. [Implementation Order at 17.]
2. Standards: The FCE must be completed by a Mental Health Professional. Except in very rare exigent circumstances,¹³ the FCE will be conducted in person. The FCE must be conducted substantially in accordance with the procedures described in the American

¹² Absent exceptional circumstances, a Sub-Class One Member will not be found to have knowingly, intelligently and voluntarily waived his or her right to a QR. [Implementation Order at 21.]

¹³ Exigent circumstances include unique characteristics where the FCE would be enhanced by the use of remote access technology and do not include, *e.g.*, the unavailability of a Mental Health Professional willing to travel to the respondent’s location. [Implementation Order at 18-19.]

Academy of Psychiatry and the Law Practice Guideline for the Forensic Evaluation of Competence to Stand Trial. [\[Implementation Order at 18-19.\]](#)

3. Timeline: The FCE shall be completed and a written report provided to the Immigration Judge and the parties *within 45 days*. [\[Implementation Order at 17.\]](#)
 - a. The Immigration Judge may grant one extension of this timeframe of no more than 30 days. Thereafter, extensions may be granted only in exceptional circumstances or where necessary to ensure fundamental fairness. [\[Implementation Order at 18.\]](#)

VIII. COMPETENCY REVIEW (“CR”)

1. Timeline: The CR must be conducted within *30 days* of receiving the FCE. [\[Implementation Order at 17.\]](#)
 - a. The Immigration Judge may grant one extension of this timeframe of no more than 30 days. Thereafter, extensions may be granted only in exceptional circumstances or where necessary to ensure fundamental fairness. [\[Implementation Order at 18.\]](#)
2. Recording: The CR must be recorded. [\[Implementation Order at 19.\]](#)
3. Submissions: At or before the CR, ICE, the Class Member, and third parties may submit for consideration any additional mental health information or other relevant information. The Immigration Judge may take additional testimony, if necessary. [\[Implementation Order at 17; 19.\]](#)
4. Findings: The Immigration Judge must make a finding of competence or incompetence at the conclusion of the CR [\[Implementation Order at 17\]](#), and must state on the record the reasoning supporting his or her competency finding. [\[Implementation Order at 19.\]](#)
 - a. Competent: A *preponderance of the evidence* establishes that the Class Member is competent to represent him- or herself in the proceedings. [\[Implementation Order at 17.\]](#)
 - b. Incompetent: A *preponderance of the evidence* establishes that the Class Member is not competent to represent him- or herself in the proceedings. [\[Implementation Order at 17.\]](#)

- i. EOIR has 21 days from the date of the incompetency finding made at the conclusion of the CR to provide a QR.¹⁴ [Implementation Order at 17.]

IX. BOND [Permanent Injunction at 2-4.]

1. Sub-Class Two Members (*i.e.*, Class Members who have been detained for more than six months) are entitled to a bond redetermination hearing.
 - a. Class Member identified *before* 180th day of detention is entitled to a bond redetermination hearing between the 180th and 195th day of detention.
 - b. Class Member identified *after* 180th day of detention is entitled to a bond hearing within 15 days of identification.
 - c. Sub-Class One Members must be represented by a QR at their bond proceedings.
2. DHS (ICE) has the burden of proving by clear and convincing evidence that the alien is a flight risk or a danger to the community.

X. APPEAL TO THE BOARD OF IMMIGRATION APPEALS

1. Who may appeal: Either party may appeal a competency determination. [Implementation Order at 20.]
 - a. If ICE appeals an Immigration Judge's determination that a Class Member is incompetent to represent him- or herself, EOIR will provide that Class Member with a QR for the appeal and all other proceedings, including bond, unless and until that Class Member is found competent by an Immigration Judge. [Implementation Order at 20.]
 - b. A Class Member who appeals an Immigration Judge's determination that he or she is competent to represent him- or herself is not entitled to a QR on appeal.
2. Remand:
 - a. BIA: If the BIA receives evidence indicating that a detained unrepresented respondent not previously determined to be a Class Member meets the definition of Class membership, the BIA must remand the case to the Immigration Judge with instructions to apply the procedures for evaluating competence as set forth above. [Implementation Order at 20-21.]

¹⁴ As noted above, absent exceptional circumstances, a Sub-Class One Member will not be found to have knowingly, intelligently and voluntarily waived his or her right to a QR. [Implementation Order at 21.]

- b. ICE: If ICE learns that a detained unrepresented respondent not previously determined to be a Class Member meets the definition of Class membership, ICE must notify the BIA and request a limited remand to apply the procedures for evaluating competence as set forth above. [\[Implementation Order at 12.\]](#)

XI. RESTORATION OF COMPETENCE [\[Implementation Order at 21.\]](#)

1. If an Immigration Judge finds sufficient reason to believe that a Sub-Class One Member is no longer suffering from a mental disorder that renders him or her incompetent to represent him- or herself, the Immigration Judge must follow the competence evaluation procedures set forth above, including the timeframes.
 - a. Input from QR: The Immigration Judge *must* invite input from the Sub-Class One Member's QR before making a finding that the Sub-Class One Member's competency has been restored.
2. The Immigration Judge must state on the record the reasoning supporting the finding of competence for a Sub-Class One Member.

XII. RELEASE OF MAIN CLASS AND SUB-CLASS MEMBERS

The procedural protections set forth in the Permanent Injunction and the Implementation Order are limited to respondents who are detained in ICE custody, except as set forth below:

1. Released Main Class Members:
 - a. If Released After Notice of Class Membership but Before FCE Ordered or Competency Determined [\[Implementation Order at 23\]](#) – In this scenario, the Main Class Member is not entitled to the procedural protections set forth in the Permanent Injunction or the Implementation Order. However, if the released Main Class Member fails to appear at a future immigration proceeding for an unexcused reason or no reason, the following protections apply:
 - i. The released Main Class Member cannot be ordered removed *in absentia* unless or until:
 1. The Main Class Member is represented in his or her immigration proceedings, or
 2. An Immigration Judge has determined that the Main Class Member is competent to represent him- or herself prior to that Main Class Member's failure to appear.

- b. If Released After FCE Ordered but Before Competency Determination is Made [Implementation Order at 22]– If, at the time the Main Class Member is released, the Immigration Judge has conducted a Judicial Competency Inquiry and ordered an FCE, but has not made a competency determination, the released Main Class Member continues to be entitled to:
 - i. Completion of the FCE (if it has not yet been conducted) and a CR.
 - 1. The normal timelines set forth in the Implementation Order for completing the FCE and conducting the CR do not apply.
 - a. However, once the FCE is received by the court, the CR must be scheduled *no more than 45 days thereafter*.
 - 2. A Class Member’s failure to appear for the FCE for no reason or an unexcused reason may forfeit the Class Member’s right to the FCE, and in such a case, the Immigration Judge may make a competency determination without an FCE.
 - ii. If, at the CR, the released Class Member is found incompetent, he or she must be provided with a QR.
- c. Released Sub-Class One Members [Implementation Order at 23]– A released Sub-Class One Member remains entitled to continued representation by the QR until the conclusion of his or her immigration proceedings irrespective of detention status or change of venue (including if a Sub-Class One Member is transferred or moves outside of California, Washington, or Arizona).
- d. Failure to Appear [Implementation Order at 23]– A released Main Class Member may be re-detained upon any failure to appear for a scheduled hearing in immigration proceedings. After any such re-detention, the failure to appear will constitute clear and convincing evidence that the Main Class Member is a flight risk in any bond proceeding.

XIII. REOPENING

- 1. Removal Order Class Member – Subject to the Court’s approval of a partial settlement agreement between the Parties, certain *Franco* Class Members who have received final orders of removal (“Removal Order Class Members”) may be entitled to seek reopening of their immigration proceedings. **[Implementation Order at 25.]**
- 2. Equitable Tolling: Subject to the Court’s approval of the partial settlement agreement, the time and numerical limitations set forth in the INA and its implementing regulations shall be equitably tolled for motions to reopen filed by “Removal Order Class Members” and

accepted for adjudication on the merits, as provided under the Parties' agreement. [Implementation Order at 26.]

XIV. POST-ORDER BOND PROCEEDINGS [Implementation Order at 25.]

1. Covered Proceedings: The benefits and protections of the Implementation Order extend to Class Members who are in bond hearings that occur after the entry of a final administrative order of removal, deportation, exclusion, or determination pursuant to 8 C.F.R. § 1208.2(c)(3) (collectively, "post-order bond hearings"), except in such cases where the final order is thereafter reopened.
2. Notice of Previous Class Membership: For Class Members in post-order bond hearings, ICE is not bound to apply the provisions of the Implementation Order pertaining to Screening and Information Gathering, and Information Sharing. Instead, in such hearings, ICE shall notify EOIR whenever information contained in the case file shows that the respondent was previously identified as a Class or Sub-Class Member.
3. Competency Determination: The Immigration Judge must assess the competence of a Class Member in post-order bond hearings if (1) the information in ICE's case file shows that the respondent was previously identified as a Class Member; **or** (2) the Immigration Judge otherwise determines – during the course of post-order bond hearings – that a respondent is a Class Member (*i.e.*, finds that the record evidence results in a bona fide doubt about the respondent's competence to represent him- or herself).
4. Sub-Class One Member – Provision of QR: If a Class Member was previously determined to be a Sub-Class One Member, he or she must be provided a QR in his or her post-order bond hearings unless an Immigration Judge has made a determination that the Sub-Class One Member is competent to represent him- or herself pursuant to the procedures set forth above.

XV. TOOLS FOR MAIN CLASS MEMBERS [Implementation Order at 26.]

1. Within 90 days of entry of the Order (*i.e.*, by January 27, 2015), Defendants shall prepare tools to be provided to all Main Class Members before the JCI, which will contain basic information to help Main Class Members prepare for the hearing.

XVI. INTERPLAY WITH EOIR'S NATIONWIDE POLICY [Implementation Order at 22.]

1. Nothing in EOIR's nationwide policy is intended to negate or alter the obligations of EOIR under the orders of the Court in *Franco-Gonzales v. Holder*.