

### *CBP Restrictions on Access to Counsel*

Over the last several years, AILA members have consistently reported that U.S. Customs and Border Protection (CBP) officers routinely stymie their efforts to provide legal representation to clients during CBP encounters, often without a clear explanation of the policies underlying the decision to exclude counsel.<sup>1</sup> In fact, the Administrative Procedure Act provides a broad statutory right to counsel in required appearances before administrative agencies,<sup>2</sup> and the immigration agencies also recognize a regulatory right to counsel during many agency examinations.<sup>3</sup>

Through Freedom of Information Act (FOIA) litigation, the American Immigration Council has obtained more than 300 pages of documents relating to CBP policies on access to counsel from CBP headquarters, field offices, Border Patrol sector offices, and other subdivisions. These documents suggest that CBP policies and practices on access to counsel vary from one office to another, although a limited number of nationwide policies exist.<sup>4</sup>

The documents released by CBP provide information about the agency's policies on:

- Access to counsel for individuals:
  - In primary and secondary inspections,
  - During personal searches,
  - In deferred inspections, and
  - In CBP detention;

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<sup>1</sup> See, e.g., American Immigration Council and Center for Immigrants' Rights, Dickinson School of Law, Pennsylvania State University, [Behind Closed Doors: An Overview of DHS Restrictions on Access to Counsel](#) (2012); [Letter](#) from American Immigration Lawyers Association and American Immigration Council to CBP Commissioner Alan Bersin (May 11, 2011).

<sup>2</sup> See 5 U.S.C. § 555(b).

<sup>3</sup> See 8 CFR § 292.5(b).

<sup>4</sup> Most documents produced are at least three years old. They were released at various times, and some are undated or in draft form. The documents may reflect policies in effect at different times or policies that have changed since the documents were produced. Some include excerpts of the Inspector's Field Manual (IFM), which has been replaced by the electronic Officer Reference Tool (ORT). Since the ORT is not publicly available, it is unclear what guidance is currently in use. CBP's Office of Field Operations has recognized that CBP officers are still using the IFM as a "reference," but stated that the officers should be using "current guidance and policy issued by HQ." See AILA/CBP National Liaison Meeting Agenda and Notes (Apr. 2014), [AILA InfoNet Doc. No. 14051241](#), at 8-10 (posted May 12, 2014). The documents produced are useful in understanding why there is such variance in the degree of access AILA members experience at different ports of entry and in assessing how best to serve the client when deferred inspection is scheduled, particularly since there is no current publicly available policy guidance.

- Advisals of rights; and
- Treatment of children.

These documents are [indexed](#) and [posted](#) on the Council’s website.

*Primary and Secondary Inspection*

Under 8 CFR § 292.5(b), an applicant for admission is not entitled to representation in primary or secondary inspections, unless he or she “has become the focus of a criminal investigation and has been taken into custody.” The CBP documents include very little additional national guidance addressing access to counsel during the inspection process. A 2003 memo notes that inspectors *may* allow an “accompanying helper” to be present during inspections – including when such an individual could assist in ensuring the inspector has pertinent information.<sup>5</sup> Furthermore, CBP will contact someone, including an attorney, on an individual’s behalf if he or she is administratively detained for more than three hours after referral to “hard secondary.” However, the detained individual may not communicate directly with others until after processing has been completed, if communication is permitted prior to removal at all.<sup>6</sup>

Some, but not all, CBP field offices released documents addressing access to counsel at some or all of their ports of entry in more detail. The content of these documents varies widely from port to port; some completely bar counsel in primary or secondary inspection, while others provide specific procedures for interacting with counsel:

- Nevada, 2007: When an individual in secondary inspection states that his attorney is waiting in the entry area, **the officer’s only responsibility “is to notify a relative or a friend” if the individual is detained for more than two hours.**<sup>7</sup>
- Buffalo Field Office, 2008: When an attorney is late to meet a client attempting to enter the United States and seeking L-1 processing, the issue is handled on a case-by-case basis. **It is not agency policy to deny admission if an individual’s attorney is late,** suggesting that attorneys are permitted in secondary inspection in certain situations.<sup>8</sup>

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<sup>5</sup> Jayson P. Ahern, Assistant Commissioner, Office of Field Operations, Attorney Representation During the Inspection Process (July 2003), [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_1.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_1.pdf), at 1-2; *see also* Inspector’s Field Manual, Chapter 2.9, <http://www.aila.org/content/fileviewer.aspx?docid=41867&linkid=253265>, at 18.

<sup>6</sup> CBP Field Operations Contact Advisory of CBP Detention (undated), [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_3.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_3.pdf), at 61. Although this advisory was provided as an attachment to a Seattle CBP Standard Operating Procedure, *see* Secure Detention Procedures for Arriving Passengers in a Secure Area (Mar. 2010), *id.* at 62-64, the advisory itself appears to apply beyond the Seattle Field Office. The document does not define “hard secondary.” However, another memorandum addressing third party notifications distinguished hard secondary as “an examination or investigative process involving immigration administrative proceedings or immigration criminal prosecutions,” unlike “soft secondary . . . where the expected outcome of CBP officers’ action will be the release of the traveler upon completion of processing.” *See* Jayson P. Ahern, Assistant Commissioner, Office of Field Operations, Detention Guidelines for Notification of Third Parties – Additional Guidance (Dec. 2004) (on file with American Immigration Council).

<sup>7</sup> CBP/Nevada AILA Liaison Meeting Agenda and Minutes (Nov. 2007), [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_2.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_2.pdf), at 2. This document was produced by the Los Angeles Field Office.

<sup>8</sup> AILA/CBP Liaison Meeting Agenda and Minutes (Mar. 2008), [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_3.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_3.pdf), at 82.

- Laredo Field Office, 2009: Individuals in “NTA processing” need not and should not receive *Miranda* or *Miranda*-like warnings, because **someone seeking admission to the U.S. “must honestly describe his identity, nationality, business, and claim of entitlement to enter, and must do this without the aid of counsel.”**<sup>9</sup>
- Los Angeles (LAX), 2010 (draft documents): **Attorney representation is barred in primary or secondary inspection**, but as a courtesy, CBP management may speak to attorneys whose clients are in secondary, accept certain documents from attorneys, inform attorneys of the disposition in a secondary inspection, and allow clients to call counsel after processing is completed if doing so would not cause delay. CBP should terminate calls if attorneys become rude or threatening—including if an attorney states that he or she will file a lawsuit or contact the media. CBP did not produce a final document addressing the LAX policy.<sup>10</sup>
- Boston (Logan Airport), 2011: **No attorneys are permitted in primary or secondary inspection**. Although the port subsequently changed its policy for deferred inspections, no new policy released through this FOIA request addresses secondary inspections.<sup>11</sup>
- St. Albans, VT Area Port, 2011: **Highgate and Derby Line ports of entry do not have a policy of barring attorneys during inspections involving L and TN adjudications**. Attorneys may enter the ports of entry to speak with officers, may sit and confer with their clients in the lobby, and may interact with officers at the officers’ request.<sup>12</sup>
- Blaine, WA, 2012: If an attorney interferes with an inspection, a supervisor will tell the attorney to stop or be removed from the premises. Attorneys may be permitted to remain in the lobby, away from the point of inspection, at CBP’s discretion. **Officers can advise attorneys that individuals who interfere with the performance of official duties by government employees may be subject to fines or other penalties.**<sup>13</sup>

### *Personal Searches*

CBP produced some documents concerning specific policies that apply to individuals in primary or secondary inspection who are detained for a “personal search” – a “significantly intrusive search[] of a person to determine whether he or she is carrying contraband close to or inside his or her body.”<sup>14</sup> CBP does not provide access to counsel during this process. If an individual

<sup>9</sup> Laredo Field Office Weekly Muster FY10-002: Improper Use of I-214 for Administrative Rights (Oct. 2009), [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_3.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_3.pdf), at 109 (quoting *U.S. v. Gupta*, 183 F.3d 615, 617 (7th Cir. 1999)).

<sup>10</sup> Los Angeles Airport Passport Control Muster: Attorney Inquiries Regarding Admissibility Issues and attachment (draft) (Mar. 2010 and undated), [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_2.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_2.pdf), at 7-11; [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_3.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_3.pdf), at 111-112.

<sup>11</sup> Email from Assistant Director, Border Security, Boston Field Office to Assistant Executive Director, CBP Admissibility and Passenger Programs (May 27, 2011), [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_3.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_3.pdf), at 87-88.

<sup>12</sup> *Id.* at 87; Memorandum, Restrictions on Access to Counsel at Ports of Entry (undated), [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_1.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_1.pdf), at 8-9.

<sup>13</sup> Office of Field Operations Weekly Muster: Dealing with Attorneys and Other Representatives at a Port of Entry (Apr. 2012), [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_1.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_1.pdf), at 53-54. This document was produced by the Seattle Field Office.

<sup>14</sup> CBP Office of Field Operations, Personal Search Handbook (Jul. 2004), [AILA InfoNet Doc. No. 04070159](http://www.aila.org/InfoNet/Doc/04070159), at 7 (posted July 7, 2014).

requests access to an attorney during a personal search, CBP guidance indicates that the officer conducting the search should advise that the personal search is not an interrogation and that the individual is thus not entitled to an attorney during the search. If an individual is detained for a personal search for more than two hours, CBP will offer to inform someone, including an attorney, of the delay, unless probable cause has been established. The detained individual may not consult with an attorney directly at any time before *Miranda* warnings are administered and invoked.<sup>15</sup>

### *Deferred Inspection*

CBP views deferred inspection as a continuation of secondary inspection. Thus, as a matter of policy, the agency does not recognize a right to counsel during deferred inspection. CBP documents, however, make it clear that officers have the discretion to allow attorneys into deferred inspection if an attorney asks to be present. Under these circumstances, the attorney may act only as an observer and consultant; he or she may not direct questioning or answer for the client.<sup>16</sup> In May 2011, the American Immigration Council and the American Immigration Lawyers Association sent a [letter](#) to the CBP Commissioner highlighting the lack of access to counsel in deferred inspections and during other interactions with CBP. Less than a week after receipt of this letter, CBP's Assistant Executive Director of Admissibility and Passenger Programs, Office of Field Operations (hereafter referred to only as "OFO") sent an inquiry to CBP Field Office Directors requesting feedback that would "demonstrate that current policies and practices adequately reflect existing statutory and regulatory protections." Further, OFO stated that the agency did "not support expanded access" to counsel.<sup>17</sup>

A number of field offices released documents that address access to counsel in deferred inspection, many in response to OFO's 2011 inquiry. Although some ports of entry subsequently changed their policies, ports have had widely disparate practices regarding access to counsel.

- Boston Field Office, 2011: Some ports under the jurisdiction of the Boston Field Office never had an official policy barring counsel at deferred inspections, while others previously did not permit attorneys in any deferred inspection interviews.<sup>18</sup> In response to OFO's 2011 inquiry, **the policy for the ports was "clarified" to ensure that attorneys should generally be allowed to be present.**<sup>19</sup>

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<sup>15</sup> Inspector's Field Manual, Chapter 17.8, [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_1.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_1.pdf), at 41; Personal Search Handbook, Chapters 2 and 10 excerpts and attachment, *id.* at 48-51.

<sup>16</sup> Jayson Ahern, Assistant Commissioner, Office of Field Operations, Attorney Representation During the Inspection Process (Jul. 2003), [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_1.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_1.pdf), at 1; Inspector's Field Manual, Chapter 17.1(g), [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_3.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_3.pdf), at 86.

<sup>17</sup> Email from Assistant Executive Director, CBP Admissibility and Passenger Programs (May 16, 2011), [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_3.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_3.pdf), at 88.

<sup>18</sup> Email from Assistant Director, Border Security, CBP Boston Field Office (May 27, 2011), *id.* at 87-88.

<sup>19</sup> Email from Area Port Director (acting), Boston, MA CBP (Jun. 24, 2011), [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_1.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_1.pdf), at 19-20 (commenting on policy and past practice at the ports within the Boston Field Office's jurisdiction).

- Highgate Springs did not previously have a policy of barring counsel.<sup>20</sup>
- In Providence, **allowing counsel in deferred inspections upon request was a “dramatic change in policy.”**<sup>21</sup>
- The clarified policy was also a surprise at Bradley International Airport in Hartford, CT.<sup>22</sup>
- Logan Airport **previously had not permitted attorneys to accompany clients into the CBP offices,**<sup>23</sup> **but changed its policy for deferred inspections** as of June 2011.<sup>24</sup>
- Baltimore Field Office, 2011 (draft document): **It is left to the discretion of CBP officers whether they will “make an exception” to allow counsel in deferred inspections.** The ports of entry within the jurisdiction of the Baltimore Field Office will allow access to attorneys “who show the proper respect and understanding of the deferred inspection process” but will “continue to exercise discretion on those attorneys who disrespect and intimidate officers.” Inappropriate behavior by attorneys includes “telling their clients not to answer questions, interrupting interviews or presenting their own, sanitized version of events.” This Field Office did not produce a final document addressing its policy.<sup>25</sup>
- Miami Field Office:
  - 2011: The office has no general policy prohibiting attorneys in deferred inspections, and **each request is evaluated on a case-by-case basis and permitted where appropriate.**<sup>26</sup>
  - 2012: CBP would not change its position that the determination of whether to permit an attorney in deferred inspection must be made on a case-by-case basis, but the office would look into creating a system to allow attorneys to fax or scan documents crucial to their clients’ cases in advance of inspections.<sup>27</sup>

<sup>20</sup> Memorandum, Restrictions on Access to Counsel at Ports of Entry (undated), [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_3.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_3.pdf), at 90; *see also* Email from Assistant Director, Border Security, Boston Field Office (May 27, 2011), *id.* at 87-88.

<sup>21</sup> Email from Port Director, CBP Service Port of Providence (Jun. 24, 2011), [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_1.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_1.pdf) at 21; *see also* Email from Assistant Port Director, Providence Service Port (Jun. 24, 2011), <http://www.legalactioncenter.org/sites/default/files/Production%2010%20for%20website.pdf>, at 18 (clarifying that officers are only “required to have attorneys present for deferred inspections if they REQUEST to do so”) (emphasis in original).

<sup>22</sup> Email from Supervisor/Fl, CBP Field Operations, Bradley International Airport (Jun. 24 2011), *id.* at 18.

<sup>23</sup> Excerpt of Memorandum responding to AILA/Immigration Council letter (undated), [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_3.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_3.pdf), at 92.

<sup>24</sup> Email from CBP Area Port Director (acting), Boston, MA (June 24, 2011), <http://www.legalactioncenter.org/sites/default/files/Production%2010%20for%20website.pdf>, at 16.

<sup>25</sup> Email from Operations Specialist, CBP Baltimore Field Office (May 18, 2011), [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_1.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_1.pdf), at 57-58. A subsequent email states that this document “looks like the final draft” of the office’s response, *see id.* at 57, but according to a CBP FOIA appeals officer, at least portions of the response “are not contained or incorporated into the ‘final’ policy at the Port of Baltimore.” Decl. of Shari Suzuki in Support of Defendants’ Motion for Summary Judgment at 10, *Am. Immigration Council v. Dep’t of Homeland Sec.*, No. 11-1972, 2014 U.S. Dist. LEXIS 37327 (D.D.C. Mar. 21, 2014) (unpublished).

<sup>26</sup> Email from Chief, CBP Miami Field Office (May 20, 2011), [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_4.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_4.pdf), at 27.

<sup>27</sup> CBP/AILA Liaison Meeting Minutes (Aug. 2011), <http://www.legalactioncenter.org/sites/default/files/Production%209%20for%20website.pdf>, at 19.



- 2013: The decision whether to allow counsel to accompany the applicant remains in the discretion of the supervisory officer on duty at the time of a deferred inspection. **The attorney is not permitted to “engage directly” with the interviewing officer** at the Miami port of entry. It would be “an error” for CBP to fail to accept information from an attorney that would support a claim of citizenship or otherwise assist in an inspection.<sup>28</sup>
- Los Angeles (LAX), 2010 (draft document): **Attorney representation is barred in deferred inspections**, but as a courtesy, CBP management may speak to attorneys whose clients are in deferred inspection and accept certain documents from attorneys. CBP did not produce a final document addressing the LAX policy.<sup>29</sup>

### *CBP Short-Term Detention*

Documents released by CBP suggest that noncitizens face obstacles in accessing counsel even outside primary, secondary, and deferred inspections. A memo regarding standards in CBP short-term detention facilities, where many individuals are held prior to transfer to ICE or another agency, does not include any provisions regarding in-person access to counsel. Instead, the memo requires CBP to give individuals access to a telephone to call an attorney after 24 hours of detention and once a day thereafter.<sup>30</sup>

Two Border Patrol offices released documents regarding access to counsel in short-term detention, again suggesting a lack of uniform access to counsel policies across CBP offices:

- San Diego Sector, 2009: Following complaints about lack of access to counsel at the Barracks 5 transit staging area in San Ysidro, **CBP developed a procedure for attorneys to meet with clients detained at the facility**, with advance notice. A G-28 is not required.<sup>31</sup>
- Tucson Sector:
  - 2004: **Border Patrol Stations have no obligation to permit attorneys to meet with individuals awaiting transfer to a long-term detention facility or removal**, although access is required for consular officials. **Detainees must have access to telephones, and after a detained individual asks to speak to an attorney, officers must provide at least two hours for the individual to try to reach an attorney by phone.** If the request is made during processing, the individual may not be allowed to make the call until after booking information is collected, but questioning must stop once the booking information is obtained.

<sup>28</sup> Miami Field Operations Director, Office of Civil Rights and Civil Liberties Referral (Feb. 2013), *id.* at 8-10.

<sup>29</sup> Los Angeles Airport Passport Control Muster: Attorney Inquiries Regarding Admissibility Issues and attachment (draft) (Mar. 2010 and undated), [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_2.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_2.pdf), at 7-11; [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_3.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_3.pdf), at 111-112.

<sup>30</sup> U.S. Border Patrol Policy, Hold Rooms and Short-Term Custody (Jan. 2008), <http://legalactioncenter.org/sites/default/files/CBP%20Counsel%20FOIA%20-Production%206.pdf>, at 4923048. Separate provisions address the rights of children. *See infra* at 8.

<sup>31</sup> Letter from Mike J. Fisher, Chief Patrol Agent, San Diego Sector, U.S. Border Patrol to David Blair-Loy, Legal Director, ACLU of San Diego & Imperial County (Feb. 13, 2009), [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_1.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_1.pdf), at 31-32.

Booking information does not include alienage, but officers should establish alienage in the field prior to booking. Officers have no obligation to provide information about a detained individual in response to incoming calls, even from an attorney.<sup>32</sup>

- **2010: Agents are permitted, but not required, to release information about detained individuals to their family members and attorneys**, including that the individual has been arrested for an immigration violation, the individual's location, and whether the individual has been removed.<sup>33</sup>

### *Advisals of Rights*

CBP officers may be required to inform some individuals in their custody of certain rights, including the right to an attorney. While *Miranda* warnings are required only for individuals facing criminal prosecution, immigration officers must provide a different set of warnings to individuals subject to removal proceedings. See 8 CFR § 287.3(c). These regulatory warnings include an advisal that an individual has the right to legal representation at no expense to the government. However, the BIA has held that officers need not provide these advisals until *after* removal proceedings have been initiated. See *Matter of ERMF & ASM*, 25 I&N Dec. 580 (BIA 2011).

CBP produced several documents concerning the required advisals, although some which clarified nationwide policies were out of date or are not currently in use.<sup>34</sup> Documents providing local guidance were more recent, but most merely outlined when *Miranda* warnings are required under 8 CFR § 292.5(b).<sup>35</sup> One 2009 directive went into more detail, making it clear that officers should never inform immigrants of their rights unless and until they are required to do so. The Laredo Field Office instructed officers not to give *Miranda*-type warnings (including warnings

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<sup>32</sup> Chief Patrol Agent, Tucson Sector, U.S. Border Patrol, Phone Calls and Visitors to Aliens in Detention (Dec. 2004), <http://www.legalactioncenter.org/sites/default/files/Production%2010%20for%20website.pdf>, at 13-14.

<sup>33</sup> Tucson Sector, Office of Border Patrol, Telephone Use and Release of Information of Subjects in Custody (Sep. 2010), [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_4.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_4.pdf), at 13-14.

<sup>34</sup> For example, excerpts of the Border Patrol Handbook provide suggested wording for advisals, emphasize the difference in warnings required for individuals facing administrative versus criminal proceedings, and note that administrative warnings need not be provided until after an officer has determined that an NTA will be issued. See Border Patrol Handbook, Chapter 5: Civil Rights in Law Enforcement (undated), [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_4.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_4.pdf), at 7-8; <http://www.legalactioncenter.org/sites/default/files/Production%2010%20for%20website.pdf>, at 11 (less redacted). However, according to a CBP FOIA appeals officer, the version of the Handbook produced “remains in draft and is not yet implemented; after it was issued, it was challenged by a union action and then withdrawn, leaving the 1984 version of the Handbook still in place.” Decl. of Shari Suzuki in Support of Defendants’ Motion for Summary Judgment at 7 n.1, *Am. Immigration Council v. Dep’t of Homeland Sec.*, No. 11-1972, 2014 U.S. Dist. LEXIS 37327 (D.D.C. Mar. 21, 2014) (unpublished). CBP did not produce a version of the Handbook that is currently in use.

<sup>35</sup> See, e.g., CBP/AILA/LACBA Liaison Meeting (Sep. 2009), [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_1.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_1.pdf), at 47 (stating that officers in Los Angeles provide *Miranda* warnings and the opportunity to request that an attorney be present at an interrogation only if an individual has become the focus of a criminal investigation and has been taken into custody); Field Operations Director, Tucson Field Office, Invocation of *Miranda* Rights and Subsequent Administrative Processing (Nov. 2008), [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_4.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_4.pdf), at 17 (noting that officers must administer *Miranda* warnings if they “contemplate[]” criminal proceedings against an applicant for admission and that if an individual invokes his or her rights, the officers must stop questioning).

specifically for individuals placed in civil immigration proceedings) during processing for a Notice to Appear (NTA) because, **following a rights advisal, an immigrant often “will refuse to answer questions or provide a sworn statement.”** Officers are informed that **advisals could “mislead the alien by giving the false impression that he or she has the right to an attorney and not make a statement,”** making it less likely that CBP will be able to obtain evidence of removability. Officers must ask whether statements are being given voluntarily, but may not inform their interviewees that they have a right to remain silent. Only after “determin[ing] that the alien is amenable to removal proceedings” should an officer provide advisals via an NTA. Where “the focus of the interrogation shifts to contemplated criminal prosecution,” officers must provide *Miranda* warnings.<sup>36</sup>

### *Policies Regarding Children*

CBP released several documents relating to the treatment of children in its custody.<sup>37</sup> Some of these documents briefly address access to counsel for children:

- The Inspector’s Field Manual, Appendix 17-4, contains the 1997 *Flores v. Reno* settlement, addressing the immigration agencies’ treatment of children in their custody. The settlement notes that **represented children should not be transferred between facilities without advance notice to their attorneys**, except in “unusual and compelling circumstances,” in which case notice must occur within 24 hours following the transfer.<sup>38</sup>
- Border Patrol’s short-term custody memo, discussed *supra* at 6, notes that **unaccompanied children in short-term custody must receive notice of their rights through I-770 Forms and a current and accurate list of free legal service providers who will represent juveniles in removal proceedings**. If a child is under 14 or unable to understand the I-770, an officer must read it to the child in a language he or she can understand.<sup>39</sup>

### *Miscellaneous*

Additionally, CBP released:

- A 2010 local response to an inquiry from the AILA Southern California chapter and Los Angeles County Bar Association (LACBA) stating that there is no method for attorneys

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<sup>36</sup> Laredo Field Office Weekly Muster FY10-002: Improper Use of I-214 for Administrative Rights (Oct. 2009), [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_3.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_3.pdf), at 109-10.

<sup>37</sup> Some documents described policies regarding children, but did not include information about access to counsel. See, e.g., David V. Aguilar, Chief, U.S. Border Patrol, Implementation of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (Mar. 2009), [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_3.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_3.pdf), at 67-77; <http://www.legalactioncenter.org/sites/default/files/Production%2010%20for%20website.pdf>, at 7 (less redacted).

<sup>38</sup> Inspector’s Field Manual, Appendix 17-4, [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_4.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_4.pdf), at 2. In addition, the settlement provides procedures allowing plaintiffs’ counsel to visit facilities where children are in immigration detention, both for attorney-client visits and to interview staff and detained children and observe detention conditions. *Id.* at 2-3.

<sup>39</sup> U.S. Border Patrol Policy, Hold Rooms and Short-Term Custody (Jan. 2008), <http://legalactioncenter.org/sites/default/files/CBP%20Counsel%20FOIA%20-Production%206.pdf>, at 4923049.



to seek reconsideration of **expedited removal** decisions because there is no right to counsel in primary or secondary inspection, citing 8 USC § 1225, 8 CFR § 235.1, and IFM Chapters 2.9 and 17.15.<sup>40</sup>

- A 1986 document summarizing INS policy that attorneys generally should receive **notice that the agency intends to interview their clients**. The document outlines when the agency need not provide notice, including during contact pursuant to subpoenas or warrants, in interviews unrelated to the matter for which the attorney is providing representation, where the interviewer is unaware that the individual is represented, and where there are specific reasons to believe that notice would hamper an investigation.<sup>41</sup>
- Excerpts from an undated version of the Border Patrol Handbook which remains in draft form.<sup>42</sup> The document directs Border Patrol officers to stop interrogations if individuals “indicate in any manner, at any time before or during questioning, their wish to remain silent” and to suspend questioning until counsel is present if an individual requests an attorney, provided that the request is “in clear and unequivocal terms.” However, the document limits the role of attorneys in interrogations to advising their clients; they may not invoke the Fifth Amendment privilege on their clients’ behalf, “participate in or obstruct inquiries,” or question them on the record. This document contains redactions; the unredacted portions do not indicate how broadly the directive was intended to apply.<sup>43</sup>
- An IFM provision outlining what materials will be released to attorneys representing individuals whose **conveyances were seized** by the agency. The document notes that attorneys may be present at their clients’ interviews relating to conveyance seizures, but may not attend in place of their clients.<sup>44</sup>

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<sup>40</sup> CBP/LACBA Immigration Section/AILA Southern California Liaison Meeting Agenda and Notes (Oct. 2010), [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_3.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_3.pdf), at 107-08.

<sup>41</sup> INS, Guidelines concerning the interview of individuals represented by attorneys (Jul. 1986), [http://legalactioncenter.org/sites/default/files/docs/lac/Supp\\_to\\_Prod%204-received\\_2-28-13.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/Supp_to_Prod%204-received_2-28-13.pdf), at 2-6.

<sup>42</sup> A CBP FOIA appeals officer stated that this version of the manual was challenged and is not in use. *See supra* n.34. CBP did not produce a version of the Handbook that is currently in use. While the document is undated, it was clearly produced after 2001, as it references the September 11, 2001 attacks.

<sup>43</sup> Border Patrol Handbook, Chapter 5: Civil Rights in Law Enforcement (undated), [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_4.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_4.pdf), at 8-9.

<sup>44</sup> Inspector’s Field Manual, Chapter 44.8(d), [http://legalactioncenter.org/sites/default/files/docs/lac/CBP\\_Counsel\\_Production\\_1.pdf](http://legalactioncenter.org/sites/default/files/docs/lac/CBP_Counsel_Production_1.pdf), at 40.