IMMIGRANT & NON-CITIZEN
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# EVIDENTIARY OBJECTIONS TO CHALLENGE COMMONLY INTRODUCED EVIDENCE USED IN SUPPORT OF GANG ALLEGATIONS

**Practice Note**
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Maya Leszczynski, Katherine Dennis, Prof. Nermeen Arastu, and Prof. Talia Peleg
Immigrant & Non-Citizen Rights Clinic

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# EVIDENTIARY OBJECTIONS TO CHALLENGE COMMONLY INTRODUCED EVIDENCE USED IN SUPPORT OF GANG ALLEGATIONS[1]

## INTRODUCTION

In bringing gang allegations against immigrant New Yorkers, the U.S. Department of Homeland Security (DHS) frequently relies on undisclosed evidence, arbitrary inferences based on one's associations or personal appearance on social media, government-generated documents containing layers of hearsay, and conclusory statements by law enforcement or informants. Often this evidence is unreliable, unfairly prejudicial, and unsupported by testimony or authentication and compromises the fundamental fairness of the proceeding. And, even though gang membership or affiliation in and of itself is not a ground of inadmissibility or deportability, it is often raised by DHS to try to deny immigration relief or bond.[2]

Although the Federal Rules of Evidence (FRE) do not strictly apply in immigration court, the FRE can be helpful as guidance and incorporating the FRE can alleviate inconsistencies in how evidentiary rules are applied in immigration proceedings.[3] If evidence is not admissible under FRE, admission likely does not comport with due process.[4] Thus, it is still important to make a timely objection.[5]

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[1] Maya Leszczynski, Katherine Dennis, Prof. Nermeen Arastu, and Prof. Talia Peleg, Immigrant & Non-Citizen Rights Clinic, CUNY School of Law. Thank you to Jordan Weiner, Professor Janet Calvo, Naz Ahmad, My Le, and Colin Bruscia for their contributions and legal advocacy. *The legal research contained herein does not constitute an exhaustive search of all relevant case law in all jurisdictions. The views and arguments are of the authors and are not a substitute for independent legal advice or research conducted by a lawyer familiar with a client's case.*

[2] *See* I.N.A. §§ 212, 237. Grounds of inadmissibility codified under Section 212 of the INA apply to people seeking admission to the United States and fall into categories such as medical issues, criminal violations, threats to national security, economic instability, employment and labor issues, and violations of immigration regulations. Grounds of deportability, codified under Section 237 of the INA, apply to people already who were legally "admitted" to the United States.

[3] Lilibet Artola, Note, *In Search of Uniformity: Applying the Federal Rules of Evidence in Immigration Removal Proceedings*, 64 RUTGERS L. REV. 863, 864 (2012).

[4] Dorothy Harbeck, *Objections in Immigration Court: Dost Thou Protest Too Much or Too Little?*, 5 STETSON J. ADVOC. & L. 1, 4 (2018) ("The F.R.E. can provide some guidance in immigration court practice, although immigration proceedings are not bound by the strict rules of evidence . . . Objections to questions must first be made at the trial court level, because if the objection is not made there, an argument based on that objection cannot be asserted on appeal. In immigration court, as in other courts, evidentiary objections must be made in a timely fashion, and the grounds must, therefore, be identified with particularity. Although the FRE do not strictly apply, they are still instructive and more importantly could be considered later by an appellate court, which is why it is important to preserve for appeal.") (internal citations omitted).

[5] *Id.*

Generally, immigration judges (IJs) tend to admit almost all of the evidence introduced.[6] Immigration court has low evidentiary standards and evidence is admissible in removal proceedings if it is probative and its use is fundamentally fair.[7] Fairness is related to reliability and trustworthiness.[8] Practitioners should make arguments to challenge evidence's weight. In turn, IJs must assess the weight that evidence should be accorded. Even if documentary evidence is not admitted, it remains part of the record.[9]

This Practice Note offers some evidentiary objections to raise when DHS introduces evidence to support gang allegations in immigration proceedings. A single piece of evidence may trigger multiple objections and reliability concerns and practitioners should be prepared to raise as many objections to the evidence as applicable while recognizing the interconnectedness of many of these objections.

## RAISING EVIDENTIARY OBJECTIONS IN IMMIGRATION COURT GENERALLY

1. *Use this Practice Note* to help you assess whether the evidence brought against your non-citizen client is probative and whether it undermines notions of fundamental fairness in its reliance on overbroad characterizations and conclusory gang allegations lacking factual support. Approach the evidence introduced by the government with skepticism. Remember that the lack of objective criteria for determining membership in or association with a gang makes such determinations highly susceptible to error.

   Refer to expert materials contained in Toolkit to Challenge Gang Allegations against Immigrant New Yorkers to support the bases of objections where lack of relevance, unreliability, unfair prejudice, and other violations are alleged.

2. Evidence is admissible in *removal proceedings* if it is relevant (probative) and its

[6] *See* 8 C.F.R. §§ 1240.7(a) ("The immigration judge may receive in evidence any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial."); 8 C.F.R. §1240.46(c) ("Testimony of witnesses appearing at the hearing shall be under oath or affirmation administered by the immigration judge.").
[7] Relevance and fundamental fairness are the only bars to admissibility of evidence in deportation cases. *In re* Barcenas, 19 I. & N. Dec. 609, 611 (B.I.A. 1988); *In re* Ponce-Hernandez, 22 I. & N. Dec. 784, 789 (B.I.A. 1999); *In re* Toro, 17 I. & N. Dec. 340, 345 (B.I.A. 1980); *In re* Lam, 14 I. & N. Dec. 168, 170-71 (B.I.A. 1972); *Espinoza v. INS*, 45 F.3d 308, 310 (9th Cir. 1995).
[8] Aslam v. Mukasey, 537 F.3d 110, 114 (2d Cir. 2008) ("The standard for due process is therefore satisfied in immigration proceedings if the evidence 'is probative and its use is fundamentally fair;' fairness in this context being 'closely related to the reliability and trustworthiness of the evidence.'") (internal citations omitted).
[9] *See e.g.*, *In re* O-D-, 21 I. & N. Dec. 1079 (B.I.A. 1998).

use is fundamentally fair. [10] Meanwhile, *fundamental fairness* is closely related to the reliability and trustworthiness of the evidence.[11] Remember that unreliable evidence is not probative nor trustworthy and should be excluded.[12] Argue against its admission because the evidence violates the respondent's due process rights and undermines the fundamental fairness of the proceeding.[13]

3. *Federal Rules of Evidence* are not binding in removal proceedings, but may provide strong support as to whether admission of evidence comports with due process. If evidence is not admissible under FRE, admission probably does not comport with due process and admission undermines the fundamental fairness of the proceeding. Consider using the policy rationales behind specific rules and case law regarding specific evidentiary objections to argue why evidence should be given less weight. As a starting point, refer to *Notes of Advisory Committee on Proposed Rules* for policy considerations and case law.[14]

4. Carefully review the Executive Office for Immigration Review's (EOIR) *Immigration Court Practice Manual* (ICPM) for the procedures, recommendations, and requirements for the admission of evidence before the immigration court. [15] The ICPM contains formal procedures for the timing, presentation, and acceptance of evidence by IJs, including formal rules for the manner in which the evidence must be presented.[16] Failure to comply with pretrial procedure can result in the denial of witness testimony or have other implications.[17] For example, if DHS introduces new evidence the day of the hearing against your client, object to the untimeliness or ask the immigration judge for more time to evaluate the evidence.

5. When an IJ is considering *evidentiary weight*, be prepared to argue how much weight should be given and why the IJ should accord little to no weight. If the judge does not explicitly state that specific evidence will be given particular weight, inquire what weight the judge is assigning. Argue why the IJ should give

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[10] Lin v. U.S. Dep't of Justice, 459 F.3d 255, 268 (2d Cir. 2006) ("Evidence may be admitted in accordance with the standard for due process if it is probative and its use is fundamentally fair. Fairness in this context is closely related to the reliability and trustworthiness of the evidence.")
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] The *Notes of Advisory Committee on Proposed Rules* contained in most publications of the FRE are helpful to understanding particular evidence rules by describing their legislative history and policy rationale. Additionally, when using online legal research services it is useful to refer to *Notes of Decisions* (found on Westlaw) or *Interpretative Notes and Decisions* (found on Lexis Nexis under *Annotations*) for categorized summaries of important cases interpreting specific FRE rules.
[15] *See* Exec. Off. Immigr. Rev., *Immigration Court Practice Manual* (Aug. 2018), https://www.justice.gov/eoir/page/file/1084851/download.
[16] *See e.g.*, *id.* at §§ 3.3, 4.16.
[17] Drop v. Holder, 586 F.3d 587, 590-92 (8th Cir. 2009) (upholding denial of psychologist's testimony where respondent failed to include her on pretrial list).

the evidence less weight by focusing on whether it is probative and whether its admission is fundamentally fair.

6. Always consider whether evidence was obtained or created in violation of a Respondent's *constitutional rights*, e.g. whether the client's arrest, detention, or interrogation was lawful. Also consider whether evidence was obtained through the violation of law enforcement's own *internal regulations*.

### Egregious or Widespread Fourth Amendment Violations

Latinx youth have been increasingly targeted for surveillance and policing by local and state law enforcement, FBI, and ICE via joint task forces that result in arrests conducted and evidence obtained in violation of the non-citizen's Fourth Amendment right to be free from unreasonable search and seizure.[18] Operation Matador and other gang policing efforts have been documented as overbroad, profiling-based measures that DHS uses to classify individuals as national security or public safety risks.[19]

Practitioners should carefully consider whether there is any evidence that the government targeted and arrested the non-citizen via these dragnet mechanisms.

Always, consider whether law enforcement officers' or government agents' **words** suggest racial profiling or bias at the time of interaction with the non-citizen. Consider whether law enforcement officers' or government agents' **conduct** revealed a racial motive in the arrest or targeting of the non-citizen. Query non-citizens about any references made to the non-citizen's ethnic or racial appearance.

If you believe that evidence may have been obtained through an egregious or widespread Fourth Amendment violation by law enforcement or through DHS's own agency regulatory violation *consider moving for suppression or termination* before the immigration court.

Please refer to Strategies for Suppression or Termination in the Gang-Related Immigration Enforcement Context, which discusses suppression and termination strategies in the gang policing context.

**Important Note:** Where a motion to suppress or motion to terminate is contemplated, when taking pleadings on the NTA, it is crucial to initially *deny all factual allegations and grounds of removal* and that *alienage is never conceded.*

[18] *See* NERMEEN ARASTU ET AL., SWEPT UP IN THE SWEEP: THE IMPACT OF GANG ALLEGATIONS ON IMMIGRANT NEW YORKERS 7, 9 (May 2018) [hereinafter SWEPT UP IN THE SWEEP], http://thenyic.pi.bypronto.com/wp-content/uploads/sites/2/2018/06/SweptUp_Report_Final-1.pdf.
[19] *Id.* at 7.

## COMMONLY INTRODUCED EVIDENCE TO BRING GANG ALLEGATIONS AGAINST IMMIGRANT NEW YORKERS AND SUGGESTED OBJECTIONS

Evidence commonly introduced to level gang allegations against immigrant New Yorkers include internally created DHS memoranda, gang database inclusion, notes about external appearance, social media posts, and various documentary evidence.[20]

DHS generally relies on its own internally created memoranda to allege gang allegations against non-citizens.[21] Practitioners are rarely able to discern what specific evidence was relied upon to support the allegations contained within. For example, it may be unclear whether the memorandum was created in reliance on photographs found on social media or was based on inclusion in gang databases or something else entirely. Nevertheless, these problematic memoranda are relied upon in immigration court.

**Internally Created DHS Memoranda:** DHS uses its internally created memoranda to lodge gang allegations against non-citizens in immigration proceedings. These documents are usually created by U.S. Immigration and Customs Enforcement (ICE), by either of its two components: Homeland Security Investigations (HSI) or Enforcement and Removal Operations (ERO). Examples include Form I-213, Record of Deportable/Inadmissible Alien (*Form I-213*), memorandum from HSI re gang affiliation (*HSI memo*), or the ICE memorandum of investigation (*ICE memo*).[22] These documents are generally summary concluding the non-citizen to be a "verified and active" member of a particular gang.[23] While they may rely on confidential informant statements, gang database inclusion, school disciplinary records, or other evidence and may even be supported by submission of social media posts or photographs, these memoranda tend to lack basic details about the factual basis for the claim or the type of affiliation.[24]

*Some Possible Objections:* Relevance | FRE 403[25] | Hearsay (often double, or more!) | Lack of ability to cross-examine | Lack of authentication | Lack of fundamental fairness

[20] LAILA L. HLASS & RACHEL PRANDINI, DEPORTATION BY ANY MEANS NECESSARY: HOW IMMIGRATION OFFICIALS ARE LABELING IMMIGRANT YOUTH AS GANG MEMBERS 10 (2018) [hereinafter DEPORTATION BY ANY MEANS], ("[T]he most commonly used types of evidence are police reports, immigration records, social media, tattoos, gang database results, client/testimony/admission, criminal records, Homeland Security Investigation reports, memos from federal law enforcement, clothing, and ORR records.")
[21] *Id.* ("In some cases, no evidence was put forward, or allegations were simply made directly by the immigration agency, such as a Homeland Security Investigations report, ICE interview notes including Form I-213, asylum-related interview notes, or Office of Refugee Resettlement records.").
[22] PAIGE AUSTIN ET AL., STUCK WITH SUSPICION: HOW VAGUE GANG ALLEGATIONS IMPACT RELIEF & BOND FOR IMMIGRANT NEW YORKERS 14 (2019) [hereinafter STUCK WITH SUSPICION], https://www.nyclu.org/sites/default/files/field_documents/020819-nyclu-nyic-report_0.pdf.
[23] DEPORTATION BY ANY MEANS, *supra* note 20, at 19-24 (appendix B).
[24] *Id.* ("…there is no information how that determination was made.").
[25] FED. R. EVID. 403 ("[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.")

Gang databases are frequently relied upon by DHS to justify gang allegations even though gang databases are fraught with serious problems, rely on overly vague and broad criteria, and include young people who have not been arrested or accused of any criminal activity.[26] Gang experts cannot agree on definitional criteria, gang identifiers, and what it means to be a gang member.[27] Because there are no objective criteria for gang classification, and local jurisdictions have discretion to create their own criteria for gang membership, each jurisdiction has its own arbitrary system.[28] Thus, it is not clear what degree of interaction qualifies as associating with a known gang member or how many times you stumble on a known gang hangout, to satisfy the loose criteria. The lack of objective criteria for database inclusion not only means that such gang allegations are unreliable, but also renders allegations and subjective determinations susceptible to bias – further undermining their relevance and reliability.

**Gang Databases:** Gang databases are notoriously flawed, inaccurate, encourage biased policing, and have been repeatedly shown to be unreliable.[29] Databases generally have minimal and overbroad inclusion criteria and lack transparency.[30] There is no clear process to discover or challenge one's alleged gang affiliation–whether erroneous or outdated.[31] Inclusion in the database can lead to repeated arrests and interrogations, denial of bail, enhanced charges, and it can also trigger inclusion in sweeping gang conspiracy cases without any evidence of actual criminal activity.[32] U.S. citizens suffer significant consequences once they are listed in a gang database; for non-citizens, the label carries the added consequences of potential removal from the United States.[33] Law enforcement relies on gang databases to target people for deportation based on spurious allegations of gang connections and local police department share their gang intelligence with federal immigration authorities to target their enforcement actions.[34] *The result?* Immigration enforcement relying on biased, unreliable policing and surveillance in violation of due process.

*Some Possible Objections:* Relevance | FRE 403 | Hearsay (often double, or more!) | Lack of ability to cross-examine | Lack of authentication | Lack of fundamental fairness

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[26] Anne Taigen, *The Controversy Over Gang Databases*, NAT'L CONF. ST. LEGIS. BLOG (Dec. 20, 2018), http://www.ncsl.org/blog/2018/12/20/the-controversy-over-gang-databases.aspx.
[27] Kristy N. Matsuda et al., *Putting the "Gang" in "Eurogang": Characteristics of Delinquent Youth Groups by Different Definitional Approaches*, *in* YOUNG GANGS IN INTERNATIONAL PERSPECTIVE 17-18 (2012).
[28] *See generally* K. Babe Howell, *Fear Itself: The Impact of Gang Affiliation on Pre-Trial Detention*, 23 ST. THOMAS L. REV. 630, 645-57 (2011) [hereinafter *Fear Itself*].
[29] SWEPT UP IN THE SWEEP, *supra* note 18, at 23.
[30] *Id.*
[31] *Id.*
[32] *See generally* BABE HOWELL & PRISCILLA BUSTAMANTE, REPORT ON THE BRONX 120 MASS "GANG PROSECUTION" (Apr. 2019) [hereinafter BRONX 120 REPORT], https://bronx120.report/the-report/#download.
[33] *See Fear Itself*, *supra* note 28, at 645-57.
[34] Christie Thompson, *How ICE Uses Secret Police Databases to Arrest Immigrants*, MARSHALL PROJECT (Aug. 28, 2017) https://www.themarshallproject.org/2017/08/28/how-ice-uses-secret-police-databases-to-arrest-immigrants.

Nevertheless, DHS automatically deems non-citizens whose names appear in the gang database as gang members whose removal from the United States should be prioritized.[35] Individuals who have not engaged in any criminal conduct may be included in gang databases due to external appearance, because they have been seen with others who have been classified as gang members, or because they live in a building complex under surveillance.[36]

Both internally created DHS memoranda and gang databases may rely on external appearance/personal expression or social media content as proof of gang affiliation.

**External Appearance/Personal Expression:** Practitioners report that DHS relies on observations of their clients' physical appearance to make assumptions about gang-affiliation.[37] Gang allegations and even gang database inclusion often stem from physical appearance or forms of personal expression, such as one's clothes, tattoos, piercings, jewelry, drawings, writings, or graffiti.[38] Some specific items that immigration officials rely on to support a finding of gang affiliation include Chicago Bulls paraphernalia, wearing specific colors (blue, white, black), Adidas hard top shoes, Nike Cortez shoes, rosary beads, flat-brimmed baseball hats, and visible tattoos.[39]

The emphasis on physical appearance dangerously results in stereotyping Latinx communities and inherently encourages race-based policing.[40] Brown and black non-citizens are already particularly susceptible to bias, profiling, and disproportionate law enforcement targeting, tracking, and contact.[41]

*Some Possible Objections:* Relevance | FRE 403 | Hearsay (often double, or more!) | Lack of ability to cross-examine | Lack of authentication | Lack of fundamental fairness

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[35] Katherine Conway, Note, *Fundamentally Unfair: Databases, Deportation, and the Crimmigrant Gang Member*, 67 AM. U. L. REV. 269, 269, 273 (2017) ("To target noncitizen gang members, the Obama Administration utilized data-sharing agreements between the Department of Homeland Security and state and local law enforcement to create immigration priority lists from state gang membership databases. Under these agreements, ICE is authorized to search nearly a thousand databases for removable noncitizens. The entries in these databases, however, present significant due process and data accuracy concerns, especially when this data flows unimpeded and uncorroborated from local law enforcement into civil immigration proceedings.") ("Specifically for "crimmigrant" gang members, the Trump Administration has inherited the Obama Administration's detection and deportation infrastructure, preloaded with thousands of "gang members" ready for removal.").

[36] *See* Anita Chabria, *A Routine Police Stop Landed Him on California's Gang Database. Is it Racial Profiling?*, L.A. TIMES (May 9, 2019), https://www.latimes.com/politics/la-pol-ca-california-gang-database-calgang-criminal-justice-reform-20190509-story.html.

[37] SWEPT UP IN THE SWEEP, *supra* note 18, at 32.

[38] *Id.* at 33; *see also* STUCK WITH SUSPICION, *supra* note 22, at 21, 23.

[39] SWEPT UP IN THE SWEEP, *supra* note 18, at 31.

[40] *Id* at 32.

[41] *See generally* ANGELA J. HATTERY & EARL SMITH, POLICING BLACK BODIES: HOW BLACK LIVES ARE SURVEILLED AND HOW TO WORK FOR CHANGE (2017).

**Social Media:** Information from social media is used as evidence of gang affiliation. Law enforcement uses social media platforms such as Facebook and Twitter for investigative purposes and rely on evidence e.g., personal photos or posts lifted off of Facebook or Twitter and activity such as liking, sharing, or retweeting to accuse individuals of gang affiliation, despite lack of authentication and inherent unreliability concerns.[42] Practitioners should reference Gang Policing: The Post Stop-and-Frisk Justification for Profile-Based Policing for information about how NYPD and other jurisdictions have "manipulated and exaggerated the threat of gang crime to generate a 'moral panic' and shore up support for intensive and unjustified policing and surveillance of youth of color based on non-criminal conduct. [43] This surveillance extends to social media and generates an extensive database of alleged gang and crew members."[44] In effect, young people's social networks transform into gang networks.

*Some Possible Objections:* Relevance | FRE 403 | Hearsay (often double, or more!) | Lack of ability to cross-examine | Lack of authentication | Lack of fundamental fairness

These commonly introduced types of evidence *intersect and overlap*. For example, a single photograph of a non-citizen client wearing certain clothing or revealing certain tattoos posted on social media is simultaneously an example of social media evidence and external appearance (personal expression), very likely to be introduced in proceedings in the form of an external document. This single piece of evidence can be used by law enforcement to generate new evidence to support gang allegations against the non-citizen. Law enforcement may rely on such an image for gang database inclusion.[45] Law enforcement may track other individuals who react to the social media post and infer guilt-by-association.[46] The photograph or database inclusion can become the basis of DHS's own internal memorandum of conclusory allegations memorialized in the non-citizen's immigration file.[47] These internal DHS-created memoranda are often the only "evidence" used to support gang allegations.

The same categories of objections generally apply to these types of evidence. Depending on the type of evidence and the specific objection involved, different arguments can be raised.

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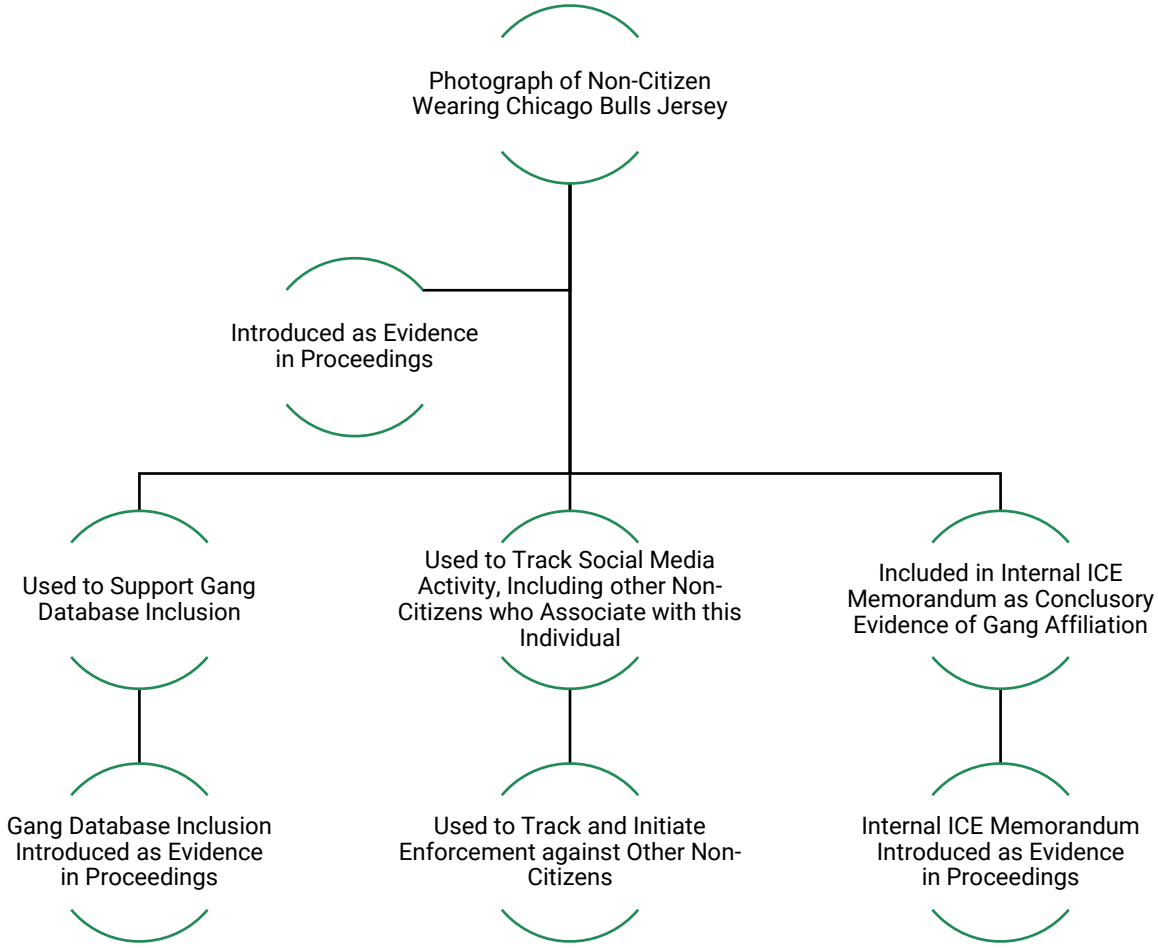
[42] SWEPT UP IN THE SWEEP, *supra* note 18, at 30-31.
[43] K. Babe Howell, Gang Policing: The Post Stop-and-Frisk Justification for Profile-Based Policing, 5 U. DENV. CRIM. L. REV. 1, 3-4 (2015).
[44] *Id.*
[45] While certain clothing alone is unlikely to result in a definitive classification as a gang member, it is a factor that can result in such a classification combined with other factors.
[46] Jeffrey Lane et al., *Guilty by Visible Association: Socially Mediated Visibility in Gang Prosecutions*, 23 J. COMPUT.-MEDIATED COMMC'N 354 (Oct. 22, 2018), https://academic.oup.com/jcmc/article/23/6/354/5140169 (analyzing how "socially mediated visibility, and specifically the visibility of associations with content and others, impact the criminal justice process" and the resultant problems from "precarious inferences about both content and association.").
[47] DEPORTATION BY ANY MEANS, *supra* note 20, at 12.

## HOW A SINGLE PHOTOGRAPH CAN BE USED TO PRODUCE MULTIPLE LAYERS OF EVIDENCE OFFERED AGAINST IMMIGRANT CLIENTS SEEKING RELIEF BEFORE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (EOIR)




The following sections delve into possible objections that a practitioner can raise when gang allegations are raised in immigration court.

# POSSIBLE EVIDENTIARY OBJECTIONS TO CHALLENGE GANG ALLEGATIONS IN IMMIGRATION COURT

This section will delve into possible objections that a practitioner can raise when "gang-related" evidence is introduced in immigration court.

## RELEVANCE

### Rule and Key Concepts

Relevance and fundamental fairness are the only bars to admissibility of evidence in deportation cases.[48] An IJ "may receive in evidence any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing or trial."[49] This gives IJs broad discretion to admit evidence they find probative. Despite objections due to relevance, IJs will generally admit documents if they have any connection to the case.

Notwithstanding its low evidentiary threshold, the admission of relevant evidence is limited by the exclusionary principles of Rule 403 and by principles of fundamental fairness.[50] After all, evidence becomes less "relevant" when balanced against, for example, the risk of unfair prejudice or when the evidence comes from an unreliable source or is otherwise untrustworthy.

| **Federal Rules of Evidence: Rule 401. Test for Relevant Evidence** |
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| Evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. |

### When is the rule/objection triggered?

This rule is triggered when evidence that seems unrelated to the legal issues raised.

[48] *See, e.g.*, *In re* Interiano-Rosa, 25 I. & N. Dec. 264, 265 (B.I.A. 2010); *In re* Ramirez-Sanchez, 17 I. & N. Dec. 503, 505 (B.I.A. 1980); *cf.* Rabiu v. INS, 41 F.3d 879, 882 (2d Cir. 1994) (due process test for ineffective assistance of counsel at deportation hearing is fundamental fairness); *see also* Simon Azar-Farr, A Synopsis of the Rules of Evidence in Immigration Removal Proceedings, 19 BENDER'S IMMIGR. BULL. 3 (Jan. 2014).

[49] 8 C.F.R. § 1240.7(a).

[50] The Due Process of Clause of the Fifth Amendment requires that immigration proceedings be fundamentally fair. Reno v. Flores, 507 U.S. 292, 305-07 (1993); Felzcerek v. INS, 75 F.3d 112, 115 (2d Cir. 1996). Fairness is closely related to the reliability and trustworthiness of evidence. Felzcerek v. INS, 75 F.3d 112, 115 (2d Cir. 1996); *see* United States v. Medico, 557 F.2d 309, 314 n. 4 (2d Cir.) *cert. denied*, 434 U.S. 986 (1977).

Relevancy also frames other evidentiary objections to admissibility[51] such as unfair prejudice, hearsay, and cross-examination and authentication requirements.

## What are the arguments?

### Summary

**DHS may argue:** Relevance is a low bar and therefore, this evidence is relevant.

**You can argue:** Evidence is not probative, unrelated to the case, not specific to the client, vague, unreliable, and ergo not relevant. DHS should articulate why its evidence is relevant and to what purpose. The relevance of the evidence is undercut by the risk of unfair prejudice or because its admission is fundamentally unfair.

### Probative Value

**Probative Value:** Always carefully consider the probative value of the evidence being offered to satisfy the applicable statutory or regulatory requirements needed to satisfy the applicable posture, status, or condition. Examine the Notice to Appear (NTA), Form I-213, and any other evidence DHS produces with a careful eye towards whether evidence factually applies to the client and the legal issue before the court.[52] Challenge the evidence if it is not probative.

**Evidence is unrelated to removability:** Alleged gang membership is unrelated to the immigration issue/charge at issue.

- It is not tailored to the client.
- It is not tailored to the legal issue before the court (e.g. whether individual is removal).
- DHS must clarify the purpose of the evidence and why it is relevant.

**DHS Should Respond to Objections:** Practitioners should request that the IJ solicit a response from DHS as to the relevance of the evidence. DHS should be pressed to precisely articulate why the evidence it seeks to introduce is relevant and to what purpose. Practitioners should argue that the government's failure to provide sufficient probative evidence, to disclose the evidence upon which it relies, and/or not providing sufficient detail as to why evidence is being proffered, undermines the evidence's relevance and thus, if applicable, fails to satisfy DHS's burden of proof to sustain its claim of e.g. removability.

[51] Although FRE do not strictly apply to removal proceedings, they are considered to be "the benchmark for fair handling of evidence in adversarial proceedings." DEPORTATION BY ANY MEANS, *supra* note 20, at 13.
[52] *See* Dree K. Collopy et al., *Challenges and Strategies Beyond Relief* 520, AM. IMMIGR. LAWS. ASS'N (2014), https://www.aila.org/File/Related/11120750b.pdf.

**Social media pages suggesting gang membership is not sufficiently probative to demonstrate dangerousness:** The BIA has held in an unpublished opinion that the Facebook page used to support DHS' argument that the respondent is a member of a criminal street gang, is insufficient to demonstrate that the respondent poses a danger to the community.[53] It is unclear whether this non-precedential decision rested its decision on the fact that the Facebook page was not relevant as to whether respondent actually belonged to criminal street gang or whether it was not relevant as to whether the respondent posed a community "danger" as a result of belonging to the criminal street gang. Still, this case is an example where social media posts suggesting gang membership are insufficiently probative against a non-citizen's assertion of not being gang affiliated and not posing a danger.

## Burden Shifting

**Shifting Burdens of Proof:** Pay attention to the shifting burdens of proof, which depend on the procedural posture of the case, the type of hearing, and the issue before the court. For example, in removal proceedings, DHS has the burden to prove, by "clear, unequivocal, and convincing evidence" that the non-citizen is deportable as charged.[54] On the other hand, non-citizens classified as "arriving aliens" carry the initial burden to show that they are admissible.[55] In the case of non-citizens present in the United States without being admitted or paroled, DHS first bears the burden to establish alienage and then, if its burden is satisfied, the burden shifts to the non-citizen to demonstrate by clear and convincing evidence of lawful presence in the United States pursuant to a prior admission or to prove clearly and beyond a doubt that the non-citizen is entitled to be admitted to the United States and is admissible.[56] To meet their respective burden of proof, the parties must present "probative" evidence to that effect.

**Using Low Evidentiary Standards to "Prove a Negative":** Gang allegations by DHS often place non-citizens in the precarious position of having to prove a negative.[57] In such circumstances, practitioners must creatively consider options to challenge, anticipate, or otherwise counter gang allegations, which may require introducing evidence to help

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[53] *In re* Rigoberto Alfonso Sibrian, 2010 WL 1976004, at *1 (Apr. 23, 2010) (unpublished) ("We find that the copy of the respondent's 'Facebook' page, which was submitted by the Department of Homeland Security ('DHS') to support its argument that the respondent is a member of a criminal street gang, is insufficient to demonstrate that the respondent poses a danger to the community.").

[54] 8 C.F.R. § 1240.8(a); Woodby v. INS, 385 U.S. 276, 286 (1966) ("We hold that no deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true.").

[55] 8 C.F.R. § 1240.8(b).

[56] 8 C.F.R. § 1240.8(c).

[57] DEPORTATION BY ANY MEANS, *supra* note 20, at 12 ("A central complaint from attorneys was that not only are accused immigrants left to prove a negative (lack of gang membership, association, or affiliation), but they are saddled with the herculean task of proving an undefined negative: that they are not gang-involved, whatever that term or idea may mean to the government.").

counter the DHS narrative. Depending on the procedural posture, the type of proceeding, and the fact specific circumstances, different evidence may be needed to fight the gang allegation.[58]

Some strategies attorneys employ to affirmatively show lack of gang affiliation (in addition to objecting to the admission of evidence submitted by DHS) include submitting evidence of positive community involvement, the unreliability of the government's gang claims and related documents, or public records search results demonstrating lack of gang involvement. Often, attorneys have their non-citizen clients testify regarding the allegations.[59] Other options include submitting affidavits of support from teachers, community members, religious institutions, or "gang experts" or affidavits from the non-citizen describing or directly addressing the allegations in lieu of testimony.[60]

Courts have found that IJs' refusal to consider relevant evidence introduced violates a respondent's due process rights.[61]

## Outweighing and Undermining Probative Value

Remember to always balance whether evidence is probative against the danger of unfair prejudice. Evidence should be excluded when its probative value is substantially outweighed by the danger of unfair prejudice. Specific evidence that is highly prejudicial and also lacks probative value is included under the evidentiary objection of unfair prejudice below, but is inextricably also linked to relevance and probative value.

**Unfair Prejudice and Lack of Reliability Outweigh and Undermine Probative Value:** Evidence should be excluded when its probative value is substantially outweighed by the danger of unfair prejudice (or other factors) or when it is undermined by lack of reliability and lack of trustworthiness.

Allegations of gang membership are unfairly prejudicial, generally rely on unverified sources, overbroad and vague criteria, and erroneous information. As such, the evidence is not only highly prejudicial, but unreliable and untrustworthy. If the evidence's probative value is sufficiently outweighed by the danger of unfair prejudice, it should not be admitted. If evidence is untrustworthy or unreliable, it is not relevant and therefore should not be admitted.

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[58] *See In re* Luis Yael Moreno-Avelar, 2012 WL 5473650, at *1 (B.I.A. Oct. 17, 2012) ("To date he has not presented any evidence that he has been granted prosecutorial discretion or deferred action by DHS, that he is not affiliated with a gang, or that his conviction has been vacated.") (emphasis added).
[59] DEPORTATION BY ANY MEANS, *supra* note 20, at 13.
[60] *Id.* at 13-14 (enumerating significant examples counteracting evidence used by practitioners).
[61] *See e.g.*, Larita-Martinez v. INS, 220 F.3d 1092, 1095 (9th Cir. 2000) (due process claim that BIA failed to review all relevant evidence submitted in suspension of deportation case); *see also* Lopez-Umanzor v. Gonzalez, 405 F.3d 1049, 1058-59 (9th Cir. 2005) (IJ's refusal to hear relevant expert testimony regarding domestic violence violated due process).

## Suggested Checklist

*Burden of Proof:* Who bears the burden of proof on the question presented? And, what is that burden?

*Relevance:* Does the [evidence] have ANY tendency to make a fact more or less probable than without the evidence? What is the fact? Why or why not?

What is the government trying to prove and is the evidence relevant to that goal?

- Is [evidence] specific to your client or is it generalizing or erroneous?
- Is [evidence] related to the current proceeding? Why or why not?
- Is [evidence] related to the current legal issue? Why or why not?

## RULE 403: EXCLUDING RELEVANT EVIDENCE FOR PREJUDICE, WASTE OF TIME, OR OTHER REASONS

### Rule and Key Concepts

Generally, relevant evidence may be excluded if it is overly prejudicial, confusing, misleading, causes delay or wastes time, or is superfluous. The danger of unfair prejudice (or other reasons) must substantially outweigh the probative value of the evidence.[62] Whether evidence is admitted is a balancing test where the probative value of evidence is weighted against the amount of unfair prejudicial effect. The immigration judge determines, in her discretion, *the probative value or weight of evidence as well as the amount of unfair prejudicial effect*.[63] Indeed, generally after assessing the probative weight of the evidence judges consider whether evidence is fundamentally fair – a qualitative determination left to the judgment of the court.[64]

| **Federal Rules of Evidence: Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons.** |
| --- |
| The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. |

### When is the rule/objection triggered?

Rule 403 is triggered whenever the government tries to introduce evidence of gang affiliation or "gang-related" appearance or conduct. This objection is appropriate for any "gang-related" allegation because given their highly inflammatory nature they are likely to have an **unfair prejudicial effect** on an adjudicator's emotions.[65]

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[62] Probative value is the value that evidence has in proving or disproving something. Admissibility of relevant evidence is weighed against any prejudicial factor that might be present. *Probative Value*, DICTIONARY.THELAW.COM & BLACK'S LAW DICTIONARY (2D ED.).

[63] Harbeck, *supra* note 4, at 1, 13 (2018) ("In determining whether to exclude evidence, immigration judges should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value.").

[64] *See* Rojas-Garcia v. Ashcroft, 339 F.3d 814, 823–24 (9th Cir. 2003); *see* Guerrero-Perez v. INS., 242 F.3d 727, 729 n. 2 (7th Cir. 2001); *see* Bustos-Torres v. INS., 898 F.2d 1053 (5th Cir. 1990).

[65] Mitchell Eisen, Brenna Dotson, & Gregory Dohi, *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?*, 62 UCLA L. REV. DISC. 2, 4 (2014), https://www.uclalawreview.org/pdf/discourse/62-1.pdf (case study finding that introducing gang evidence at trial can have a significant prejudicial effect on juror decisions as to defendant's guilt or innocence); *see e.g.*, Caitlin Dickerson, *How U.S. Immigration Judges Battle Their Own Prejudice*, N.Y. TIMES (Oct. 2016), https://www.nytimes.com/2016/10/05/us/us-immigration-judges-bias.html https://www.nytimes.com/2016/10/05/us/us-immigration-judges-bias.html ("Keeping implicit biases out of immigration court decisions is critical and daunting. Claims often rise and fall on testimony alone. Cultural and linguistic misunderstandings are common.")

**Unfair Prejudice of the Gang Label | Dispelling Myths and Supporting Documentation**

Practitioners will need to challenge the highly prejudicial "gang-related" label itself as *unfair prejudice* as well as the related *unreliability (fundamental fairness)* of a "gang-related" determination, especially when overbroad and unsubstantiated gang allegations are involved. In doing so, it is important to collect supporting documentation tailored to each fact-specific situation and to undermine the inherent subjectivity in any "gang-related" determination and how it ultimately undermines the reliability of such allegations.

Even when the gang allegations are "true," practitioners should argue to overcome the stereotypes associated with the label. Gang membership itself is not a crime. Membership in a gang or in a crew does not mean that the individual is engaging in criminal conduct or in a conspiracy. Likewise, someone's friendships or "associations" with "known gang members" do not mean that the individual is engaging in criminal conduct or in a conspiracy even assuming his or her friends are engaging criminal activity. That a black or brown young person is likely to be classified as a gang member based on such scant, circumstantial, and unreliable evidence and that the allegation itself is taken as "truth" compounds the layers of prejudice, bias, discrimination, lack of reliability, and lack of fundamental fairness associated with any gang determination.

Practitioners should consider introducing reports, news, and law review articles to demonstrate the *unfair prejudicial impact* and problematic nature of gang allegations, their *unreliability*, their overbreadth, and the lack of evidentiary support for them.[66] *Tailor evidence to your client.* What practitioners argue will depend on the evidence being presented by the government and fact-specific circumstances. Someone who has never been associated or affiliated with a gang may require different supporting documentation to combat gang allegations than someone who may have been a victim of gang violence or someone who was a former member of a gang.

For some helpful references to cite when making these arguments, refer to Toolkit to Challenge Gang Allegations against Immigrant New Yorkers which is a compilation of various resources aimed at preventing and protecting against gang allegations, challenging and defending against gang allegations in immigration proceedings, and documenting the unreliability of gang allegations and aggressive police practices. Another useful resource is Swept Up in the Sweep: The Impact of Gang Allegations on Immigrant New Yorkers addressing how ICE and other federal agencies use arbitrary methods to profile immigrant youth and allege gang affiliation.

[66] *See e.g.,* SWEPT UP IN THE SWEEP, supra note 18. Please refer to Toolkit to Challenge Gang Allegations against Immigrant New Yorkers for additional resources.

## What are the arguments?

### Summary

The overarching argument is that the danger of "unfair prejudice" of the "gang-related" label outweighs its probative value; furthermore, separately, but relatedly, the lack of reliability undermines fundamental fairness. The arguments below relate to excluding evidence for "unfair prejudice" and "other reasons." The arguments address how specific "gang-related" evidence is highly prejudicial and also highly unreliable.

Practitioners should consistently and explicitly connect the theme of unfair prejudice to the lack of probative value (relevance) and to the lack of reliability (undermining fundamental fairness), which are separate objections, but nevertheless closely related to any evidentiary objection based on unfair prejudice.

**DHS may argue:** The probative value of this evidence outweighs any prejudicial effect.

**You can argue:** "Gang-related" evidence should be excluded because it is unfairly prejudicial, confusing, and lacks probative value due to its unreliability. Even if someone is or was gang-affiliated, the gang label is highly inflammatory and prejudices decision-making based on *actual* legal standards and *actual* conduct or criminal history of the non-citizen.[67] There is significant misinformation about gangs.[68] Overbroad and unfounded gang allegations are brought against Latinx youth in increasing numbers.[69] Despite lack of evidentiary support these allegations are taken at face value and highly prejudice any discretionary determination.[70] Labeling someone as gang affiliated does not require any evidence of criminality.[71]

### The Prejudicial Impact of the "Gang-Related" Label

The *"gang-related" label* is inherently prejudicial and highly inflammatory. Any time an individual, that individual's qualities, or that individual's conduct is classified as "gang-related," that person must overcome the prejudicial "gang-related" descriptor, which is so inflammatory that even when that individual, that individual's qualities, or that individual's conduct would not otherwise result in judicial, criminal, or immigration scrutiny, that person will likely face serious consequences as a result of being labelled gang-affiliated.

The prejudicial impact of the "gang-related" label can seriously impact a factfinder's "neutral" position in assessing the actual conduct and behavior at issue. The descriptor "gang-related" can conjure images and assumptions in an adjudicator's mind that may

[67] *See generally* Eisen et al., *supra* note 65.
[68] *See* SWEPT UP IN THE SWEEP *supra* note 18, at 25.
[69] *Id.* at 9.
[70] *Id.* at 22.
[71] *Id.* at 24.

be stereotypical and generalizing. And, once prejudicial thoughts flood a judge's mind, undermining the court's impartiality, will the judge be willing to, for example, grant bond to someone believed to be a gang member? Indeed, non-citizens facing allegations of gang involvement are more likely to face difficulty satisfying their burden of proof under INA § 236(a) despite evidence to the contrary.[72]

Thus, the practitioner and non-citizen grapple with overcoming the judge's prejudice and the deep-seated stereotypes society has been conditioned to associate with the gang label that often unjustly strips individuals of their humanity in the eyes of the court.

That the inflammatory label is also inherently unreliable, lacks applied consistency, and is highly subjective, both as a defining term and in suggesting what it means to be a gang member, further increases the risk of **unfair prejudice**. Additionally, practitioners should argue that because gang membership is neither a crime, nor a ground of inadmissibility, nor a ground of deportability, the label should be rendered **irrelevant**.[73]

Moreover, in addition to the inevitable unfair prejudice resulting from the gang label, practitioners must also undermine the very criteria used to make the gang determination, by undercutting the reliability of the criteria at issue.

Thus, with these considerations in mind, practitioners will have to exercise a multipronged approach and address the unfair prejudice of the gang label while also simultaneously challenging the problematic assumptions that the underlying evidence is "gang-related."

**Words "Gang-Related":** The words "gang-related" give rise to strong emotions and have a strong prejudicial effect.[74] A 2014 social research study Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt? concluded that introducing gang evidence at trial can have a *significant prejudicial effect* on juror decisions as to the defendant's guilt or innocence even when reasonable doubt has been clearly established.[75] "[T]he weaker the case, the stronger the effect of extralegal factors. There is good reason to believe that the label 'gang member' invokes an extremely potent stereotype that can have a biasing effect on jurors, particularly when evidence linking the defendant to the crime is weak. Once a negative stereotype like gang member is activated, people often seek

[72] STUCK WITH SUSPICION, *supra* note 22, at 16-17 ("Because the burden is placed on the respondent in bond hearings held under INA § 236(a), ambiguity or a judge's lingering uncertainty over the veracity of DHS's claims tend to be held against the respondent. That means a respondent's failure to testify or the absence of any document definitively establishing a lack of gang affiliation can lead to the denial of bond. In one bond denial that was later reversed by the BIA, the Immigration Judge cited press reports about the prevalence of gangs on Long Island and then wrote that although the Respondent had produced proof he had never been arrested, 'several letters of support,' his school transcript, '[t]he Court finds that he has not met his burden.'") (internal citations omitted).
[73] *See* I.N.A. §§ 212, 237 (grounds of removability).
[74] Eisen et al., *supra* note 65, at 4.
[75] *Id.* at 17.

information that further supports the instilled perspective. Frey referred to this as 'confirmation bias.' Once this bias is instilled, the jurors may tend to filter the evidence presented through the negative stereotype that has been activated."[76] Although immigration practitioners generally do not practice in front of a jury, and an IJ is presumably differently situated than an average juror (as a legally trained adjudicator), that does not mean that IJs are immune from prejudice.[77] Depending on the specific IJ, practitioners may consider including the 2014 *Probative or Prejudicial* study to help support that any "gang-related" evidence is highly prejudicial and that even an adjudicator can be vulnerable to prejudice.

"[G]angs are particularly susceptible to labeling as deviant, regardless of their behavior."[78] The mere mention of an individual's purported gang affiliation is highly stigmatizing and results in improper inferences due to how the media sensationalizes gang activity – depicting gang members as violent or as involved in illegal activities.[79] Such automatic assumptions about the conduct, character, and behavior of a person based on a faulty and stigmatizing label are conclusory and not logically probative as to an individual's conduct.

The term "gang-related" is often used to describe an individual's qualities, characteristics, or conduct in a *conclusory* manner without any reliable factual support.[80] For instance, a non-citizen may be accused of having "gang-related" tattoos, but the tattoos themselves are not described, identified, or supported by any factual

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[76] *Id.* at 5.

[77] *See, e.g.* Caitlin Dickerson, *How the U.S. Immigration Judges Battle Their Own Prejudice*, N.Y. TIMES (Oct. 4, 2016), https://www.nytimes.com/2016/10/05/us/us-immigration-judges-bias.html ("[e]xperts say the conditions that immigration judges work under — fast paced, high pressure and culturally charged — make some misjudgments all but inevitable."); Fatma Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 428-29 (2011) ("[a]mong all judges, however, IJs have the weakest structural and professional norms to remain impartial and independent. Unlike federal judges who derive their authority from Article III of the Constitution and have the highest degree of independence through lifetime appointments, IJs are career civil servants within the Department of Justice.").

[78] Joan W. Moore, *Isolation and Stigmatization in the Development of an Underclass: The Case of Chicano Gangs in East Los Angeles*, 33 SOC. PROBS. 1, 2 (1985).

[79] *Cf. e.g.*, Kelsey Gushue et al., *Familiar Gangsters: Gang Violence, and the Media's Fascination with a Crime Family* (2017), https://journals.sagepub.com/doi/abs/10.1177/0011128716686340?journalCode=cadc.

[80] DEPORTATION BY ANY MEANS, *supra* note 20, at 8 ("The attorneys interviewed were troubled by the evidence used to support gang allegations, as it often lacked transparency and reliability. Evidence, in some cases, consisted simply of investigatory notes, meaning a single school, police or immigration official's speculation may decide the immigrant youth's future; the author of the investigatory note is rarely made available for examination, and therefore the basis for the allegation may remain unknown. As one attorney stated, the trend of using allegations is 'an absolute violation of due process. Ice uses unsubstantiated evidence. The biggest problem is the burden of proof falls on someone to prove a negative.'") (internal citations omitted); STUCK WITH SUSPICION, *supra* note 22, at 3 ("USCIS provides very little, if any, factual basis for the allegation that a child is a gang member…"); SWEPT UP IN THE SWEEP, *supra* note 18, at 29 ("…individuals who were otherwise eligible for bond, were held without bond when DHS presented overbroad and unsubstantiated gang related allegations to allege dangerousness.") (internal citations omitted).

statement or any explanation as to the significance of the specific tattoo. Rather, broad generalizations are made and there is rarely factual basis for why the tattoos are "gang-related"[81] or what qualifies as "gang-related" behavior or style.[82]

**Conclusory Statements:** Mere conclusory statements are highly prejudicial and are generally enough to dismiss an action or claim.[83] The same principals regarding conclusory allegations should apply in immigration proceedings concerning the term "gang-related" when it is used to qualify conduct or characteristics without describing the underlying rationale.

**Judicial Bias:** Consider whether the IJ's words or conduct suggest prejudice or bias against the non-citizen in the form of explicit or implicit biases.[84] Be vigilant as to whether an IJ's words or conduct suggest that the IJ takes the prejudicial "gang-related" label as a given, has been swayed by the "gang-related" allegations asserted by DHS despite a lack of probative evidence, or is conflating others' actions with that of your non-citizen client. The practitioner should explore various remedies and consider how best to establish a record of judicial hostility when an IJ is exhibiting prejudicial behavior.[85]

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[81] SWEPT UP IN THE SWEEP, *supra* note 18, at 32.

[82] Even if DHS did provide factual support as to what qualifies as "gang-related," there would still be issues with overbreadth, prejudice, and the expertise to make that qualification.

[83] *See e.g.*, Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); *see also* Cantor Fitzgerald Inc. v. Lutnick, 313 F.3d 704, 709 (2d Cir. 2002) (a court need not give "credence to [a] plaintiff's conclusory allegations"); *see also*, People v. Dumay, 23 N.Y.3d 518 (2014) (finding that where an accusatory instrument contains conclusory statements that merely track the language of that statute it is jurisdictionally defective and must be dismissed as facially insufficient) (criminal case); *see also* People v. Dreyden, 15 N.Y.3d 100, 102–103 (2010) (conclusory statement that an object is a gravity knife is a jurisdictional defect without additional factual allegations); *see also* People v. Dumas, 68 N.Y.2d 729, 731 (1986) (requiring evidentiary facts showing basis for conclusion that substance sold was actually marijuana) (criminal case).

[84] There is a significant amount of judicial bias inherent in immigration court. Marouf, *supra* note 77, at 424 ("The informality of immigration court-where the rules of evidence do not apply, forty percent of respondents are unrepresented by counsel, and overloaded, burned out judges are allowed to play an inquisitorial role creates a setting with weak normative structures and vague guidelines for appropriate behavior, leading to discrimination."); although it is rare, remand may be required when an IJ demonstrates bias and hostility towards an applicant for relief in removal proceedings. *See Guo-Le Huang v. Gonzales*, 453 F.3d, 142, 148 (2d Cir. 2006). This may lead to unfair prejudice when a non-citizen is facing gang allegations.

[85] If this bias is perpetuated by the IJ, consider making a bias-based objection against IJ by emphasizing that the non-citizen is entitled to a full and fair hearing. Where "the hearings included several instances of questioning by the IJ that were at least inappropriate and at worst indicative of bias against Chinese witnesses," the Second Circuit remanded the case back to the IJ. *Guo-Le Huang*, 453 F.3d at 148. The IJ expressed bias and hostility against Mr. Huang by making gross generalizations about Chinese nationals. *Id.* For more information about judicial bias, and how to file a complaint to challenge judicial bias, *see* CLINIC, *Responding to Inappropriate Immigration Judge Conduct* (2017), https://cliniclegal.org/sites/default/files/responding_to_inappropriate_immigration_judge_conduct_1.pdf.

## Problematic Gang Databases and Overbroad Gang Identifiers

**Problematic Gang Databases:** The highly prejudicial gang label is often the result of an individual's inclusion in problematic, unreliable, and discriminatory databases. Jurisdictions continue to maintain gang databases of suspected gang members, although notoriously inaccurate and overbroad.[86]

After it was discovered that the NYPD was keeping personal information on the people who had been subjected to a stop-and-frisk, and after a settlement was reached in the *Lino v. City of New York*, New York's criminal procedure law was amended to prohibit the maintenance of an electronic database of people who were stopped-and-frisked because many of them had not committed any actual crime or infraction. *Lino v. City of New York*, 958 N.Y.S.2d 11 (App. Div. 1st Dep't 2012). Now, the City of New York and other jurisdictions use gang databases to a similar effect. In *Lino,* the City ultimately settled and agreed to end the NYPD's practice of storing in electronic databases the names and addresses of all people who have been stopped, arrested, or issued a summons and whose cases were either dismissed or resolved with a fine for a noncriminal violation.[87]

Presently, many law enforcement agencies maintain extensive databases that include suspected gang members or associates even though gang membership is not a crime.[88] Some of the information contained in databases flows from foreign police and militaries and it is used to detain migrants and separate them from their children.[89] There is no right to notice or procedure to challenge inclusion.[90] There is no uniform definition of gang and no universal method for determining gang membership.[91] Despite no criminality requirement, individuals can be identified as gang members merely based on appearance, association, location, law enforcement "intelligence," or confidential informant information.[92]

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[86] Howell, *supra* note 43, at 15.
[87] Lino v. City of New York, 958 N.Y.S.2d 11, 13 (App. Div. 2012) (challenging aspects of NYPD's stop-and-frisk database).
[88] Lanzetta v. New Jersey, 306 U.S. 451, 457-58 (1939).
[89] Melissa del Bosque, *Gang Databases to Deny Migrant Asylum Claims*, PROPUBLICA (July 8, 2019), https://www.propublica.org/article/immigration-officials-use-secretive-gang-databases-to-deny-migrant-asylum-claims ("With scant public notice, federal immigration officials are relying on databases run by foreign police and militaries to check whether migrants crossing the United States border have gang affiliations, which would allow officials to detain and eventually deport them . . . But legal experts and human rights advocates say the government has kept the use of databases at the border largely secret, subverting potential challenges to the reliability of the information in them. An attorney in Texas recently discovered that her Salvadoran client had been falsely accused of being in the MS-13 gang based on intelligence from the center. The man was jailed in a maximum-security facility for violent criminals for six months, and his two children were taken away. Government attorneys, pressed repeatedly in court to provide evidence, eventually dropped the allegation of gang membership against him without explanation.").
[90] Howell, *supra* note 43, at 15.
[91] *Id.*
[92] *Id.*

These problematic aspects of gang databases undermine the trustworthiness and reliability of the resultant gang label, which violates precepts of *fundamental fairness*.

**Gang Membership Itself is Not a Crime:** The Supreme Court held decades ago that it is not a crime to be a member of a gang due to the vague nature and uncertainty about the scope of such a classification.[93]

**Subjectivity of Prejudicial Gang Determinations for Database Inclusion:** The subjectivity involved in making the highly prejudicial gang determination means that these determinations can be based on biases. This undermines the trustworthiness and reliability of such a determination, which is fundamentally unfair.

The factual issue of whether an individual is likely a gang member "is a subjective, complex determination made by a potentially poorly trained officer."[94] A non-citizen can be subjected to gang allegations based on biased interpretations of evidence based on law enforcement racial, ethnic, and cultural bias.[95] Considering the subjective criteria in assigning the gang label, practitioners should consider whether the gang allegation results from the non-citizen being caught up in a web of racial and religious profiling in addition to loosely satisfying the overbroad gang inclusion criteria.[96] That the highly prejudicial gang label can be assigned so subjectively increases the danger of unfair prejudice and confusing the issues that outweighs any probative value of the alleged gang label.

**High Risk of Error and Disproportionate Impact:** The fact that gang databases unjustifiably misidentify mainly black and brown men as gang members means they are untrustworthy and unreliable therefore fundamentally unfair.

Gang databases are sweeping surveillance efforts, which collect and catalogue information about mostly men of color with virtually no oversight or public scrutiny.[97] Gang membership determinations are notoriously inaccurate and courts have

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[93] Lanzetta v. New Jersey, 306 U.S. 451, 457-58 (1939). In *Lanzetta*, the Court invalidated a New Jersey law criminalizing gang membership as unconstitutionally vague under the Due Process Clause. *Id.* at 452, 458.

[94] *See* Rebecca A. Hufstader, Note, *Immigration Reliance on Gang Databases: Unchecked Discretion and Undesirable Consequences*, 90 N.Y.U. 671, 690 (2016).

[95] *Id.* at 696 ("This statistical evidence of disparate impact suggests that the racial stereotypes in "gang-related" law enforcement leave people of color vulnerable to a disproportionately high risk of erroneous documentation.) (internal citations omitted).

[96] *Id.* ("Given the lack of procedural protections in the documentation process, the substantive standards defining whether an individual is likely to be a gang member could play a significant role in curbing police discretion. Yet their vague, subjective, and over-inclusive nature makes them foster, rather than discourage, decisionmaking that is influenced by racial stereotypes.").

[97] Alice Speri, *New York Gang Database Expanded by 70 Percent under Mayor Bill de Blasio*, INTERCEPT (June 11, 2018), https://theintercept.com/2018/06/11/new-york-gang-database-expanded-by-70-percent-under-mayor-bill-de-blasio/.

recognized that "accusations of gang membership in particular involve a considerable risk of error."[98] "The informal structure of gangs, the often fleeting nature of gang membership, and the lack of objective criteria in making the assessment all heighten the need for careful factfinding."[99]

Yet, law enforcement's emphasis on appearance dangerously results in stereotyping Latinx communities and inherently encourages race-based policing. Indeed, affixing gang labels is often used to disproportionately[100] criminalize black and Latinx youth.[101] "Surveys of young people have shown that up to 40 percent of individuals who identify as gang members are white, but law enforcement regularly undercounts them and overcounts black and Latino youth. While white young youth are afforded the privilege of being seen as individuals in the eyes of law enforcement, black and Latino youth are held accountable for the action of their peers."[102]

**Reliance on Suspicion Instead of Actual Criminal Conduct:** There are serious due process issues with the immigration court's reliance on mere suspicion of gang membership rather than conduct and criminality as described in Rebecca A. Hufstader's 2015 article Immigration Reliance on Gang Databases: Unchecked Discretion and Undesirable Consequences:[103]

> "While immigration law entrusts many decisions to the discretion of the executive branch and does not subject them to procedural due process protections, it usually avoids relying on the discretion of state and local law enforcement. The vast majority of criminal grounds of deportability and inadmissibility, which allow the government to deport non-citizens regardless of whether they have a visa or other immigration status, require convictions, not just mere arrests or allegations by law enforcement. By focusing on convictions, the Immigrant and Nationality Act demonstrates Congress's long-held respect, in the context of life-altering immigration decisions, for the fairness and accuracy that judicial due process has been

[98] Vasquez v. Rackauckas, 734 F.3d 1025, 1045-46 (9th Cir. 2013).
[99] *Id.*; *see e.g.*, Michael Cannell, *Assumed Dangerous Until Proven Innocent: The Constitutional Defect in Alleging Gang Affiliation in Bail Hearings*, 63 DEPAUL L. REV. 1027, 1035 (2014).
[100] *See* Daryl Khan, *New York City's Gang Database is 99% People of Color, Chief of Detectives Testifies*, JUV. JUST. INFO. EXCHANGE, (June 14, 2018), https://jjie.org/2018/06/14/new-york-citys-gang-database-is-99-people-of-color-chief-of-detectives-testifies/ ("Ninety-nine percent. The number sent an audible gasp throughout the City Council chamber. Chief of Detectives Dermot F. Shea had just read off the percentage of people of color on the NYPD's controversial…largely secretive database.")
[101] Maritza Perez, *Mistaken Identity: The Dangers of Sweeping Gang Labels for Black and Latino Youth*, CTR. AM. PROGRESS 2 (Sep. 13, 2018), https://cdn.americanprogress.org/content/uploads/2018/09/11121709/GangDatabases-brief-4.pdf
[102] *Id.* (citing Donna Ladd, *Dangerous, Growing, Yet Unnoticed: The Rise of America's White Gangs*, GUARDIAN (Apr. 5, 2018), https://www.theguardian.com/society/2018/apr/05/white-gangs-rise-simon-city-royals-mississippi-chicago).
[103] *See* Hufstader, *supra* note 94, at 690 ("Gang databases raise serious questions regarding procedural due process.") (internal citations omitted).

> designed to protect. The movement toward immigration reliance on gang databases threatens to abandon that principle by basing eligibility for immigration benefits on law enforcement tools that are notoriously inaccurate and possibly contrary to the Constitution's procedural due process guarantees."[104]

Thus, reliance on highly prejudicial evidence obtained from unreliable gang databases exacerbates concerns of fundamental fairness in immigration proceedings.

**No Criminal History or Conduct:** Unproven and unsupported gang allegations that are highly prejudicial are used by law enforcement as a catch-all justification for arresting, detaining, or deporting people law enforcement finds suspicious.[105] This may include non-citizens who have never committed any crimes and are accused of gang membership.[106]

For clients with no criminal history records, emphasize that there is no evidence of criminal conduct, that the non-citizen has no convictions, citations, or violations. Try to obtain criminal history records from the non-citizen's country of origin.

Even if there have been arrests, if applicable, consider arguing that these were based on targeted surveillance of specific communities and racial or ethnic groups.[107] Look at current reports of U.S. immigration raids as to whether there are counties that were disproportionately the focus of ICE's community arrests.[108] Get additional information from local immigrant community groups.

That the non-citizen was alleged to be a gang member or was flagged as a potential gang member given a lack of any criminality suggests unfair prejudice.

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[104] *Id.* at 689-90.
[105] *See generally* SWEPT UP IN THE SWEEP, *supra* note 18.
[106] Manuel Bojorquez, *Immigrant Father Accused of Being in a Gang Reunites with Children After 184 Days*, CBS News (May 30, 2019), https://www.cbsnews.com/news/immigrant-father-accused-of-being-in-a-gang-reunites-with-children-2019-05-30 ("Instead, he said U.S. Border Patrol accused him of being a gang member. Adolfo showed CBS News a letter his lawyers say is from the government of El Salvador, showing he had no criminal history. He also showed that he has no tattoos, which are a trademark of Salvadoran gangs.").
[107] *See e.g.*, SWEPT UP IN THE SWEEP, *supra* note 18, at 19.
[108] *See id.*; *see e.g.*, ICEWATCH, https://raidsmap.immdefense.org/ (summarizing ICE raids from the New York Metropolitan area).

**Gang Identifiers: The unfairly prejudicial "gang-related" label is applied to non-citizens indiscriminately based on problematic, unreliable, overbroad, and untrustworthy gang identifiers. Relying on such unfairly prejudicial and problematic evidence is not fundamentally fair.**

## Gang Identifier: Self-Admission

"Self-admission" is an identifier that generally does not require other objective factors to classify someone as a gang member and appears to be heavily relied upon by law enforcement for that reason.

**Self-admission:** An individual admitting to gang membership (during debriefing) will suffice for inclusion into the New York City Police Department's (NYPD) gang database.[109] "Self-admission" of gang membership is a gang identifier used by the Nassau County Police Department (NCPD) and other jurisdictions.[110] The government often relies on alleged "self-admission" of gang membership without providing any details or statements, dates, locations, or context for how the conclusory "admission" was made; even if some details are provided, sufficient context is still absent.[111] This practice makes it difficult for practitioners to effectively refute such claims.[112]

A state audit of California's state-wide database, CalGang, revealed glaring errors, such that toddlers were included gang database under the self-admission category.[113] Such brazen misclassification further supports that law enforcement widely misclassifies individuals as gang members under the ruse of self-admission.[114]

## Gang Identifier: Associations

Many individuals are assumed to be gang members based on their associations, friendships, or living in or frequenting certain locations.

**Guilt by Association:** The government's assertion that one individual's friendship or familial relationship is proof of that individual's guilt or proof of gang affiliation prejudices an individual's substantive rights by impeding on the right of association and of individual free expression.[115]

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[109] SWEPT UP IN THE SWEEP, *supra* note 18, at 24 (NYPD gang database inclusion criteria).
[110] SWEPT UP IN THE SWEEP, *supra* note 18, at 24 (NCPD gang database inclusion criteria).
[111] DEPORTATION BY ANY MEANS, *supra* note 20, at 10.
[112] STUCK WITH SUSPICION, *supra* note 22, at 3.
[113] Chris Sommerfedt, *Audit Discovers Toddlers in California Gang Database*, N.Y. DAILY NEWS (Aug. 15, 2016), http://www.nydailynews.com/news/national/audit-discovers-toddlers-california-gang-database-article-1.2751798; SWEPT UP IN THE SWEEP, *supra* note 18, at 25.
[114] *See id*; *see* Annie Sweeney & Madeline Buckley, *Chicago Police Gang Data Collection Faulted by City's Inspector General as Unchecked and Unreliable*, CHICAGO TRIBUNE (Apr. 11, 2019), https://www.chicagotribune.com/news/breaking/ct-met-chicago-police-gang-data-04112019-story.html.
[115] Zachariah D. Fudge, *Gang Definitions, How Do They Work?: What the Juggalos Teach Us About the Inadequacy of Current Anti-Gang Law*, 97 MARQ. L. REV. 979, 1025 (2014) ("Gang members are often identified by the individuals they associate with and the clothes they wear. Far from being a potential

Because associations with gang members are one criterion that (with other similarly broad factors) warrants gang database inclusion[116] – each new inclusion extends the database's reach by entangling entire communities under the gang label.[117]

The issue of criminalizing friendships, neighborhoods, and mere associations is particularly apparent in the context of federal conspiracy charges.[118] Gang prosecutions require the demonstration of a criminal conspiracy.[119] Describing the largest "gang" raid in New York City, as investigated in the Report on the Bronx 120 Mass "Gang" Prosecution, of the 120 individuals who were swept up, 60 were not alleged gang members, 80 were not convicted based on violent conduct, and only 40 individuals appear to have prior felony convictions. These numbers display the wide scale targeting of young men of color only based on associations with those with alleged gang-involvement.[120]

> "Prosecutors can use mass conspiracy indictments to round up local crews and gangs and to erase the difference between bad actors and their friends and peers. But they should not. Even the privileged among us would not choose to be held criminally responsible for the conduct of fraternity brothers, high school friends, or even drama club and math team members. Bad decisions and conforming behaviors are the norm for adolescents and young adults, but many avoid engaging in violent conduct and others can be helped to develop non-violent responses. Conspiracy is a powerful tool but should not be leveled against the least powerful among us; instead, our goal should be constructive interventions and individualized justice with due process of law."[121]

While public connection may imply a relationship between two people, it does not specify the nature or strength of that relationship.[122] Indeed, a connection on social media does not necessarily mean that the two individuals are in fact "friends."[123]

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problem, there are already examples of gang statutes being applied in a disconcertingly overbroad manner, where defendants are found to be gang members based only on clothing or other innocent expressive conduct.").

[116] Speri, *supra* note 97.
[117] *See id.*
[118] *See generally* Lane et al., *supra* note 46.
[119] *Id.*
[120] BRONX 120 REPORT, *supra* note 32, at 2.
[121] *Id.* at 29.
[122] Lane et al., *supra* note 46.
[123] *Id.*

## Gang Identifier: Tattoos

The government often relies on non-citizen's tattoos to attach unfairly prejudicial gang label. Often HSI memos will state that the non-citizen has a "gang-related" tattoo without any description of the tattoo or how it was determined that it was "gang-related."

**Is there a tattoo and if so, is it gang-related?:** Practitioners should discuss with their clients what tattoos they have, if any. There have been incidents where DHS has accused non-citizens of having gang-related tattoos, when they had no tattoos at all.[124]

- How and where and by whom was the tattoo observed in the first place? Who recorded this observation and where?
- How is it known that this is a gang-related tattoo?
- Who made the determination that it is a gang-related tattoo and how/why are they qualified to do so? [125]
- Has the government provided anything to show that this specific tattoo has any connection to gang affiliation? What proof did the government provide that it is actually "gang-related?"

**Not a gang tattoo:** People get tattoos for many reasons that are not indicative of gang membership.[126] Tattoos that have been adopted by particular gangs do not necessarily mean that someone who has a certain tattoo is necessarily or ever has been a gang

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[124] *See e.g.*, Liz Robbins, *Young Immigrants Are Being Held Illegally, Lawsuit Claims,* N.Y. TIMES (Feb. 20, 2018), https://www.nytimes.com/2018/02/20/nyregion/ms-13-immigrants-lawsuit.html ("At L.V.M.'s Dec. 18 hearing, the government presented additional evidence outlining his gang involvement. According to his lawyers, the government said a video existed of him flashing gang signs (which they have been unable to see), he wore clothing that distinguished him as a gang member, he had been identified by the Suffolk County Police Department as belonging to the gang, and he had gang tattoos. His mother, Esmeralda Mejia de Galindo, said she was surprised to hear all of these allegations — especially that last detail. 'My son doesn't have a tattoo,' she said in an interview through an interpreter on Monday. 'I'm the mom, I would know.'"); *see also* N.Y. Civ. Liberties Union, *Class Action Challenges Indefinite Detention of Immigrant Children by Trump Administration* (Feb. 20, 2018), https://www.nyclu.org/en/press-releases/class-action-challenges-indefinite-detention-immigrant-children-trump-administration ("LVM has no tattoos whatsoever.").

[125] Non-citizens' tattoos have been erroneously classified as "gang-related" by ICE. *See e.g.*, Complaint at 5, n.8, Electronic Frontier Found. v. Dep't. of Com. *filed* Nov. 30, 2017, Case 1:17-cv-02567 *citing* Miriam Jordan, *Tattoo Checks Trip Up Visas*, WALL STREET J. (July 11, 2012), https://www.wsj.com/articles/SB10001424052702303933404577505192265987100 [hereinafter EFF Complaint] ("In the immigration context, there are a number of stories of Mexican, Central, and South American immigrants who were raised in the United States and married to U.S. citizens but who are denied reentry into the U.S. because their tattoos are deemed gang affiliated. In the case of Hector Villalobos, his theater mask tattoos, while a common symbol, were incorrectly identified as gang affiliated."); *see e.g.*, Liz Jones & Paige Browning, *To Stay in America, He Must Convince a Judge his Tattoo Isn't Gang Related*, KUOW (May 2, 2018), https://www.kuow.org/stories/stay-america-he-must-convince-judge-his-tattoo-isn-t-gang-related; *see e.g.* Liz Wolfe, *Tattoos Shouldn't Be Cause for Deportation,* REASON (June 19, 2018), https://reason.com/archives/2018/06/19/tattoos-shouldnt-be-cause-for-deportatio.

[126] Jones & Browning, *supra* note 125.

member.[127] Assuming a tattoo is gang-related is unduly prejudicial.

What else could the tattoo represent? Be sure to speak with your client to get a better understanding of the meaning of the drawing, if any. An individual may have gotten the tattoo as a *fashion* statement, to project a certain image, or for other reasons.[128]

Law enforcement flags tattoos of *ethnic* or *religious significance*, tattoos depicting *national pride*, or certain *generic* tattoos of clowns, crowns, skulls, demons, Yin Yang, barbed wire, or styled as "heavy metal" as gang-related.[129] Some examples of commonly tattooed or worn Catholic symbols that are associated and conflated with gang membership include tattoos of praying hands, religious iconography, and artifacts and wearing rosary beads or crucifixes – all an "integral part of Latino youth culture."[130]

For the foregoing reasons, tattoos are also personal expressions should not be relevant in making a gang determination.

**Tattoos as Personal Expression:** Framing tattoos as gang identifiers is unfairly prejudicial, unreliable, and **not** relevant. Tattoos are elective expressions of free speech and should be protected under the First Amendment.[131]

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[127] EFF Complaint at 7, n.19, *citing* Cecilia Saixue Watt, *Are These Clowns Really Gang Members? Juggalos Protest FBI's Label*, GUARDIAN (Sept. 11, 2017), https://www.theguardian.com/music/2017/sep/11/juggalosprotest-fbi-label-gang-report-insane-clown-posse ("[J]ust because a tattoo may currently be associated with criminal activity does not mean that the owner intended such association.").

[128] *See e.g.*, Brendan Cole, *MS-13 Suspect Avoid Deportation as Tattoos Will Endanger Him in His Native Country*, NEWSWEEK (Sep. 11, 2018), https://www.newsweek.com/man-ms-13-tattoos-will-not-be-deported-because-his-body-ink-would-endanger-1115298 ("'I made bad decision getting these tattoos not knowing that it was going to relate to this,' Pacheco said at an immigration hearing in 2017. 'I took as, like, a fashion nowadays. You know everybody has tattoos and I made that bad decision of getting these tattoos and not knowing what I was getting. I'm not a member. I made a mistake…. Innocent people are dying back in my country and here I am getting these tattoos thinking it's a joke not realizing the consequences that it brings.'").

[129] See Liz Wolfe, *Tattoos Shouldn't Be Cause for Deportation , Reason*, REASON (June 19, 2018), https://reason.com/archives/2018/06/19/tattoos-shouldnt-be-cause-for-deportatio; *see* Margaret Ramirez, *The Gangs and Their God*, L.A. TIMES (May 8, 1999), https://www.latimes.com/archives/la-xpm-1999-may-08-me-35168-story.html; *see e.g.*, N.J. Off. Att'y Gen., *Recognize the Signs*, https://www.nj.gov/oag/gang-signs-bro.pdf; Robert J. Bunker & John P. Sullivan, *Mara Salvatrucha (MS-13): A Law Enforcement Primer*, FBI NAT'L ACAD. ASSOCS., https://www.fbinaa.org/FBINAA/Associate/MARAPR2018_Feature_1.aspx.

[130] Margaret Ramirez, *The Gangs and Their God*, L.A. TIMES (May 8, 1999), https://www.latimes.com/archives/la-xpm-1999-may-08-me-35168-story.html.

[131] EFF Complaint, at 4, ¶ 13 ("Tattoos are used as artistic representations of an individual's innermost thoughts, closely-held beliefs, and significant moments. Traditions for tattoo artistry are not limited to a particular sex, race, culture, religion, economic status, or country of origin. Tattoos have been and remain speech, thought, and art."); *see id.* at 5, ¶ 14 ("This raises serious concerns for the First Amendment – tracking tattoos disadvantages them as a form of free speech and also creates freedom of association

**Former Gang Members:** Some individuals who have tattoos that are unambiguously affiliated with a particular gang, may not be current members and may have "rehabilitated" or collaborated with law enforcement. "[I]ndividuals who have renounced former criminal activity may still carry criminally affiliated tattoos because removal is time-intensive, painful, expensive, and highly dependent on individual beliefs."[132]

**Emerging technology:** Practitioners should be mindful of rapidly developing *tattoo recognition technology*, which can be used to identify individuals, reveal individuals' perceived religion or political beliefs, and associate them with other people with similar tattoos.[133] Tattoo recognition is considered to "be a form of biometric technology in the same category as face recognition, fingerprinting, and iris scanning."[134] The Electronic Frontier Foundation (EFF) provides resources exposing issues regarding privacy protection, ethical standards, and constitutional violations in developing and implementing this technology that may be useful to practitioners depending on the evidence introduced by the government.[135]

Considering that the unfairly prejudicial "gang-related" label is associated with common tattoos, such technology increases the likelihood that the gang label will spread like a scarlet letter and unreliably label even more individuals as gang affiliated without adequate suspicion or allegations of any unlawful conduct.

### Gang Identifier: Drawings/Doodles/Graffiti

DHS has relied on drawings and doodles made by children in schools in their notebooks and graffiti or tags on certain residential buildings to make gang allegations.

**Is it a gang-related drawing?:** Practitioners should consider:

- How, where and by whom was the drawing observed in the first place? Who recorded this observation and where?
- How it is known that this is a gang-related drawing or graffiti?[136]
- Who made that determination that it is a gang-related drawing or graffiti and how/why are they qualified to do so?

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concerns when people are matched with others for government surveillance and investigative purposes, sometimes incorrectly.").

[132] *Id.* at 7, n.20, *citing* Victoria St. Martin, *Former Gang Members Remove Tattoos to Break from Past*, WASH. POST (July 10, 2015), https://www.washingtonpost.com/local/gang-members-remove-tattoos-to-break-from-past/2015/07/10/3bd54ae8-266d-11e5-b72c-2b7d516e1e0e_story.html?utm_term=.77474b9135e1.

[133] EFF, *Tattoo Recognition* (last visited March 31, 2019) https://www.eff.org/pages/tattoo-recognition.

[134] *Id.* Biometric information is generated from measurements of an individual's biological characteristics such as fingerprints, palm prints, voice print, or facial geography/facial scans.

[135] Electronic Frontier Found., *Surveillance Self-Defense: Tips, Tools and How-Tos for Safer Online Communication,* (last visited Feb. 22, 2019) https://ssd.eff.org/en.

[136] Practitioners should refer to resources pertaining to tattoos and how tattoos have been erroneously classified as "gang-related."

- How can you be sure that the drawing was made by your client and/or not modified by other intervening individuals?
- What else could the drawing represent (be sure to speak with your client to get a better understanding of the meaning of the drawing, if any)?
- Was your client simply mimicking drawings/graffiti/doodles that are observable in that person's community, school, and environment?

If your client was drawing insignia related to their country of origin, it is unduly prejudicial that DHS assumes they are a member of a gang; people from Central American countries should not automatically be classified as gang members.[137]

## Gang Identifier: Style of Dress/Clothing/Apparel

The government relies on style of dress, clothing, apparel and miscellaneous fashion choices to make gang allegations. High school students have been questioned about gang involvement for wearing certain "urban" attire on costume days in schools.

**Is the style of dress indicative of gang-involvement?:** Practitioners should consider:

- How, where and by whom was the attire observed in the first place? Who recorded this observation and where? Was it shared with ICE? If yes, how?
- How is it known that this is a gang-related fashion? Are there any facts that describe the apparel and support why that is gang-related?
- Who made the determination that it is a gang-related apparel/colors and how/why are they qualified to do so?
- Has the government provided anything to show that this specific clothing has any connection to gang affiliation? What proof did the government provide that it is actually "gang-related?"

**Trendy apparel:** Even if DHS has provided information about what apparel constitutes "gang-related," consider alternative explanations for why a young person might wear such clothing.

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[137] *See e.g.*, Hannah Dreier, *How a Crackdown on MS-13 Caught Up Innocent High School Students*, N.Y. TIMES (Dec. 27, 2018), https://www.nytimes.com/2018/12/27/magazine/ms13-deportation-ice.html ("And he had grown close to a group of friends in his homeroom who showed off their Central American pride by dressing in the colors of their home countries' flags. They tagged themselves in group Facebook photos with the telephone calling codes for their home countries – 503 for El Salvador, 502 for Guatemala and 504 for Honduras. Alex started wearing a bracelet with the blue and white of the Honduran flag. When his parents had extra money, he asked for a T-shirt, sweatshirt or backpack emblazoned with Huntington High's name and its mascot, the blue devil with horns. Alex knew that MS-13 claimed Nike Cortez shoes and blue bandannas, so he made sure to avoid them. In the spring of 2017, school security guards stopped him as he walked down the hall wearing bright blue sneakers that his mother picked out for him as a gift for accompanying her to an immigration appointment in Queens. They said the blue of the shoes was the color of MS-13. They also searched Alex's bag, on which he had written '504,' and found that he had doodled the name of his Honduran hometown and a devil with horns. Without explaining why, the security guards photographed the drawings before giving Alex his books back. When Alex got home that day, he buried the shoes in a closet and didn't wear them again, even on weekends.").

- Would the allegation be made against a white child wearing the same apparel?

Often youngsters are reflecting a specific fashion.[138] Teen idols frequently dress in attire that could be construed as gang-related.[139] The line between fashion and "gang" clothing can be blurred. Wearing certain colors may simply be a color preference for that student. For example, blue and white are the flag colors of the Northern Triangle countries – Guatemala, Honduras, and El Salvador and the colors MS-13 membership are blue and white; "black [is] sometimes used as a secondary color to blue or a tertiary color to blue and white."[140] The notion that wearing blue and white, the color of these and other Central American countries, is deemed to suggest MS-13 membership, is profoundly overbroad and yet results in the highly and unfairly prejudicial gang label.[141]

- How can a young person know that certain clothing qualifies as gang-related?

In an appeal of condition of supervised release from prison prohibiting an individual from associating with members of criminal street gangs or wearing the colors, tattoos, or insignia related to gangs, the Second Circuit held that the portion of the condition prohibiting the wearing of gang colors or insignia was unconstitutionally vague.[142]

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[138] Police, schools, and immigration officials appear to equate specific fashion choices of young people with membership in MS-13. *See* Joel Rose & Sarah Gonzalez, *Sports Jersey or Gang Symbol? Why Spotting MS-13 Recruits Is Tougher Than It Seems*, NPR MORNING EDITION (Aug. 18, 2017), https://www.npr.org/2017/08/18/544365061/identifying-ms-13-members ("And Latino students on Long Island say that they're the only ones who get in trouble at schools for wearing clothing brands associated with MS-13, including Versace belts, Nike shoes and Chicago Bulls jerseys.").

[139] Denise Hamilton, *Gang Attire Wearing Thin at Area Schools*, L.A. TIMES (Feb. 4, 1990), https://www.latimes.com/archives/la-xpm-1990-02-04-ga-165-story.html ("Teachers say the difficulty of their work is compounded by television, which often shows teen idols dressed in attire that could be construed as gang-related. 'when they see kids on MTV in gang apparel, they think it looks cool,' said Baldwin Park's DeLong, who called her job 'very difficult.'").

[140] Robert J. Bunker & John P. Sullivan, *Mara Salvatrucha (MS-13): A Law Enforcement Primer*, FBI NAT'L ACAD. ASSOCS., https://www.fbinaa.org/FBINAA/Associate/MARAPR2018_Feature_1.aspx.

[141] *See e.g.*, Dreier, *supra* note 137.

[142] United States v. Green, 618 F.3d 120, 124 (2d Cir. 2010) (per curiam) ("The condition of supervised release that prohibits Green from the 'wearing of colors, insignia, or obtaining tattoos or burn marks (including branding and scars) relative to [criminal street] gangs,' on the other hand, is not statutorily defined and does not provide Green with sufficient notice of the prohibited conduct. The range of possible gang *colors is vast and indeterminate*. For example, the L.A. Police Department's explanation of gang colors and clothing includes "white T-shirts," "blue or black or a combination of the two," red, green, black, brown and purple. Los Angeles Police Department, How Are Gangs Identified, http://www.lapdonline.org/get_informed (last visited May 14, 2010). Eliminating such a broad swath of clothing colors would make his daily choice of dress fraught with potential illegality. People of ordinary intelligence would be unable to confidently comply with this condition.") (emphasis added).

## Gang Identifier: Hand Gestures

DHS has relied on school officials claiming students flashed a "gang sign", on law enforcement observing similar conduct, or social media photographs as indicative of gang membership.

**Is it a gang-related gesture?:** Practitioners should consider:

- How, where and by whom was the gesture observed in the first place? Who recorded this observation and where? Was it shared with ICE? If yes, how?
- How is it known that this is a gang-related hand sign?
- Who made that determination and how/why are they qualified to do so?
- Is the gesture described?
- Could the sign have been misinterpreted?
- Was the alleged gesture even made?

**Gesture does not mean gang member:** There have been instances where non-citizens who were merely making some obscene gesture were accused of flashing gang signs.[143] People of color who point are generally accused of making gang-related hand gestures.[144]

- What hand gesture was your client making?
- Was your client simply mimicking hand gestures that are observable in that person's community, school, and environment?
- Would the same gang allegation be made against a white child making the same gesture?

For example, when "sign of horns" gestures, widely used worldwide by devotees of rock and metal music, are used by young Latinx rockers, they have been construed as a MS-13 gang-related, while white rockers using the same gesture are not accused of gang affiliation.[145]

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[143] *See* Tina Vasquez, *With Gang Allegations, Educators Are Funneling Migrant Teens Into a School-to-Deportation Pipeline*, Rewire News (May 24, 2018), https://rewire.news/article/2018/05/24/gang-allegations-educators-funneling-migrant-teens-school-deportation-pipeline ("A faculty member who witnessed the motion—LVM raising both middle fingers to a fellow student—claimed that the teen had flashed a gang sign, prompting his suspension. And because the school district cooperates with law enforcement, which shares information with immigration officials, ICE arrested him in July 2017 at his home as part of Operation Matador four months after his suspension.").

[144] *See e.g.*, Amanda Terkel, *Black People Pointing Their Fingers Keep Getting Accused of Gang Activity*, HUFFPOST (Nov. 7, 2014), https://www.huffpost.com/entry/gang-hand-signs_n_6122122.

[145] Travis M. Andrews, *Gene Simmons of Kiss Tries to Trademark the Sign Language Gesture for Love*, WASH. POST (June 15, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/06/15/gene-simmons-of-kiss-tries-to-trademark-the-sign-language-gesture-for-love/?noredirect=on&utm_term=.b0bdab675f52; Michael E. Miller, *'You Feel the Devil is Helping You': MS-13's Satanic History*, WASH. POST (Dec. 12, 2017), https://www.washingtonpost.com/news/retropolis/wp/2017/12/20/you-feel-that-the-devil-is-helping-you-ms-13s-satanic-history/?utm_term=.4c203dfd8ae1.

## Social Media Evidence is Not Dispositive of Gang Membership

Posting of gang-related social media content does not necessarily mean that an individual is in a gang.

**Wannabes and Posturing:** Social media braggadocio is not always backed up with actual criminal conduct and is often exaggerated.[146] It prejudices the non-citizen in that it makes it difficult for adjudicators to not infer gang involvement or intent to commit crimes.

## Unreliable School Records and Resulting Prejudice

**School Records Vulnerable to Prejudice:** The same principles regarding the gang label apply in the schools context. School officials are vulnerable to the same prejudicial and conclusory determinations as law enforcement. Therefore, in reviewing gang allegations that had been lodged against students in the school context, practitioners should carefully consider what qualifies as gang-related and who decided that something was gang-related:

- How were the records created? By whom?
- What was the factual basis for any of the allegations? Are the school records relying on conclusory language that something is gang-related without describing the underlying facts?
- What criteria were used?
- What is the purpose of school records/disciplinary material?
- Were the allegations tested in any way to make them reliable?
- Were there disciplinary proceedings tested in any court of law?
- Why are they being relied upon in the immigration proceeding?

Understanding these circumstances can help practitioners challenge the gang label or its implications.

Practitioners should note whether what is being alleged to be indicia of gang membership is uniformly considered to be gang-related across school districts. If the problematic gang identifier is not uniformly applied, the school's reliance on it undercuts its probative and signals that the allegation was arbitrary and subjective.

[146] Desmond Upton Patton et al., *Internet Banging: New Trends in Social Media, Gang Violence, Masculinity and Hip Hop*, Computers in Human Behavior 29, at A56 (2013), https://safelab.socialwork.columbia.edu/sites/default/files/2016-11/1-s2.0-S0747563212003779-main.pdf (".In her ethnography of urban youth in Boston, Janelle Dance (2002) describes the wannabe as an individual who ''does not genuinely possess ganger-banger-like abilities'' (p. 61).").

If there was a suspension hearing,[147] and the school disciplinary record noted a "gang-related" allegation, this allegation will be vulnerable to unfair prejudice.[148] Schools are also often unaware of the devastating impact of gang allegations and are not properly trained on the gang identifiers.

**School Disciplinary Records (official suspension record):** If the non-citizen has been alleged to be gang affiliated in the context of a school disciplinary action, it is vital that practitioners obtain any and all school records. Practitioners should consider whether a specific gang-related school disciplinary record was used by the school? Was there a school disciplinary hearing?[149] What was the outcome of the school disciplinary hearing? Were the charges against the child sustained? Was anyone else besides the non-citizen and school official present at the hearing? How frequently has the child faced disciplinary action in school? How recent was the disciplinary action? *Practitioners should consider consulting with an education law attorney to brainstorm any ways to challenge unreliable or problematic evidence or records.*

After analyzing the context of the school disciplinary action, practitioners should better understand how DHS was able to obtain this information. Depending on whether a gang-related code or allegation was successfully lodged against the student and the student was suspended for the alleged misconduct of gang allegation, this may be a difficult prejudicial presumption to overcome.

For more information regarding school records, refer to School Disciplinary Records under Authentication of this Practice Note.

**Distortion of the MS-13 Threat in the United States:** Latinx youth are being broadly cast as MS-13 gang members in order to be targeted for incarceration and deportation. To help undermine such allegations and for more information, refer to Swept Up in the Sweep: The Impact of Gang Allegations on Immigrant New Yorkers, which discusses the distortion of the MS-13 threat in the United States, the problematic and unreliable gang policing tactics, and the devastating impact of gang allegations against Latinx New Yorkers.[150]

[147] Practitioners should obtain any recordings or records of suspension hearings.
[148] It is important that any gang allegation made in a school disciplinary hearing be challenged.
[149] Practitioners should obtain school disciplinary records, if there were any.
[150] SWEPT UP IN THE SWEEP, *supra* note 18, at 7.

## Suggested Checklist

- What evidence is being relied upon to raise gang allegations? What qualifies as “gang-related” and why? Are the allegations overbroad and vague? Is there any factual support for the allegations?
- In what context are the gang allegations being raised? What needs to be proven in the hearing? Why are they being raised?
- Has DHS mischaracterized the evidence? Have it incorrectly identified an image or incorrectly associated an image with gang membership?
- Is there reliance on law enforcement data, such as gang databases, that is unsupported by independent social science research?
- Did your client ever have disciplinary issues at school? Has your client ever been suspended or had gang-related allegations brought in the school context?
- What is the basis of the government’s allegations? How did the government obtain this information? Where did the government get [evidence] of these gang allegations? What is the source of information? Was there law enforcement involvement? What kind of law enforcement? What kind of interaction did those agents have with DHS?
- Do the circumstances support that the gang-related allegations are based on race/religious/or ethnic profiling? Where the evidence speaks to alienage, practitioners should consider a motion to suppress.

# HEARSAY

## Rule and Key Concepts

Hearsay is "an out of court statement made by the declarant for the truth of the matter asserted," and can include documents containing hearsay or a witness testifying.[151]

**Federal Rules of Evidence. Rule 801: Definitions That Apply to This Article; Exclusions from Hearsay**

**(a) Statement.** "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

**(b) Declarant.** "Declarant" means the person who made the statement.

**(c) Hearsay.** "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and
(2) a party offers in evidence to prove the truth of the matter asserted in the statement . . . .

In immigration proceedings, hearsay is admissible, but its admission must be probative and not fundamentally unfair.[152] In the evidentiary context, fairness is closely related to the reliability and trustworthiness of the evidence.[153] Scholars have posited that it is "fundamentally unfair to hold a party accountable based upon hearsay statements that cannot be cross-examined in court, regardless of the reliability of those out-of-court statements."[154]

Hearsay often contains *indicia of unreliability*, such as:

- Inaccuracies, discrepancies, conflicting details, mischaracterizations, misstatements of material information, and other incorrect information
- May have been obtained by coercion or duress
- May have been created/prepared long after the events/statements it purports to capture
- Unclear source material or a general lack of information on which to even assess reliability

[151] FED. R. EVID. 801(c).
[152] Rojas-Garcia v. Ashcroft, 339 F.3d 814, 823-24 (9th Cir. 2003); Guerrero-Perez v. INS, 242 F.3d 727, 729 n.2 (7th Cir. 2001); Bustos-Torres v. INS, 898 F.2d 1053 (5th Cir. 1990).
[153] *See* United States v. Medico, 557 F.2d 309, 314 n. 4 (2d Cir. 1985), cert. denied, 434 U.S. 986 (1977).
[154] Liesa L. Richter, *Goldilocks and the Rule 803 Hearsay Exceptions*, 59 WM. & MARY L. REV. 897, 948 (2018), http://scholarship.law.wm.edu/wmlr/vol59/iss3/4 (citing Justin Sevier, *Popularizing Hearsay*, 104 GEO. L. J. 643, 678, 687-88 (2016)).

- Statements made without the use of an interpreter
- Unknown author(s) and unknown qualifications/training
- Inability to cross-examine/observe the declarant under oath

Practitioners should be mindful of the various and "*firmly rooted" hearsay exceptions*[155] codified in the FRE, such as the business and public records exceptions.[156] Practitioners should also be mindful of any *exclusions to these exceptions*, such as police reports or police records of convictions.[157] Moreover, there are *certain statements that meet the definition of hearsay but are not hearsay*.[158]

The unreliability of hearsay evidence is closely tied with lack of ability to cross-examine and authentication objections. Therefore, these are overlapping arguments.

## When is the rule/objection triggered?

This rule is triggered when the government introduces evidence that contains an *out-of-court factual assertion* offered for its truth. If the statement is offered only to prove that an assertion was made as circumstantially relevant to prove a material proposition regardless of its truth, it is not hearsay.

The most commonly introduced hearsay evidence are internally created DHS memoranda such as Form I-213, HSI memos, and ICE memos as they contain multiple levels of hearsay. These documents rarely reflect the personal knowledge of the officer who signs them. Rather, DHS often memorializes the statements and observations of officers who rely on information they obtained from third parties such as confidential informants, other law enforcement or immigration officials, or statements contained in external documents.

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[155] FRE 803 enumerates twenty-four exceptions to the rule against hearsay (including "other exceptions"). FED. R. EVID. 803. FRE Rule 807 (residual exception) specifies the circumstances under which a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804. FED. R. EVID. 807. Mary Holper, *Confronting Cops in Immigration Court*, WM. & MARY BILL RTS. J. 675, 693 (2015) ("To determine whether evidence introduced in immigration court is 'reliable and trustworthy,' courts and the Board have used the Federal Rules of Evidence, which, in codifying many of the firmly rooted exceptions to the hearsay doctrine, provide an easy test for reliability.").

[156] *See* United States v. Contreras, 63 F.3d 852, 857 (9th Cir. 1995); *see also* Ohio v. Roberts, 448 U.S. 56, 66 n. 8 (1980) ("'Properly administered[,] the business and public records exceptions would seem to be among the safest of hearsay exceptions.'") (citations omitted); Felzcerek v. INS, 75 F.3d 112 (2d Cir. 1996).

[157] United States v. Bell, 785 F.2d 640, 643-44 (8th Cir. 1986) ("While police reports may be demonstrably reliable evidence of the fact that an arrest was made, they are significantly less reliable evidence of whether the allegations of criminal conduct they contain are true. We note that Congress exhibited similar doubts about the reliability of such reports when it specifically excluded them from the public records exception to the hearsay rule in criminal cases." (internal citations omitted); *see* FED. R. EVID. 803(8)(B). The *Advisory Committee Notes* to Rule 803, paragraphs 6 and 7 address the unreliability of police reports.

[158] FED. R. EVID. 801(d). Statements that are not hearsay include prior statements by a witness and party-opponent admissions.

## What are the arguments?

### Summary

Hearsay arguments are closely linked to relevance, reliability, lack of ability to cross-examine, and authenticity. Some of these themes have been discussed in other sections.

**DHS may argue:** Hearsay is generally permissible in immigration court,[159] or the contested evidence is firmly rooted in codified hearsay exceptions. For example, the government may argue that documents are work product or business or public records, and thus they should be presumed reliable. DHS may also argue that providing additional detail would be unrealistic, burdensome, time-consuming, or risk the safety and security of the source if their identity is discovered.

**You can argue:** The hearsay evidence presents several indicia of unreliability. There are multiple layers of unauthenticated hearsay and the declarant is unavailable for cross-examination; therefore, its use is fundamentally unfair.

### Layers of Hearsay

**Multiple layers of hearsay:** FRE Rule 805, *Hearsay Within Hearsay* requires that all layers of hearsay statements be independently verified (or found to separately conform to the requirements of a hearsay exception) to be admissible.[160] Each level of hearsay is less likely to be dependable, more likely to be misunderstood or to be erroneous – ultimately less relevant and less fair.[161] Each problematic level of hearsay increases the risk of unreliable evidence undermining the fundamental fairness of a proceeding to be admitted.[162]

[159] *In re* Grijalva, 19 I. & N. Dec. 713 (B.I.A 1988). *See also* Rojas-Garcia v. Ashcroft, 339 F.3d 814, 823-24 (9th Cir. 2003); Guerrero-Perez v. INS, 242 F.3d 727, 729 n.2 (7th Cir. 2001).
[160] FED. R. EVID. 805.
[161] *See* Peter Nicolas, *But What if the Court Reporter is Lying? The Right to Confront Hidden Declarants Found in Transcripts of Former Testimony*, 2010 B.Y.U. L. REV. 1149, 1153-54 (2010) ("Traditionally, there are four risks associated with hearsay evidence, and thus four reasons why hearsay evidence is excluded: (1) faulty perception (the risk that the declarant may have inaccurately perceived the events at issue in her statement; (2) faulty memory (the risk that the declarant does not accurately recall the details of the events at issue in her statement); (3) faulty narration (the risk that the declarant may misspeak or be misunderstood); and (4) insincerity (the risk that the declarant is not being truthful when she speaks).").
[162] *See* Laila Hlass, *The School to Deportation Pipeline*, 34 GA. ST. U. L. REV. 697, 754 (2018).

## Internally Created DHS Memoranda

DHS may introduce evidence such as the Form I-213, Record of Deportable/Inadmissible Alien (Form I-213), memorandum from HSI re gang affiliation (HSI memo), or the ICE memorandum of investigation (ICE memo) to allege gang allegations. These documents generally contain multiple layers of hearsay and conclusory assertions lacking a factual basis.

**Unreliability of Form I-213, Record of Deportable/Inadmissible Alien (Form I-213):** The government frequently introduces its own internal documents, such as Form I-213, which is prepared by an arresting DHS officer, and contains biographical information, narratives describing the alleged circumstances of arrest, and other information.[163] The Form I-213 is generally presumed reliable and admissible and DHS may offer it to impeach testimony. IJs generally find this document presumptively reliable and allow it to be admitted without giving the non-citizen the opportunity to cross-examine the document's author.[164]

However, Form I-213 is not presumed reliable when some of the material contained therein is somehow contested or where there may be a motive to falsify information.[165] Practitioners have the burden to challenge the information contained in Form I-213 and therefore must scrutinize Form I-213 for error, hearsay, and prejudice/bias.[166]

Some indicia of unreliability of Form I-213 include containing information known to be incorrect or obtained by coercion or duress, having been drafted carelessly or maliciously, mischaracterizations or misstatements of material information, or indicators that the evidence may have been obtained from someone other than the non-citizen who is the subject of the form.[167] If a Form I-213 has the indicia described, argue it is inherently flawed and it would be a violation of due process for the immigration judge to rely on it.[168]

Finally, the government provides little factual basis or evidentiary support for gang allegations besides conclusory statements to support the alleged gang membership.[169]

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[163] *See e.g.*, CLINIC, *Sample Form I-213*, https://cliniclegal.org/sites/default/files/Redacted-Form-I-213.pdf.
[164] *See* Espinoza, 45 F.3d at 310-11; Bustos-Torres, 898 F.2d at 1056; *see also* INS v. Lopez-Mendoza, 468 U.S. 1032, 1049 (1984) (noting that officer who completes a Form I-213 "rarely must attend the hearing").
[165] *See* Felzcerek v. INS, 75 F.3d 112, 116 (2d Cir. 1996).
[166] *See Espinoza v. INS*, 45 F.3d 308, 310–11 (9th Cir. 1995) ("information on an authenticated immigration form is presumed to be reliable in the absence of evidence to the contrary presented by the [non-citizen].").
[167] *Id.* at 1013 (citing Barradas v. Holder, 582 F.3d 754, 763-64 (7th Cir. 2009) and Rosendo-Ramirez v. INS, 32 F.3d 1085, 1088 (7th Cir. 1994)).
[168] *See* Pouhova, 726 F.3d at 1012-13, 1016 (Form I-213 was written seven years after the conversation it records took place, is inconsistent with Respondent's statements, and its sources are unreliable).
[169] STUCK WITH SUSPICION, *supra* note 22, at 3 ("DHS documents memorializing allegations of gang affiliation—including memoranda authored by Homeland Security Investigations (HSI) and I-213s—often mention the respondent's attire, tattoos, associations or alleged self-admission, or unnamed third parties'

**HSI Memos:** HSI memos, documents created by DHS to allege gang allegations, "often lack basic details about the factual basis for the claim and even the type of affiliation alleged."[170] They include generic "background" information about the particular "gang" followed by reasons why DHS believes the non-citizen is gang affiliated, including factors such as tattoos, clothing, and accessories supposedly indicative of gang membership, putative identification of non-citizen as a gang member by informants, interactions with known gang members, or self-admission.[171]

## Law Enforcement Documents

Unreliability of Law Enforcement Documents: While some law enforcement documents may fall under the firmly rooted public records[172] or records of a regularly conducted activity (business records)[173] exceptions of the FRE some may nevertheless be unreliable because they are adversarial, were created during an investigation with a prosecutorial purpose, or were not created contemporaneously. All of these and other factors may undermine the reliability of some law enforcement documents to the point of exclusion or minimal weight.

**Adversarial and Created during Course of Investigation:** Law enforcement documents are unreliable because they are adversarial and created during the course of an investigation. The nature of the confrontation between police and a criminal defendant is inherently adversarial, raising concerns about reliability of police reports.[174] After all, they were created by agencies whose jobs are "to seek to detect and prosecute crimes" and thus "do not necessarily emanate from neutral, reliable source."[175]

**Not Contemporaneous:** Law enforcement documents are sometimes unreliable because they were not created contemporaneously to when the events occurred. [176] They are also unsworn or submitted by an interested witness.[177]

## Police Reports and Criminal Records

**Police Reports:** For an extremely helpful resource that analyzes the problematic and routine use of police reports by immigration judges, the use of hearsay evidence in immigration proceedings, and the right to confront police officers, refer to Mary Holper's article Confronting Cops in Immigration Court.[178]

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accusations, but these documents lack even basic details about when, where, or in what context the suspicious incidents occurred, making the allegations difficult to effectively refute.")

[170] STUCK WITH SUSPICION, *supra* note 22, at 15 (2019).

[171] *Id.*

[172] FED. R. EVID. 803 (8).

[173] FED. R. EVID. 803 (6).

[174] United States v. Bell, 785 F.2d 640, 634-44 (8th Cir. 1986).

[175] Francis v. Gonzales, 442 F.3d 131, 143 (2d. Cir. 2006).

[176] *See* Gurung v. Holder, 563 F. App'x 824, 826 (2d Cir. 2014).

[177] *See* Qiuqun Ni v. Sessions, 697 F. App'x 76, 77 (2d Cir. 2017).

[178] *See generally* Holper, *supra* note 155.

A police report likely fits within the public records exception under FRE 803(8) because the reports document "a matter observed while under a legal duty to report" or "factual findings from a legally authorized investigation."[179]

However, the use of police reports against defendants in criminal cases is limited by FRE 803(8) even if the report meets the definition of a "public record" as indicated by the *Notes of Advisory Committee on Proposed Rules* because police reports generally lack sufficient trustworthiness even though they may help in certain ways.[180]

Police reports may be helpful in guiding an investigation, helpful in locating useful witnesses, and be helpful in "serving as contemporaneous recollection of what the officer observed and what the officer understood people to have told him."[181] And, while police reports demonstrate reliable evidence that an arrest was made, they are "significantly less reliable evidence of whether the allegations of criminal conduct they contain are true."[182]

Practitioners should consider the following arguments to argue against the admission of police reports:

- **Multiple Layers of Hearsay:** Police reports contain multiple levels of hearsay. Police reports are ultimately unreliable, untrustworthy, and do not accurately depict events as they actually took place because in police reports "[a]ll the defects of hearsay, double hearsay, and triple hearsay apply, since people may speak to the police despite lack of personal knowledge and adequate observation, may be misunderstood, and what they say may be misreported."[183]

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[179] *Id.* at 683; FED. R. EVID. 803(8) ("The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: . . . Public Records. A record statement of a public office if: (A) it sets out: (i) the office's activities; (ii) **a matter observed while under a legal duty to report**, **but not including, in a criminal case, a matter observed by law-enforcement personnel**; or (iii) in a civil case or against the government in a criminal case, **factual findings from a legally authorized investigation**; and (B) neither the source of information nor other circumstances indicate a lack of trustworthiness.") (emphasis added).

[180] *Id.* at 690; Prudencio v. Holder, 669 F.3d 472, 483-84 (4th Cir. 2012) ("[P]olice reports…often contain little more than unsworn witness statements and initial impressions…Further, because [they] are generated early in an investigation, they do not account for later events, such as witness recantations, amendments, or corrections."); Olivas-Motta, 746 F.3d 907, 918-19 (9th Cir. 2013) (Kleinfeld, J. concurring) ("[P]olice reports are not especially useful instruments for finding out what persons charged actually did… All the defects of hearsay, double hearsay, and triple hearsay apply, since people may speak to the police despite lack of personal knowledge and lack of adequate observation, may be understood, and what they say may be misreported. People sometimes lie or exaggerate when they talk to the police."); *see supra* note 14 and accompanying text.

[181] Holper, *supra* note 155, at 684-685 (quoting Olivas-Motta, 746 F.3d at 918-19 (Kleinfeld, J., concurring)).

[182] United States v. Bell, 785 F.2d 640, 643-44 (8th Cir. 1986).

[183] Holper, *supra* note 155, at 684-685 (quoting Olivas-Motta v. Holder, 746 F.3d 907, 918-19 (9th Cir. 2013) (Kleinfeld, J., concurring)); Francis v. Gonzales, 442 F.3d 131, 143 (2d Cir. 2006).

- **Motive:** Interaction between criminal defendant and police is inherently adversarial. Police reports are prepared in anticipation of litigation and tend to be one-sided and self-serving.[184] Police have been accused of falsifying information on reports.[185] Witnesses may lie or exaggerate when they talk to police.[186]

- **Lack of Ability to Cross-Examine:** Please refer to the section on Lack of Ability to Cross-Examine for specific arguments. Not being able to cross-examine the sources of testimonial evidence undercuts the reliability of hearsay statements contained in e.g. police reports. In *Pouhova v. Holder*, the Seventh Circuit held that Pouhova's statutory right to cross-examination was violated when the IJ found her removable based on two hearsay documents claiming she sold her passport to a Bulgarian citizen who used it to gain entry into the U.S.[187] Without the opportunity to cross-examine the declarant or author, these hearsay documents were found to be unreliable and inadequate.[188] Similarly, the Ninth Circuit held that the admission of a hearsay document (where an affidavit was the government's sole evidence for a smuggling charge) was insufficient because the deported affiant was unavailable for cross-examination. [189]

- **Other Indicia of Unreliability:** Besides the factors above, which weigh against the reliability of the police report, police reports may be unreliable because they contain factual errors, statements are conclusory and not supported by facts, statements of others are summarized rather than written down verbatim, writings were not made contemporaneously, or the contents of the report are not corroborated or have been refuted.

**Record of Arrest and Prosecutions (RAP):** RAP sheets are not necessarily sufficient evidence of a conviction to e.g. bar discretionary relief.[190] A RAP sheet will likely be

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[184] *See* Holper, *supra* note 155, at 686; *see Notes of Advisory Committee on Proposed Rules* for FED. R. EVID. 803(8); Colin Miller, *Why Incriminatory Police Reports Are Unreliable/Inadmissible & Exculpatory Police Reports Are Reliable/(Potentially) Admissible*, EVIDENCEPROFBLOG (Sep. 7, 2016), https://lawprofessors.typepad.com/evidenceprof/2016/09/in-response-to-mondays-post-ive-been-getting-a-lot-of-questions-about-the-admissibilityreliability-of-police-reports.html ("If a police report contains information that seems helpful to the defense, that information is thought to be reliable and admissible against the prosecution (barring another reason for inadmissibility). On the other hand, if a police report contains information that seems helpful to the prosecution, that information is thought be unreliable and inadmissible against the defendant.").

[185] *See* Holper, *supra* note 155, at 686 (citing Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 AM. CRIM. L. REV. 1, 5-13 (2010)); *see generally* Kali Holloway, *Lying Is a Fundamental Part of American Police Culture* (Apr. 3, 2018), https://truthout.org/articles/lying-is-a-fundamental-part-of-american-police-culture.

[186] *Id.* at 684-685 (quoting Olivas-Motta v. Holder, 746 F.3d 907, 918-19 (9th Cir. 2013) (Kleinfeld, J., concurring)).

[187] Pouhova v. Holder, 726 F.3d 1007 (7th Cir. 2013).

[188] *Id.*

[189] Hernandez-Guadarrama v. Ashcroft, 394 F.3d 674 (9th Cir. 2005).

[190] Rosales-Pineda v. Gonzales, 452 F.3d 627, 632 (7th Cir. 2006) ("we do not find that rap sheets will always constitute sufficient evidence of a conviction to bar discretionary relief.").

excludable in the absence of other corroborating circumstances or where it is from a foreign jurisdiction.[191] Practitioners should carefully examine RAP sheets with their clients for accuracy and attempt to remedy any incorrect information. There are many resources available to help correct criminal records, which also indicates how these documents are susceptible to errors and inaccuracies.[192]

**Pre-Sentence Reports (probation records):** A pre-sentence report (PSR) is a "tool used in aid of sentencing, and typically describes conduct that demonstrates the commission of an offense even if the [non-citizen] was never *convicted* for that activity."[193] The Second Circuit found that hearsay-based narratives prepared by probation officers are inherently unreliable and may be inaccurate, because they "include allegations that were not proven at trial, as well as alleged facts that would have been inadmissible at trial had the prosecution attempted to present them."[194] This includes such extraneous information such as social history, employment history, family situation, and economic status.[195]

## Gang Databases and Hearsay

The prejudicial impact of relying on gang databases is detailed extensively above. Please refer to Toolkit to Challenge Gang Allegations against Immigrant New Yorkers under *Unreliability of Gang Databases and Gang Policing Efforts* for select resources to contest the reliability and use of notoriously inaccurate gang databases.

As addressed extensively above, a person can be included in a gang database even when there is no evidence that one has committed a crime or broken the law. Law enforcement agencies rely on scant evidence and overbroad criteria to include people in gang databases, which are later used as evidence of gang involvement.[196] As such, gang databases rely heavily on hearsay. Practitioners should consider looking at each specific gang identifier at issue in their client's case in order to pinpoint the layers of hearsay used in making such a determination.

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[191] *Id.*

[192] Legal Action Ctr., *Your New York State RAP Sheet: A Guide to Getting, Understanding & Correcting Your Criminal Record* (2015), https://lac.org/wp-content/uploads/2014/12/Your_New_York_State_Rap_Sheet_2013.pdf; CUNY Investigative Team, *The Rap-Sheet Trap: Mistaken Arrest Records Haunt Millions*, CITYLIMITS (Mar. 3, 2015), https://citylimits.org/2015/03/03/the-rap-sheet-trap-mistaken-arrest-records-haunt-millions.

[193] Dickson v. Ashcroft, 346 F.3d 44, 54 (2d Cir. 2003).

[194] Dickson, 346 F.3d at 53-55 ("factual narratives in the PSR are prepared by a probation officer on the basis of interviews with prosecuting attorneys, police officers, law enforcement agents, etc., they may well be inaccurate") ("Such a narrative is not a highly reliable basis for a decision of such importance as deportation."); *see* Hili v. Sciarrotta, 140 F.3d 210, 216 (2d Cir.1998) (noting that the inclusion of hearsay statements and inaccurate information in a pre-sentence report is "virtually inevitable"); Dorman v. Higgins, 821 F.2d 133, 138 (2d Cir.1987) (noting that verification of the information contained in a pre-sentence report is "desirable . . . [but] not always possible").

[195] Dickson, 346 F.3d at 53.

[196] SWEPT UP IN THE SWEEP *supra* note 18, at 23.

Presumably, **any** entry into the gang database that is being introduced in a proceeding can be considered hearsay. After all, the entry in the gang database is being brought as truth that someone is gang affiliated and that conclusory assessment is hearsay itself. Further, any information contained within the database supporting the entry is almost certainly hearsay.

Moreover, the conclusory determination that any given qualifier, e.g. tattoo, is “gang-related” has multiple layers of hearsay. The fact that an individual *has* a tattoo should be established by a witness with personal knowledge who has seen the tattoo or by an authenticated photograph. The qualification that the tattoo is “gang-related” is effectively a separate layer of hearsay. And, assuming the individual winds up in a gang database based on this information, the resultant allegation that he/she is a “gang member” is yet another layer of hearsay.

Likewise, individuals can wind up in gang databases based on an officer's subjective statement that the individual's clothing or appearance was "gang-related" or that the individual was seen with “known gang members” or based on a confidential informant’s alleged tip-off that someone is a gang member. However, without competent and independent proof, such statements should be deemed inadmissible as case-specific hearsay, absent a valid hearsay exception or exclusion.

## Suggested Checklist

*General*

Does any of the [evidence] contain hearsay?

- Was the statement made out of court?
- Is it being introduced for the truth of the matter asserted?
- Does it fall into an exception that makes it admissible in court?
- Do any exceptions to the exceptions apply to argue it should not be excluded?

Is the author or person who made the statement being presented to testify? If not, argue about the need to cross-examine the author in order for the statement to be relied upon. Refer to following section Lack of Ability to Cross-Examine for more information.

How did DHS obtain this evidence?

- Has there been any context provided for the hearsay statement?
- What were the circumstances under which statement was made?
- Are there any indicia of duress or coercion? [ask your client about the circumstances]

*An isolated statement is ripe for abuse because the statement could have been taken out of context and could have multiple meanings.*

*When DHS relies on its own internally created document or a report issued by another law enforcement agency:*

- Who authored the document?
- Was it made by DHS or an agency who works with DHS?
- What qualifications does the author have to determine that the evidence establishes or suggests gang membership?
- What training or experience does the author have to make such a determination?
- What makes them qualified to determine what evidence indicates gang membership?
- When was the report made?
- Was it made in anticipation of litigation?
- Was it made concurrently with the alleged incident?
- Are the contents of the report/records accurate (confirm with the non-citizen)?

*Hearsay Specific to Form I-213, Record of Deportable/Inadmissible Alien*

If Form I-213 has incorrect information or has information that can be easily disputed, strong arguments exist that other portions of the document are unreliable.

- Are there any indicia that suggest that the Form I-213 is erroneous? Are the facts alleged in the Form I-213 accurate (confirm with your client)? Can you dispute *any* of the information on the form?
- Are you able to figure out the source of information for the allegations contained in the Form I-213? Can you verify all of the information in the report with an outside, independent source of information?
- Does the source of information have any ulterior motives to make statements against the non-citizen?
- How did the government acquire this information?
- Are you able to request records for any of the non-citizen's arrests, convictions, or police reports of the alleged events?
- Does the Form I-213 indicate the circumstances of any apprehensions?
- Is any testifying witness being proffered to verify the source of the information and its recording?
- Are any of the allegations conclusory?
- Was any of the information obtained through coercion or duress?
- Are there any unexplained cross-outs and handwritten additions to the form that have not been initialed?

*Local Law Enforcement Records*

- Who authored the documents? Was the individual a police department employee or official?
- Who obtained the documents?
- Did the police department provide any statement authorizing the release of documents or authenticating them?
- What indicia are there that these documents/forms are routinely used by the law enforcement to document information obtained in the course of an investigation?

## LACK OF ABILITY TO CROSS-EXAMINE

### Rule and Key Concepts

Aside from limited exceptions,[197] a non-citizen has the right to a "reasonable opportunity" to examine adversarial evidence and to cross-examine witnesses presented by the government.[198] In turn the government must make "*reasonable efforts*" to produce witnesses for cross-examination.[199] A non-citizen must a) be presented with the evidence before the hearing to afford them sufficient time to evaluate the evidence and offer rebuttal evidence and testimony, and b) have the opportunity to cross-examine the author of the report.[200]

Furthermore, "in a removal proceeding, the IJ shall . . . [a]dvise the respondent that he or she shall have a reasonable opportunity to . . . cross-examine witnesses provided by the government."[201]

And, while the FRE are not applicable to immigration hearings, "the government's choice whether to produce a witness or to use a hearsay statement [cannot be] wholly unfettered."[202] Even in the immigration context, IJs cannot allow DHS to deprive the non-citizen of an opportunity for cross-examination, notwithstanding admissibility of

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[197] These rights are limited in as far as not entitling the non-citizen to examine "national security information" the government may proffer to oppose a non-citizen's admission to the United States or a non-citizen's application for discretionary relief. 8 U.S.C. § 1229(a)(b)(4)(B).
[198] 8 U.S.C. § 1229(a)(b)(4)(B) ("(B) the [non-citizen] shall have a reasonable opportunity to examine the evidence against the [non-citizen], to present evidence on the [non-citizen's] own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the [non-citizen] to examine such national security information as the Government may proffer in opposition to the [non-citizen's] admission to the United States or to an application by the [non-citizen] for discretionary relief under this chapter."); 8 U.S.C. §§ 1240.2, 1240.10(a)(4); *see* Saidane v. INS, 129 F.3d 1063, 1065 (9th Cir. 1997); *see also* Angov v. Holder, 788 F.3d 893, 899 (9th Cir. 2015). Part of the reason why DHS has "formidable information-gathering powers" in contrast to non-citizens in removal cases who have few discovery options, is because the INA of 1952 "was enacted during the early days of discovery, and as a result contained very limited discovery rights. Today immigration discovery is more or less as it was in 1952." Geoffrey Heeren, *Shattering the One-Way Mirror: Discovery in Immigration Court*, 79 BROOK. L. REV. 1569, 1571 (2014) (citing *see* 8 U.S.C. § 1229(a)(b)(3) (1952) (a non-citizen must "have a reasonable opportunity to examine the evidence against him…."); 8 C.F.R. § 242.53(a)(2), (4) (1952) (allowing special inquiry officers to issue subpoenas and "[t]ake or cause depositions to be taken")).
[199] Ocasio v. Ashcroft, 375 F.3d 105, 107 (1st Cir. 2004) ("[T]he INS may not use an affidavit from an absent witness unless the INS first establishes that, despite reasonable efforts, it was unable to secure the presence of the witness at the hearing") (internal quotations and citations omitted); Immigrant Defense Project, *Challenging Evidence of Gang-Related Activity at Immigration Court Bond Hearings* (Aug. 3, 1017), https://www.immigrantdefenseproject.org/wp-content/uploads/Practice-Note-8-3-17-gang-bond-hearings-1.pdf.
[200] 8 U.S.C. § 1229(a)(b)(4)(B).
[201] 8 C.F.R. 1240.10(a)(4).
[202] Baliza v. INS, 709 F.2d 1231, 1233-34 (9th Cir. 1983).

hearsay, where admission goes to the core of the agency's case.[203] In *Patel*, where the IJ denied the non-citizen's subpoena to compel the government affiant to appear and the government did not offer their affiant as a witness, the removal hearing was found to be fundamentally unfair because the non-citizen's right to cross-examine an adverse witness was violated.[204]

Indeed, the Supreme Court has explained that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."[205]

## When is the rule/objection triggered?

This rule applies when the government uses evidence created or offered by someone who is not made available for cross-examination, introduces documentation or testimony that contains hearsay information, or relies upon a confidential informant or an unnamed officer. Examples of evidence the government may try to introduce without cross-examination include, a school safety report, an arrest or other record created by a police officer, or records jotted down or memorialized by a school or immigration official.

## What are the arguments?

### Summary

**DHS may argue:** *Any effort*, including sending an email or making a phone call to a prospective witness and finding the witness was unavailable to testify is sufficient to satisfy the "reasonable efforts" prong. Although the Second Circuit has not definitively ruled on the issue, some circuits have held that the government has to make "any effort" to make the witness available.[206]

**You can argue:** The government must make *reasonable* efforts to produce its witness. Any reliance on evidence created/proffered by or otherwise stemming from witnesses

[203] Patel v. Sessions, 868 F.3d 719, 725 (8th Cir. 2017) ("We conclude that the BIA erred in affirming the IJ's admission of Nilesh's affidavit and the USCIS report without granting Patel's request for a subpoena or otherwise providing Patel the opportunity to cross-examine Nilesh. This error was prejudicial and rendered Patel's removal hearing fundamentally unfair.").
[204] *Id.* at 724-725.
[205] Goldberg v. Kelly, 397 U.S. 254, 269 (1970). The Sixth Amendment Confrontation Clause does not presently attach to removal proceedings because deportation is not considered to be punishment and removal proceedings are considered civil, "notwithstanding the gravity of the liberty deprivation at issue[ ]" or even despite the fact that the Supreme Court has acknowledged that "deportation is a penalty—at times a most serious one." Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299, 1301-04 (2011); Bridges v. Wixon, 326 U.S. 135, 154 (1945).
[206] *See* Pouhova v. Holder, 726 F.3d 1007, 1015 (7th Cir. 2013) (holding that *any effort* the government takes to authenticate is sufficient, even if it's very minimal, is sufficient) (emphasis added).

not made available for cross-examination, undercuts the reliability of evidence and it should be excluded or accorded minimal weight. Firsthand testimony is inherently more trustworthy than hearsay because of oath, physical presence at trial, and the opportunity for cross-examination.[207] Lack of ability to cross-examine adverse witnesses undermines the fundamental fairness of a proceeding and violates due process. Even if even a portion of the hearing or a single piece of submitted evidence is not fundamentally fair, then the fundamental fairness and due process of the entire proceeding is compromised.

An opportunity to confront and cross-examine "is even more essential where the evidence consists of the testimony of individuals where there may be a chance of faulty recollection or where there may be mal intent which if oft involved in aggressive race-based gang policing.[208] Without an opportunity for cross-examination, evidence should be given little to no weight.

## Reasonable Efforts

**The government must make *reasonable* efforts to produce its witness**: The government must make a *reasonable* effort in immigration proceedings to afford the non-citizen a *reasonable* opportunity to confront adverse witnesses.[209]

**Explanation of Reasonable Efforts:** Not only has the government *not* made reasonable efforts to produce the witness, it does not explain the efforts it took to do so. The government should specify its reasonable efforts to produce a witness.[210] Absent indicia of what the government's "reasonable efforts" entailed and absent a witness made available for cross-examination, the court must find that the non-citizen's right to a fundamentally fair hearing was violated.[211] Thus, if the government has only taken minimal steps, akin to filling out a "single, unserved subpoena for the wrong date," that

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[207] Richard M. Cagen, *Dealing with the Problem of Unreliable Evidence Admitted Under a Literal Interpretation of Federal Rule of Evidence 803-18*, 14 VAL. U. L. REV. 329, 330, 330 n. 9-11 (1980), http://scholar.valpo.edu/vol14/iss2/4.

[208] Goldberg v. Kelly, 397 U.S. 254, 269 (1970).

[209] "[T]he government must make a reasonable effort in [immigration] proceedings to afford the alien a reasonable opportunity to confront the witnesses against him or her. This duty is not satisfied where the "government…effectively…shift[s] the burden of producing its witness onto [the alien]." Saidane v. INS, 129 F.3d 1063, 1065 (9th Cir. 1997) (internal quotations omitted) (citing Cunanan v. INS, 856 F.2d 1373, 1375 (9th Cir. 1988).

[210] *See* Karroumeh v. Lynch, 820 F.3d 890, 897 (7th Cir. 2016) ("Although the government repeatedly invokes the phrase 'reasonable efforts' in its brief, it has never set forth what those efforts entailed. Left with a record that shows nothing more than a single, unserved subpoena for the wrong date, we cannot conclude that the government used reasonable efforts to secure Wright's presence at the hearing.") Here, DHS argued that it used "reasonable efforts" to ensure witness's attendance at the hearing, but DHS never subpoenaed the witness for the merits hearing nor did the IJ follow through on the regulatory requirement to seek the assistance of the United States Attorney and district court in enforcing a subpoena pursuant 8 C.F.R. 1003.35(b)(6). *Id.*

[211] See *id.*

is not sufficient and violates the non-citizen's right to a fundamentally fair hearing.[212]

**No Burden-Shifting onto Non-citizen:** DHS should not be permitted to shift the burden onto the non-citizen by not producing its own adverse witness for cross-examination; this practice "render[s] the hearing fundamentally unfair."[213] The government effectively engages in such burden-shifting when it does not cooperate "in making a good faith effort to overcome considerable logistical difficulties and afford the [non-citizen] an opportunity to cross-examine its witnesses."[214]

## Witness Shopping

**No Witness-Shopping/Single Witness Not Enough:** The government's offer to produce a single witness when the non-citizen had legally significant interactions with multiple government actors, contravenes the statutory convention of "reasonable opportunity" to cross-examine.[215]

The government often relies on a single government witness to testify on behalf of or in support of multiple government actors.[216] Effectively, the government is participating in "witness-shopping" where it chooses a witness whose testimony will most likely provide a favorable judgment, even though there could be a more appropriate witness or multiple witnesses that could provide more precise information as to specific interactions with the non-citizen.

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[212] *Id.*

[213] Saidane v. INS, 129 F.3d, 1063, 1065 (9th Cir. 1997) ("In *Bachelier*, the INS cooperated in making a good faith effort to overcome considerable logistical difficulties and to afford the alien an opportunity to cross-examine its witnesses. Here, the only apparent reason for the INS's decision not to call Padilla, but to rely on [ ] her affidavit, was to avoid subjecting her to cross-examination. The government thus shifted the burden of producing its witness onto the alien.") ("Here, the INS made no effort to call an admittedly available witness and relied instead on that witness's damaging hearsay affidavit. This rendered the hearing fundamentally unfair. That the IJ issued a subpoena for the alien to serve on the government's witness did not cure that unfairness.")

[214] *Id*. at 1065-66; Cunanan v. INS, 856 F.2d 1373, 1375 (9th Cir. 1988) ("The government suggests that, because Cunanan has the burden of proving eligibility for and circumstances warranting voluntary departure, he also has the burden of producing a government's hearsay declarant that he may wish to cross-examine. This suggestion runs contrary to the controlling principle in this case, that the government must make a reasonable effort in INS proceedings to afford the alien a reasonable opportunity to confront the witnesses against him or her.") (citations omitted).

[215] *See* 8 U.S.C. § 1229(a)(b)(4)(B).

[216] For example, a Customs and Border Protection (CBP) officer may make a declaration to support DHS's case based on his personal knowledge and based on records maintained by CBP. And, while the CBP officer may have been involved in conducting a baggage examination or may have been present for the entirety or part of a non-citizen's sworn interview, different officers may have completed related forms, conducted additional interviews, heard relevant statements or requests by the non-citizen, or otherwise participated in CBP processing. Interactions with other officers may have been legally significant, but they will not be described or stated by the single witness -- these could include requests for interpretation, legal assistance, or clarifying statements. Bringing a single witness when multiple individuals interacted with a non-citizen undermines the fairness of a hearing because the government has plausible deniability, while the non-citizen fights an uphill credibility determination battle.

However, like forum shopping and judge shopping, witness shopping is similarly problematic and adversely undermines the fairness of a proceeding.[217] Such a witness representing a specific government agency can conveniently deny personal knowledge at times, but also attest to conclusory allegations at other times. The government's strategic practice of using governmental employees in different capacities to make and support the allegations of gang membership exploits an already uneven power dynamic between the government and the non-citizen, where the government has a vast informational advantage over the non-citizen.[218]

In the context of immigration proceedings, the problem is compounded because IJs will generally find government witnesses credible and the mere fact that a government witness was brought to a proceeding may be sufficient to satisfy the cross-examination requirement.[219]

## Lack of Reliability

Cross-examination of individuals who have made hearsay statements provide the opportunity to interrogate the statements in question. Without the benefit of cross-examination to probe a declarant's perception, memory, and veracity, hearsay evidence is unreliable as substantive proof.

**Risk of Perjury:** Practitioners should argue that the admitted allegation, statement or assertion, was not a sworn statement made under oath or under penalty of perjury, and therefore the extrajudicial statement is less likely to be true. The admitted statement was not made under oath, which undermines its credibility.[220] The Code of Federal Regulations (CFR) provides that in removal proceedings, "testimony of witnesses appearing at the hearing shall be under oath or affirmation administered by the immigration judge.[221] Physical presence of the testifying witness helps the trier of fact better judge the witness's credibility by observing witness's conduct and demeanor. Testimony can help clarify ambiguities or mistakes in evidence. If the evidence contains layers of hearsay then without testimony it remains unclear where any of the underlying

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[217] *See e.g.*, Rich Samp, *Forum-Shopping Takes a Major Hit in U.S. Supreme Court*, FORBES (June 2017), https://www.forbes.com/sites/wlf/2017/06/29/forum-shopping-plaintiffs-take-a-major-hit-in-us-supreme-court/#7b311a5a6de4; *Cf.* Markus Petsche, *What's Wrong With Forum Shopping? An Attempt to Identify and Assess the Real Issues of a Controversial Practice*, 45 INT'L LAW. 1005, 1011 (2011) (discussing how forum selection may "unfairly" disadvantage one party and what kind of unfairness may be at stake).

[218] Geoffrey Heeren, *Shattering the One-Way Mirror: Discovery in Immigration Court*, 79 BROOK. L. REV. 1569, 1571 (2014) ("In contrast to DHS's formidable information-gathering powers, non-citizens in removal cases have few discovery options.").

[219] *See generally* Vida B. Johnson, *Testimony of Police Officer Witnesses with Caution*, 44 PEPP. L. REV. 245 (2017), https://digitalcommons.pepperdine.edu/plr/vol44/iss2/5/.

[220] Cagen, *supra* note 207, at 330 n. 9 ("While the oath does not have the effect it historically held when fear of divine punishment would make witnesses more truthful than without the oath, it does give the act of testifying some semblance of solemnity. Furthermore, the witness may fear perjury prosecution and be more likely to testify truthfully than if the statement was not repeated under oath.") (internal citations omitted).

[221] 8 C.F.R. § 1240.7(b).

information originated, what motivated or influenced that individual, and whether the information provided is accurate.[222]

**No Opportunity to Impeach:** The respondent does not have an opportunity to impeach the witness. Counsel should be able to challenge the witness's credibility to examine a witness's perception, motives, memory, and knowledge of the evidence. Practitioners should also consider whether they are able to expose a witness's bias. This is especially ironic, because often gang allegations are being used to impeach non-citizens while non-citizens do not have the opportunity to impeach their accusers.

**Confidential Informants:** The government's use of a confidential informant is fundamentally unfair because there is no way to challenge the credibility, reliability, or trustworthiness of the informant in open court. There is a danger of fabricated sworn statements, arrests, or a motive to lie.[223] The informant could be fictitious.[224] Practitioners should ask about the identity of the informant and examine the informant's relationship with the non-citizen.

- Does the informant have personal knowledge of the situation or whether the accusations are mere conjecture?
- Further, does the informant have a personal stake in the outcome of the proceeding by collaborating with the government or law enforcement (leniency for their own crimes or payment for information)?
- Does the informant have an open criminal case?
- Did the informant undermine the non-citizen's constitutional rights e.g. Fourth Amendment rights against unlawful search and seizure?

The court's reliance on confidential informants without the ability to cross-examine them for reliability undermines the fairness of the proceeding.

**Incomplete Record:** Lack of opportunity to cross-examine an adverse witness denies the non-citizen the opportunity to refute evidence presented (e.g. what the author stated on the record) and renders the record incomplete, with only one biased narrative presented. The witness's testimony is vital to having a complete record. Lack of cross-examination denies a non-citizen a fundamentally fair hearing because without an ability to cross-examine e.g. the author of a report, there is evidence missing from the

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[222] Goldberg v. Kelly, 397 U.S. 254, 270 (1970).
[223] Nick Pinto, *The Incredibles: Judges Said These Cops Can't be Trusted So Why Does the D.A. Rely on Them,* VILLAGE VOICE (Nov. 1, 2016), https://www.villagevoice.com/2016/11/01/the-incredibles-judges-said-these-cops-cant-be-trusted-so-why-does-the-d-a-rely-on-them; Paige Fernandez & Carl Takei, *The Use of "Confidential Informants" Can Lead to Unnecessary and Excessive Police Violence*, ACLU (Feb. 25, 2019), https://www.aclu.org/issues/criminal-law-reform/reforming-police-practices/use-confidential-informants-can-lead.
[224] Stephanie Clifford, *In Brooklyn Gun Cases, Suspicion Turns to the Police*, N.Y. TIMES (Dec. 11, 2014), https://www.nytimes.com/2014/12/12/nyregion/gun-arrests-with-2-things-in-common-the-officers-and-unidentified-informers.html?_r=0.

record. The BIA held in an unpublished decision where respondent was alleged to be a street gang member by a DHS attorney who relied on information which was not found in the record that "the Immigration Judge is making a discretionary judgment when they are unaware of a significant portion of the evidence bearing on the discretionary calculus and that the respondent should be provided the opportunity to submit evidence in support of his application."[225]

**Denial of a fundamentally fair hearing**: The government's failure to make reasonable efforts to produce a witness for cross-examination violates the non-citizen's right to a fundamentally fair hearing. Fundamental fairness and protection of fundamental rights are basic requirements in immigration proceedings.[226] In immigration court, if a non-citizen does not have the opportunity to cross-examine a witness, then the practitioner must object and argue that due process has been violated.[227] This principle is affirmed by the Second Circuit, "[p]articularly where liberty is at stake, due process demands that the individual and the government each be afforded the opportunity not only to advance their respective positions but to correct or contradict arguments or evidence offered by the other."[228] The Ninth Circuit has similarly held that failure to make important witnesses available for cross-examination can constitute denial of a fundamentally fair immigration hearing, and noted a greater burden where the government exercised custodial power over the witness.[229]

[225] *In re* Jorge Lucas Valdez-Castellano, 2008 WL 5181821, at *1 (Nov. 13, 2008).
[226] The Second Circuit has held that removal proceeding should be terminated where "the INS fails to adhere to its own regulation and the 'regulation [was] promulgated to protect a fundamental right derived from the Constitution or a federal statute.'" Montero v. INS., 124 F.3d 381, 386-87 (2d Cir.1997) (quoting Waldron v. INS, 17 F.3d 511, 518 (2d Cir. 1993).
[227] Goldberg v. Kelly, 397 U.S. 254, 269 ("[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.").
[228] U.S. v. Abuhamra, 389 F. 3d 309, 322 (2d Cir. 2004) (criminal case).
[229] Cinapian v. Holder, 567 F.3d 1067, 1074-75 (9th Cir. 2009) (immigration case) (holding petitioners' right to a fair hearing was violated and their asylum applications prejudiced because the government failed to make the author of an adverse forensic evaluation of Petitioners' documents available for cross-examination, failed to disclose the existence of the report to Petitioners until the day of their hearing, and because the IJ insisted on proceeding despite these failures)); Saidane v. INS, 129 F.3d 1063, 1066 (9th Cir. 1988) (finding that INS did not make a good faith effort to give the non-citizen a reasonable opportunity to confront and to cross-examine the witness against him thereby denying him a fundamentally fair hearing); Hernandez-Guadarrama v. Ashcroft, 394 F.3d 674, 682 (9th Cir. 2005) ("The government may not evade its obligation to produce its witness by taking affirmative steps, such as deportation, that render the witness unavailable. Indeed, the government's burden is greater, not lesser, when it exercises custodial power over the witness in question.").

## Internally Created DHS Memoranda

**Gang Allegations Memorialized in Internally Created DHS Memoranda:** Internally created DHS memoranda, such as Form I-213, HSI memos, and ICE memos, are created by government agents and universally used by DHS in removal proceedings to support allegations against non-citizens. These memoranda are generally considered to be inherently trustworthy (in particular Form I-213) and are admissible even *without the testimony of the officers responsible for creating the documentation*, although the documentation is clearly hearsay created by the government as evidence to support their allegations.[230] Indeed, "DHS documents memorializing allegations of gang affiliation – including memoranda authored by Homeland Security Investigations (HSI) and I-213s– typically mention the respondent's attire, tattoos, associations or alleged self-admission, or unnamed third parties' accusations. But, these documents lack even basic details about when, where, or in what context the suspicious incidents occurred. This makes the allegations very difficult to effectively refute."[231] Even so, IJs find such memoranda as having persuasive authority and rely on them to make a positive gang determinations without additional substantiation.

**Cross-Examine Authors of Internal Memoranda:** Despite the observations outlined above, practitioners should request that the IJ require DHS to make available the authors of DHS internal memoranda to be presented for cross-examination.

**Author Has No First-hand or Personal Knowledge:** The author of the memo does not have first-hand knowledge of the allegations or information proffered. The witness must have personal knowledge about the matters about which the witness is testify. The author/witness/source is relying on generalized information and conclusory beliefs regarding gangs and gang affiliation. This is problematic when the entire document is based on unauthenticated hearsay information. To root out such issues, it is important that practitioners have the opportunity to cross-examine the authors or sources of allegations.

**Author Bias:** For documentary evidence, consider whether evidence reveals any explicit or implicit biases that underscore the reliability of the evidence? Is there stark subjectivity by the author? Are there conclusory statements without factual support? Is the author making false equivocations? Is it an adversarial document? Note any such issues with the court and emphasize the need for an opportunity to cross-examine the sources of any problematic allegations.

**Independent IJ Evaluation of Internal Memoranda:** Besides demanding that authors of DHS internal memoranda be presented for cross-examination, practitioners should object to DHS using such internally created DHS memoranda and can request that IJs conduct a truly independent evaluation of any memoranda submitted by DHS to

[230] *See In re* Barcenas, 19 I. & N. Dec. 609, 610 (B.I.A. 1988).
[231] STUCK WITH SUSPICION, *supra* note 22, at 14 (2019).

determine whether the memorandum is persuasive and supported by adequate authenticated documentary evidence or whether its contents are merely conclusory.

When independently evaluating the validity/reliability of a memo, IJs should consider:

- who actually authored/wrote the memo,
- where/how authors of the report/memorandum gathered information,
- who were the sources of information for the authors,
- any malintent possible on the of the drafter, author, signatory or information source of the memo, and
- whether the authors detail their methodology for gathering this information.

**DHS policy memoranda:** DHS policy memoranda may be treated as persuasive authority, but they are not binding on the court.[232] Practitioners can reference *In re Arrabally & Yerrabelly* to undermine the perceived authority of DHS policy memoranda[233] or to *Castillo-Padilla* to encourage IJs not to treat DHS internal guidance memos as binding authority.[234]

[232] *In re* Arrabally & Yerrabelly, 25 I. & N. Dec. 771, 776 n. 4 (B.I.A. 2012) ("Because this statutory scheme is embodied in internal DHS memoranda rather than in regulations, it is entitled to respect to the extent it has the 'power to persuade,' but it is not binding.").
[233] *Id.*
[234] *In re* Castillo-Padilla, 25 I. & N. Dec. 257 (B.I.A. 2010) (reiterating that DHS internal guidance memoranda do not carry the force of law and that both the BIA and IJs can decline to follow or abide by them). In *Castillo*-Padilla, the BIA evaluated two internal guidance memoranda drafted by DHS employees (INS General Counsel and INS Commissioner) relied upon by DHS in support of their arguments. The BIA stated that "policy memoranda are intended for internal agency use and are not binding on the Board or Immigration Judges." *Id.* at 263 (citing *In re* Tijam, 22 I. & N. Dec. 408, 416 (B.I.A. 1998); *In re* Cavazos, 17 I. & N. Dec. 215 (B.I.A. 1980)).

## Suggested Checklist

*General*

- Is any of the [evidence] hearsay?
- Who created/sourced the [evidence] and is this person present in court?
- Is it clear who the authors are?
- Are any of the authors' names redacted/omitted?
- Is the government relying on an unnamed informant?
- Is the government relying on a source who may have a hazy memory of the events or may have malintent specially warranting cross-examination?

*Reasonable Efforts*

- Has the government attempted to bring the witness to court to testify?
- If so, is it the "right" witness or is the government engaging in "witness shopping" and choosing a convenient witness, but not the most appropriate witness to testify?
- Has the government expended "reasonable efforts" to bring the witness(es) to court?
- Has the government explained the steps they took to bring the witness to court to testify and for cross-examination?
- Are the efforts sufficiently "reasonable"?
- If the government is not bringing the witness to court, what affirmative steps can be taken to demonstrate to the IJ and the DHS attorney that your client has the right to cross-examine that particular witness?

# AUTHENTICATION

## Rule and Key Concepts

Authentication requires a showing of evidence that the item "is what it purports to be."[235] "'Authentic' means the document is 'real,' not that its contents are necessarily 'true.'"[236]

A document may be authenticated through various means.[237] FRE Rule 901(b) provides examples "of *evidence that satisfies the requirement*" for authentication[238] FRE Rule 902 lists "items of evidence that are *self-authenticating*" and "require no extrinsic evidence of authenticity in order to be admitted."[239] These options are not exhaustive.[240]

Authentication is an "inherent logical necessity" on which *relevancy* depends.[241] Failure to abide by or satisfy authentication requirements may render an item of evidence unidentified, which renders it not relevant and unreliable, and therefore potentially inadmissible in immigration proceedings. If such an unreliable document is admitted and relied upon, then the fundamentally fairness of the proceedings are undermined.

If an item of evidence is ultimately authenticated, practitioners may still seek to undermine its reliability and relevance.

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[235] Yongo v. INS, 355 F.3d 27, 31 (1st Cir. 2004); FED. R. EVID. 901, 902.
[236] *Id.*
[237] *See e.g.*, *In re* O-D-, 21 I. & N. Dec. 1079 (B.I.A. 1998).
[238] FED. R. EVID. 901(b). Examples of evidence that satisfy the authentication requirement include, but are not limited to (1) testimony of a witness with knowledge, (2) nonexpert opinion about handwriting, (3) comparison by an expert witness or trier of fact, (4) distinctive characteristics and the like, (5) opinion about a voice, (6) evidence about a telephone conversation, (7) evidence about public records, (8) evidence about ancient documents or data compilations, (9) evidence about a process or system, (10) methods provided by a statute or rule. *Id.*
[239] FED. R. EVID. 902. Examples include (1) domestic public documents that are sealed and signed, (2) domestic public documents that are not sealed but are signed and certified, (3) foreign public documents, (4) certified copies of public records, (5) official publications, (6) newspapers and periodicals, (7) trade inscriptions and the like, (8) acknowledged documents, (9) commercial paper and related documents, (10) presumptions under a federal statute, (11) certified domestic records of a regularly conducted activity, (12) certified foreign records of a regularly conducted activity, (13) certified records generated by an electronic process or system, (14) certified data copied from an electronic device, storage medium, or file. *Id.* Amendments to the FRE, effective Dec. 1, 2017, adding Rule 902(13) and Rule 902(14) made it easier to authenticate data from electronic sources. *Id.*
[240] Yongo, 355 F.3d at 31 ("[A]uthentication requires nothing more than proof that a document or thing is what it purports to be and, even though the Federal Rules of Evidence spell out various options, the rules also stress that these options are not exclusive and the central condition can be proved in any way that makes sense in the circumstances.").
[241] Michael and Adler, *Real Proof*, 5 VAND. L. REV. 344, 362 (1952); 7 Wigmore § 2129, 564.

**Federal Rules of Evidence. Rule 901: Authenticating or Identifying Evidence**

**(a) In General.** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is . . . .

## When is the rule/objection triggered?

The authentication objection is triggered when the government attempts to introduce evidence that has not been properly authenticated, identified, or where insufficient foundation was laid for its admittance. Some examples of evidence that is often not properly authenticated includes social media evidence, i.e. screenshots of social media posts of the non-citizen wearing apparel that is allegedly "gang-related" or social media interactions ("liking" a photo) with alleged gang members. Along with Facebook, Twitter and other social media postings, other examples include internally created DHS memoranda such as Form I-213, HSI memos, and ICE memos.

## What are the arguments?

### Summary

**DHS may argue:** Generally, there is a low bar to authenticate evidence.

- **Low standard:** Rule 901 "does not erect a particularly high hurdle, and that hurdle may be cleared by circumstantial evidence."[242] Proponent does not need to "rule out all possibilities inconsistent with authenticity, or to prove beyond any doubt that the evidence is what it purports to be."[243]

- **Testimony can be enough to satisfy the authentication requirement:** Authentication depends on the fact-specific circumstances and evidence can be authenticated by testimony from someone who is familiar with it. "The guiding principle is that proper authentication requires some sort of proof that the document is what it purports to be."[244] Oftentimes, DHS then uses the respondents own testimony to authenticate their social media evidence.

- **Circumstantial authentication can be sufficient:** Pursuant FRE 901(b)(4) circumstantial evidence, including "appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances," can be used to authenticate evidence. "While any one factor *may* be insufficient to determine admissibility, when circumstantial factors are

[242] United States v. Chin, 371 F.3d 31, 37 (2d Cir. 2004).
[243] *Id.*
[244] *In re* Velasquez, 25 I. & N. Dec. 680, 684 (B.I.A. 2012).

weighed together, authenticity may be established."[245] In this context, time stamps of social media postings, matching up photos and names with the respondents' may be used as persuasive evidence of the documents authenticity.

- **Non-citizen to authenticate DHS's own evidence:** DHS may attempt to have the non-citizen him/herself authenticate social media evidence found on the non-citizen's social media account.

**You can argue:** DHS has failed to meet the low bar that authentication requires and there must be some authentication; unauthenticated evidence is not reliable. This is not an example of self-authenticating evidence nor does it meet the authentication requirements of the FRE. DHS did not lay a proper foundation to properly authenticate or identify the evidence. There was no testimony from a witness with personal knowledge that the evidence is what DHS purports it to be. Due to the evidence not being properly authenticated, the IJ should accord the evidence minimal evidentiary weight. Where DHS attempts to authenticate DHS evidence using the non-citizen, such as to authenticate e.g. social media evidence, practitioners should push back and insist that that is DHS's burden.

### Government Records, Generally

DHS should produce the author/source of the record testify to authenticate the record.

**Witness Testimony to Authenticate:** Records can be authenticated with testimony.[246] As such, practitioners should argue that even though the standard for authentication is low, there still is a requirement that every piece of evidence produced by the government be authenticated. Pursuant to *Yongo*, DHS's records can be authenticated in "any way that makes sense in the circumstances" or via testimony. If a document is being introduced through a witness's testimony, it must be authenticated by testimony of a witness with personal knowledge that it is what it purports it to be.[247] The *Yongo* court considered whether the authors of the affidavits were available to testify, whether they would be cross-examined under oath, and whether the challenges to credibility were "far-fetched." Thus, DHS cannot simply produce records without any effort to authenticate them. Practitioners should object to such admissions and request to IJ to require that DHS bring in the author or an official to testify about the source and appearance of the record. Please refer to Lack of Ability to Cross-Examine section above.

**No testimony? Less weight!:** Evidentiary standards should be applied consistently to the government and to the non-citizen. Evidence offered by non-citizens are often afforded

[245] Daniel Capra, *Authenticating Digital Evidence*, 69 BAYLOR L. REV. 1, 15, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1855&context=faculty_scholarship.
[246] Yongo v. INS, 355 F.3d 27, 31 (1st Cir. 2004) (holding German immigration records could be authenticated via an INS officer's testimony regarding their source and their appearance).
[247] FED. R. EVID. 901(b)(1).

lesser weight where the author of an affidavit is not present and ready to testify.[248] Accordingly, if the author of an affidavit, form or memorandum is not present and ready to testify on behalf of DHS, then the affidavit, form or memorandum should be given less weight.[249]

**Internally Created DHS Memoranda**

As discussed in the Introduction regarding the **interconnected nature of evidence** contained within Internally Created DHS Memoranda, these documents are consistently used by DHS to bring unsubstantiated gang allegations against non-citizens. These documents contain layers of unauthenticated hearsay information that is highly unreliable, unfairly prejudicial, and not relevant. The contents of these documents are often factually incorrect or conclusory – lacking the most basic information and preventing practitioners to track or understand the source of gang allegations against their non-citizen clients. This lack of transparency effectively denies any opportunity for cross-examination to verify/discredit the layers of unauthenticated hearsay information contained in these highly problematic Internally Created DHS Memoranda.

**Unidentified Source/Author:** Because the source/author is unknown, there is no way to confirm whether the source of the information or author of the memo/affidavit had any personal knowledge for authentication purposes.

**Layers of Unauthenticated Information:** Even if the Form I-213 is properly signed and generated by a named Deportation Officer, the underlying content is still derived from unidentified and unauthenticated sources. *Underlying documents have not been authenticated.* Even if the author is relying on existing documentation provided by e.g. law enforcement, any underlying documents, gang intelligence, or information on which the author relies have similarly not been authenticated (or shown to be what they are purported to be). It is not clear whether these documents are based on personal knowledge or whether they were obtained lawfully; there is no way for non-citizen's counsel to properly examine and review underlying documentation for authentication, accuracy, or reliability. DHS is effectively relying on multiple layers of unauthenticated hearsay information.

**Factually Erroneous:** Carefully review documentation like the Form I-213 or the NTA as to whether DHS's formulaic approach resulted in other non-citizen or erroneous information being included. While this clearly undercuts reliability, if the documentation includes the wrong country of origin, incorrect factual information, is it really an NTA or a Form I-213 for that specific person? These errors undercut that the document (or its contents) are what they are offered to be and could be raised as an objection to proper authentication.

[248] *In re* H-L-H- & Z-Y-Z-, 25 I. & N. Dec. 209, 215 (B.I.A. 2010) (holding that minimal weight may be afforded to unsigned unauthenticated documents prepared for purpose of a hearing and documents authored by interested witnesses unavailable for cross-examination).
[249] *See id.*

## Feasibility of Allegations

Sometimes the government will seek to admit evidence that cannot possibly be attributed to the non-citizen client, such as the non-citizen's alleged statements, writings, or recordings even though they are clearly fabricated or attributable to another party. Reflect whether the allegations or evidence could realistically apply to the non-citizen. Challenge whether the evidence could realistically be what the government purports it to be. Argue that given these circumstances and the risk of fabrication or tampering, DHS failed to sufficiently authenticate the evidence.

**Language Skills:** Consider the non-citizen's literacy level -- ability to read, write, speak, or otherwise communicate in different languages. If the allegation is that the client had done or said or communicated something in a specific language, practitioners should consider whether the non-citizen client knows how to effectively communicate in that language. Additionally, consider whether the language at issue is the non-citizen's native language or whether it was learned later in life. Depending on the evidence and the specific language concerns, consider raising language fluency as a means to challenge certain evidence. Consider the non-citizen's education level and abilities to communicate and comprehend matters in *any* language.

Additionally, if the non-citizen is unable to communicate in a particular language, but evidence of that interaction is being introduced as evidence against him, query if an interpreter provided and what efforts were made, if any, so that the non-citizen client could effectively communicate.

**Physical Markers/Appearance:** Consider whether any physical descriptions could actually apply to the non-citizen and whether medical records or other documentation are properly attributable to the non-citizen. For example, the lead plaintiff in a New York Civil Liberties Union law suit against the Office of Refugee Resettlement (ORR) was a child with no criminal record and no gang involvement who was accused of wearing gang apparel, flashing gang signs (two middle fingers), and having gang tattoos.[250] However, the child had no tattoos whatsoever.[251]

**Social Media Evidence:** Consider whether access to the non-citizen's alleged social media accounts were shared with others or whether the non-citizen was detained at the time postings were made. Was the non-citizen the only person with access to the account in question? Did others make postings on their behalf?

[250] Class Action Compl., L.V.M. v. Lloyd et al., No. 1:2018-cv-01453, at *17-18, ¶ 50 (S.D.N.Y. Feb. 16 2018), https://www.nyclu.org/en/cases/lvm-v-orr.
[251] *Id.* at *20, ¶ 63.

### Miscellaneous School Records

Questions about authentication with regard to school records may help practitioners uncover improper sharing practices between government agencies and schools.

**School Disciplinary Records**: DHS has supported gang allegations in immigration proceedings based on information contained in school disciplinary records, though it is unclear how exactly DHS obtains school record information.[252] The Family Educational Rights and Privacy Act of 1974 (FERPA) is a federal law that protects the privacy of student education records and applies to all schools that receive funds under an applicable program of the U.S. Department of Education.[253] Advocates should refer to state and local law and policies for more information.

**How did DHS learn about misconduct in school?** Practitioners should consider how the school records were obtained by DHS. Advocates are concerned that school officials have been reckless about the privacy of certain students.[254] However, school districts maintain that they do not share school records with school resources officers (SROs) stationed in schools and employed by the police department.[255] Asking questions related authentication may surface that the government obtained information in violation of federal laws:

- How did DHS gain access to a student's records?
- Who knew about a particular incident and who created the records? [Consider issues with how the actual school record was created or obtained]
- What language was used in this allegation?
- Who made the gang allegation?

**Obtaining School Records:** If school records are being introduced in proceedings, practitioners should consider asking about their chain of custody and how they arrived in DHS's possession. Pursuant to FERPA, educational agencies must maintain a record of each request for access to and each disclosure of identifiable information students' education records as well as the legitimate interests under § 99.31 which the parties have in requesting the information.[256] By asking about the chain of custody, practitioners might learn that the records were obtained unlawfully and may have documents struck on different grounds.

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[252] SWEPT UP IN THE SWEEP, *supra* note 18 at 7, 35 ("Schools, local police departments, and federal law enforcement agencies all communicate in secrecy and trap Central American migrants in a growing and obscure web of enforcement.").
[253] 20 U.S.C. § 1232g; 34 C.F.R. § 99.
[254] *Id.* at 35.
[255] "FERPA generally prohibits the improper disclosure of personally identifiable information derived from education records." Family Educational Rights and Privacy Act, Guidance for Eligible Students, U.S. DEP'T OF EDUC. (Feb. 2011), https://www2.ed.gov/policy/gen/guid/fpco/ferpa/for-eligible-students.pdf.
[256] 34 C.F.R. § 99.32(a)(1).

## Miscellaneous Police Records

**Official Police/Domestic Records:** The regulatory standard for authenticating official domestic records (e.g. a NYPD complaint form) requires that "when admissible for any purpose, [domestic records] shall be evidenced by an official publication thereof, or a copy attested by the official having legal custody of the record or by an authorized deputy."[257] This standard should be expected of any police record, report, or other variation of official domestic records that DHS wants to enter as evidence in immigration court. This standard should also apply to all underlying records. Practitioners should object to any unauthenticated police reports entering immigration court and argue that the document violates the regulatory authority regarding proof of official domestic records.[258]

**Due Process Concerns:** Unreliable and unauthenticated investigative reports and law enforcement records raise serious due process concerns.[259] Several circuit courts have held that the Constitution prohibits the IJ and BIA from relying on investigative reports without making a determination on the reliability and trustworthiness of the document in accordance with Fifth Amendment right for due process.[260]

## Databases and Miscellaneous Computerized Data

**Computerized Data (e.g. gang databases):** Practitioners should consider challenging gang database allegations on authentication grounds and push DHS to authenticate gang database entries. Accuracy can be compromised by incomplete data entry, clerical errors, entering incorrect information, programming errors, various malfunctions by improper search, retrieval issues (esp. around common names) etc.[261] The custodian of the records or person responsible for data entry could potentially have the requisite degree of personal knowledge for these purposes.[262] Practitioners, in this authentication context, could argue the method of clerical entry was improper and that the resultant record, how it was obtained and how it could have been easily altered, and

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[257] 8 C.F.R. § 1287.6(a).
[258] *See e.g.*, 8 C.F.R. § 1287.6(a).
[259] Lin v. U.S. Dep't of Justice, 459 F.3d 255, 269 (2d Cir. 2006).
[260] Banat v. Holder, 557 F.3d 886, 892–93 (8th Cir. 2009); Anim v. Mukasey, 535 F.3d 243, 256–58 (4th Cir. 2008); Alexandrov v. Gonzales, 442 F.3d 395 (6th Cir. 2006); Ezeagwuna v. Ashcroft, 325 F.3d 396 (3d Cir. 2003).
[261] Kathryn Burkett Dickson, *Admissibility and Evidentiary Issues with Electronic Evidence*, AM. B. ASS'N. St. (2011), https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/ac2011/123.authcheckdam.pdf (citing Clair v. Johnny's Oyster & Shrimp, Inc., 76 F. Supp. 2d 773, 774 (S.D. Tex. 1999) (referring to information taken from the internet as "voodoo"); *see also* Terbush v. United States, 2005 WL 3325954 at *5 (E.D. Cal. Dec. 7, 2005) ("Information on internet sites presents special problems of authentication.")).
[262] United States v. Kassimu, 2006 WL 1880335 (5th Cir. July 7, 2006) (holding copies of a post office's computer records could be authenticated by a custodian of the records, even though the witness neither personally entered the data nor had knowledge sufficient to testify about its accuracy).

its link to the non-citizen client is improper or faulty and therefore the entry cannot be authenticated.

## Social Media and Other Internet Evidence

DHS is increasingly offering social media evidence to allege gang affiliation and social media accounts are increasingly monitored by law enforcement and immigration officials.

**Social media posts:** Government agencies mine social networking sites for evidence.[263] Although social media is subject to the same rules of evidence as paper documents or electronically stored information, "the unique nature of social media as well as the ease with which it can be manipulated or falsified creates hurdles to admissibility not faced with other evidence.[264] Due to the ease of manipulation and falsification, authentication is especially important in this context.

**Proper Foundation:** Practitioners should consider objecting to the admission of certain social media evidence (e.g. photograph) arguing that the government had not proffered a sufficient foundation establishing the authenticity of the evidence (e.g. photograph) as a fair and accurate representation (of what that the evidence, e.g. photograph accurately represents the subject matter depicted) and that the social media evidence was genuine and had not been altered.[265] The government's failure to present sufficient evidence that an internet page/profile page on a social networking site was actually created and controlled by the person whose profile page it appeared to be is enough to exclude evidence stemming from or relating to the site.[266] In making the determination

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[263] Justin P. Murphy & Adrian Fontecilla, *Social Media Evidence in Government Investigations and Criminal Proceedings: A Frontier of New Legal Issues*, 19 RICH. J.L. & TECH 11 at *3 (2013), https://jolt.richmond.edu/2013/04/03/social-media-evidence-in-government-investigations-and-criminal-proceedings-a-frontier-of-new-legal-issues/; Rachel Levinson-Waldman, *How ICE and Other DHS Agencies Mine Social Media in the Name of National Security*, BRENNAN CTR. JUST. (June 3, 2019), https://www.brennancenter.org/blog/how-ice-and-other-dhs-agencies-mine-social-media-name-national-security.

[264] *Id.* at *24.

[265] *See* People v. Price, 29 N.Y.3d 474, 474, 476 (2017) (criminal case) (holding that photograph purportedly depicting defendant holding a handgun and money was not sufficiently authenticated when the photograph was taken from an Internet profile page belonging to the defendant, but the detective was unable to identify who took the photograph, when it was taken, where it was taken, or under what circumstances it was taken, or whether it was altered in any way).

[266] *See* United States v. Vayner, 769 F. 3d 125, 132 (2d. Cir. 2014) (holding that the mere fact that a page with the defendant's name and photograph happened to exist on the Internet did not permit a reasonable conclusion that this page was created by the defendant or on his behalf) (criminal case). Practitioners should consider analogizing to the facts of *U.S. v. Vayner* because often the government has even less circumstantial evidence linking someone to their profile page regarding gang allegations than what was demonstrated in *Vayner*. In *Vayner*, the prosecutor alleged that a social media profile page (on a Russian social networking site akin to Facebook) belonged to Mr. Zhyltsou because it 1) contained a photograph of Mr. Zhyltsou, 2) confirmed his nationality, 3) listed his Skype address, two prior places of employment, and his Gmail address under the contact information section, 4) details of his life consistent with testimony. *Id.* at 132. The Second Circuit decided the web page evidence was not admissible because "the government presented insufficient evidence that the page was what the government claimed it to be—that is, Zhyltsou's profile page, as opposed to a profile page on the Internet that Zhyltsou did not

that the government did not present sufficient evidence to authenticate the profile page, the court considered whether other individuals had access to the information/facts posted on the defendant's profile page, whether others had motive to fabricate such a page, whether any evidence in the defendant's record indicated the defendant had such a profile page, and whether there was any affirmative evidence that the social networking site identity verification was required to create such a page. [267]

**Verifying Authorship and Witness with Personal Knowledge:** "[C]ourts have raised legitimate concerns that "social networking accounts may be hacked, fictitious accounts created, and accounts left open and unattended. Testimony should thus address those concerns and also explain the extent to which the social media in question may have been vulnerable to manipulation. These considerations are important for both proffering evidence and challenging admissibility." [268]

A witness with personal knowledge may testify to authenticity, but the personal knowledge must pertain to the authorship of the messages or to ownership of the social media account in question – not merely to how the witness is a records custodian.[269]

Where DHS attempts to authenticate DHS evidence using the non-citizen, such as to authenticate e.g. social media evidence, practitioners should push back and insist that that is DHS's burden. The non-citizen need not stipulate that the evidence presented by the government was created by the non-citizen. Further, the non-citizen should be mindful not to make unnecessary concessions.[270]

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create or control." *Id.* at 127. The court reasoned that the information on the VK page was known by others, some of whom had reasons to falsely create a page attributed to the defendant; there was no evidence proffered that identity verification was necessary to create a page with VK; there was no other evidence in the record suggested defendant had a VK page besides the page itself; and, considering that the purpose of the web page was to corroborate testimony that certain monikers were used, *some* basis beyond one interested source was needed to conclude that the page was in fact Mr. Zhyltsou's profile. *Id.* at 132-33.The court states "[w]e express no view on what kind of evidence *would* have been sufficient to authenticate the VK page and warrant its consideration by the jury. Evidence may be authenticated in many ways, and as with any piece of evidence whose authenticity is in question, the 'type and quantum' of evidence will always depend on context." *Id.* at 133 (citing United States v. Sliker, 751 F.2d 477, 488 (2d Cir. 1984)).

[267] *Id.* at 132-33.

[268] H. Christopher Boehning & Daniel J. Toal, *Authenticating Social Media Evidence*, N.Y. L .J. (Oct. 2, 2012), https://www.paulweiss.com/media/1211973/4oct12tt.pdf.

[269] *See e.g.*, United States v. Browne, 2016 U.S. App. LEXIS 15668 (3d Cir.).

[270] *See e.g.*, United States v. Browne, 2016 U.S. App. LEXIS 15668 (3d Cir.).

**Reliance on Screenshots:** Practitioners should consider arguing that the information contained in screenshots is unsourced and therefore unreliable.

- If the government is relying on "screenshots" how has it shown that these materials came from the respondent or alleged source?
- What indicia are there to suggest whose account was used or any evidence substantiating that the source is what the government alleges it to be?
- Do any of the documents on which the government relies state who took the screenshots and the process of how the government obtained it?
- Are there phone numbers associated/attached to the screenshot? Is there a date stamp?
- Is there context to the message/screenshot being used as evidence of the gang allegation?

Furthermore, if any information is cropped out from a page where the screenshot is taken, the IJ has no context or may be missing crucial context about the post. If there is a lack of contextual information for the IJ to fully, accurately, and completely determine what is being discussed or what the non-citizen means, the evidence is unreliable.

**Social Media Posts Easily Manipulated:** Printouts, photographs, and social media posts are easily manipulated, modified, or changed.[271] Social media posts have not been authenticated because of emerging technological innovations and the ability of someone to "photoshop" an image. The mere existence of a social media page with a defendant's name and photograph may be insufficient for authentication.[272] Collection of social media evidence by parties interested in the outcome of a case compromises the digital chain of custody and social media pages appearing to represent a party to the case can be faked.[273]

**Blogs:** Blogs are not self-authenticating; authentication of Internet printouts requires a witness declaration along with a document's circumstantial indicia of authenticity (i.e. date, web address) to support that the documents are what the declarant purports them to be.[274] Without either, authentication fails.[275]

[271] People v. Lenihan, 30 Misc. 3d 289 (Sup. Ct. Queens Cty. 2010) ("In light of the ability to 'photoshop,' edit photographs on the computer, defendant could not authenticate the photographs.") (criminal case).
[272] United States v. Vayner, 769 F.3d 125 (2d Cir. 2014) (finding the mere existence of a social media page with defendant's name and photograph is insufficient to authenticate the printout) (criminal case)
[273] *See e.g.*, *id.*; *see also* United States v. O'Keefe, 537 F.Supp.2d 14, 20 (2008) ("a piece of paper or electronically stored information, without any indication of its creator, source, or custodian may not be authenticated under Federal Rule of Evidence 901.").
[274] *In re* Carrsow-Franklin, 456 B.R. 753, 756-57 (Bankr. D.S.C. 2011).
[275] *Id.*

## Other Considerations Regarding Social Media Evidence, Ethics, Reliability

**Obtaining Social Media Evidence via Improper "Friend Requests:"** Peoples' social media profiles are regularly searched, people are pressured to provide passwords during interrogations, and law enforcement officers assume fake identities in order to gain access to otherwise private information.[276] The ability to cross-examine individuals who directly obtained social media evidence is important to help ascertain the reliability of the information and whether it was lawfully obtained. Where a non-citizen client has been subjected to such unregulated, potentially long-term monitoring, and extensive invasion of privacy via fake accounts, practitioners should consider whether such a practice was permissible in the first place; in some jurisdictions an attorney or agent may be required to disclose the reason for making a "friend request."[277]

In assessing social media evidence, practitioners should consider the following questions:

- Was the non-citizen's social media information publically available?
- Did the government obtain access to the non-citizen's social media page/profile/information by using truthful information (real names and real profiles) and by complying with ethical standards?

[276] Policing Project, *Undercover Policing in the Age of Social Media*, N.Y.U. SCH. L. (Dec. 17, 2018), https://www.policingproject.org/news-main/undercover-policing-social-media; *see e.g.*, Loren Grush, *A US-born NASA Scientist Was Detained at the Border Until He Unlocked His Phone*, Verge (Feb. 12, 2017), https://www.theverge.com/2017/2/12/14583124/nasa-sidd-bikkannavar-detained-cbp-phone-search-trump-travel-ban.

[277] Professional Guidance Committee, Op. 2009-02, (Phila. Bar Ass'n, Mar. 2009) (ethical propriety of attorney gaining access to MySpace and Facebook pages by using third party to make request to page owner).

## Suggested Checklist

*General*

- What types of evidence were collected?
- How was the [evidence] obtained/collected?
- How was the information contained in the [evidence] obtained?
- Where did the [evidence] come from? Where was the evidence collected?
- Who handled the evidence before it was collected?
- When was the evidence collected?
- When/how was the [evidence] created?
- Who created the [evidence] and when?
- Was the [evidence] created contemporaneously?
- Is the [evidence] inconsistent with other evidence in any way? Why or why not?
- Is this an original document?
- Are there dates or signatures on the [evidence]?
- Is there an accompanying declaration?
- Did each person who should have signed the [evidence] sign it?
- What does your client know about the [evidence]?
- Does your client understand the [evidence]?

*Government Evidence*

- If [evidence] is from local or state law enforcement, is there an accompanying declaration certifying documents are actually from the local or state law enforcement entity?
- Were internal agency rules followed?
- Was the [evidence] obtained in violation of any local law (e.g. no city resources to be used for immigration enforcement)?
- Was there a cooperative agreement?

*Social Media Evidence/Screenshots*

If [evidence] is social media evidence, consider the following:

- Is there any evidence tying the screenshot to the non-citizen?
- Was the client's social media public?
- Who captured the evidence and how? Is there a risk that interested parties were involved in the collection of social media evidence?
- How was this information accessed? Who accessed the evidence?
- Who took the screenshot?
- Is there a phone number attached to the screenshot (if phone record)?
- Is the time the page was printed recorded?
- Is there a date stamp/webpage, etc. with the record?

- Is the URL address of the page and IP address included?
- What browser was used to collect the evidence?
- Are there chain of custody concerns?
- Is there a risk of tampering? Did your client have sole control of the social media account? Does anyone else have access to the client's password and account?
- Is it feasible that the postings belong to your client considering language skills and if your client was in custody at the time the postings were made?

*Photographs (including those found on social media)*

Did the government lay a proper foundation?[278]

- Do you recognize this photograph?
- How are you able to do so?
- Who took the photos?
- Who posted the photos?
- When were these photographs taken?
- Do these photographs accurately and fairly depict the scene as it appeared the day they were taken?
- Are there any material alterations or deletions to the photographs?
- Were these images edited, touched up, altered, or cropped in any way, including application of filters?
- How do you know this? What proof do you have of this?

[278] Rule 901 requires that a photograph is identified and confirmed to be a fair and accurate representation of what is depicted. *See* Huffman v. State, 746 S.W.2d 212, 222 (Tex. Crim. App. 1988). Practitioners could consider arguing that due to the malleable nature of digital photographs/social media posts, the predicate for authenticity should require a more stringent foundation.