Discovery in Removal Proceedings*

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INTRODUCTION

The U.S. Department of Homeland Security (DHS) likes to say that there is no discovery in removal proceedings. And, it isn't entirely wrong on this point – the Federal Rules of Civil Procedure, which sets forth the U.S. discovery regime, do not apply in removal proceedings.[1] But to say that there is no discovery in Immigration Court is a little facile, because there are, in fact, many mechanisms available to immigration law practitioners to extract from your opponent the same type of information obtainable through discovery. In this Practice Pointer, we explore these mechanisms—from Freedom of Information Act (FOIA)[2] requests to informal requests for records under the so-called mandatory access law to subpoenas and depositions. We also discuss the arcane procedure for securing testimony from a DHS employee, set forth in the agency's *Touhy*[3] regulations. Because a practitioner's ability to timely obtain relevant documents is absolutely vital to a successful removal defense strategy, the tools discussed in this Practice Pointer should become as familiar to you as the statutory forms of relief available to your clients.

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* This practice advisory was published originally in AILA's *Immigration Practice Pointers* (2018–19 Ed.). The information contained within is based on the experience of the author(s) and the current state of the law at the time of original publication. Please be sure to conduct legal research and analysis for your unique situation, as the law changes quickly and experiences may differ from your own.

[1] Fed. R. Civ. Pro. 1 (limiting scope to civil actions in U.S. district courts); *see also Matter of Khalifa*, 21 I&N Dec. 112 (BIA 1995); *Matter of Benitez*, 19 I&N Dec. 173, 174 (BIA 1984).

[2] Freedom of Information Act, 5 USC §552, as amended by Pub. L. No. 104-231, 110 Stat. 3048.

[3] See *Touhy v. Ragen*, 340 U.S. 462 (1951).

DEVELOP A DISCOVERY PLAN

A best practice in removal defense is to develop a discovery plan early in the representation. After your initial meetings with your client, and once you have developed a theory of the case, reflect on the information you will likely need to know in order to win under your theory. Consider the following questions as you craft your discovery plan:

- What evidence will you need to present to the court?
- What information do you simply want to know?
- Where is that evidence located?
- What is the best way to get the information you need?
- What information will the Office of Chief Counsel likely know and question your client about?
- Are there any witnesses you will want to call who are unlikely to voluntarily testify or documents you would like to obtain that will not be handed over to you without a court order?
- If a subpoena or other court order will be required to obtain necessary documents or witnesses, what preliminary steps do you need to take prior to enlisting the court's help?

Early in the representation, request records from various government agencies and give your client a long list of documents to gather to present in support of your removal defense strategy. This latter step is especially important in asylum cases, where evidence may become unobtainable if not procured immediately. Your discovery plan should begin with your client interview, but it can be unwise to simply accept the client's version of what happened as to all matters.

INFORMAL DISCOVERY

Although we do not ordinarily think of interviewing our clients and obtaining documents from them as "discovery" in the traditional sense, your client is the single most important source of information available to you. So get to know your clients inside and out. Part of the beauty of being an immigration lawyer is that getting to know your client *is*, in many ways, your job.

Bad Conduct

The subjects your client is likely the most reluctant to talk about—the bad things they have done—are probably going to come up in court. And the best way to prepare for surprises at trial is to make sure there are no surprises. Of course, there is no lawyer who can perfectly achieve this goal. Fortunately, winning is the goal in litigation rather than perfection. To win, a lawyer must adhere rigorously to three techniques: discovery, narrative, and preparation. Unfortunately, a client can often be the greatest obstacle to implementing these techniques. Most clients, like most people, are uncomfortable admitting or talking about bad or questionable behavior. In almost every case, an attorney must devise a strategy to confront a client about the unpleasantness of the past while still building a sense of trust and understanding.

Practice Pointers:

- A client will often seek to deny or minimize past bad acts or questionable behavior and a legal strategy that allows the client to do so is doomed to fail.
- An attorney must play the good cop/bad role when confronting a client about past bad acts; be sensitive, but do not hesitate when toughness is required.
- Bad acts that are identified and confronted early can become strengths rather than weaknesses (*i.e.*, counseling, therapy, the narrative of redemption, etc. . . .).

Immigration Records

FOIA is undoubtedly the most vital mechanism available to immigration lawyers to obtain government records pertaining to clients. In the interest of focusing on other discovery mechanisms, we direct your attention to the helpful American Immigration Council Practice Advisory, FOIA for Immigration Lawyers, which is available at www.americanimmigrationcouncil.org/practice_advisory/foia-immigration-lawyers. It provides a broad overview of the FOIA, including how to make a FOIA request and how to appeal an inadequate response. It discusses the exemptions from FOIA that agencies are most likely to invoke in immigration cases, and lays out the basics of bringing a federal district court challenge to an agency's failure to disclose certain documents. In addition, it collects the FOIA policies of the most relevant immigration agencies in a single place. We provide only the following practice pointers on obtaining client immigration records, because we believe them to be particularly vital to a strong removal defense strategy.

Practice Pointers

- File FOIA requests with *all* agencies that may have relevant records.
- If your client is in removal proceedings, request expedited ("Track 3") processing of your USCIS FOIA request. For your request to be placed on Track 3, you must furnish evidence that your client is in removal proceedings and has a future hearing before an immigration judge.
- If your client was previously interviewed by USCIS,[4] you may wish to expressly request copies of adjudicator notes and videos of

[4] Note that where USCIS issues a decision that is adverse to an applicant and where it relies on derogatory information not known to the applicant, USCIS must inform the applicant of that fact and offer him or her an opportunity to rebut the information and present information in his or her own behalf before the decision is rendered. 8 CFR §103.2(b)(16)(i).

those interviews. Pursuant to a settlement agreement, USCIS may not withhold asylum officer interview notes.[5]

- Form I-213, Record of Inadmissible/Deportable Alien, is often a particularly crucial document to review early in the representation. Consider calling your local Office of Chief Counsel and requesting it, along with any potentially exculpatory information. Frame your request as one that will render proceedings more efficient. If OCC refuses to provide the I-213 voluntarily, consider denying the allegations and contesting removability, which may force ICE to produce it.
- Do not hesitate to file an administrative appeal of an agency's response to your FOIA request. Assert in your appeal that the government's search was inadequate and that the agency's withholdings were excessive. Invariably, your appeal will produce additional documents.

Criminal Records and Police Reports

The Office of Chief Counsel (OCC) has limited resources so the practical reality is that OCC's knowledge of your client's bad behavior will likely be limited to the record search that results from biometrics. CC will usually order the charging document and judgment of conviction for each case. Sometimes OCC may have police reports, or an immigration judge may order defense counsel to provide a pre-sentence investigation report.

Even if OCC does the minimum, a charging document may contain "probable cause" summaries from the investigating law enforcement officer. These summaries are full of traps for a client because they are usually filled with the officer's subjective observations at the time of arrest and hearsay from witnesses who have biases and will never be confronted in court. Irrespective of the legal strategy for excluding or limiting such evidence, a client must be prepared to address each and every bad allegation from the witness stand.

Practice Pointers:

- FBI rap sheets are relatively inexpensive and easy to obtain but do require fingerprints. They also take about 90 to 120 days to process: www.fbi.gov/about-us/cjis/identity-history-summary-checks/submitting-an-identity-history-summary-request-to-the-fbi
- Most states have criminal record departments. Some of these databases are accessible on the Internet and only require a name and date of birth. With searches that do not require fingerprinting, be aware of a client's possible aliases. While most of these databases report to the FBI, never assume that the records will be identical. Often the state database contains a more detailed record of convictions, charges, and arrests.

[5] *See Martins v. USCIS* et al., No. 3:13-cv-591-LB, Settlement Agreement (ECF 42) (N.D. Cal. Nov. 19, 2013), *published on* AILA InfoNet Doc. No. 13120545 (*posted* Dec. 5, 2013).

- Databases from county or municipal courts are also increasingly online. OCC may use such databases for "eve of trial" searches and confront your client about an arrest or ordinance violation that did not result in a criminal conviction.

INA §240(c)(2): THE MANDATORY ACCESS LAW

Underutilized by practitioners, INA §240(c)(2) affords a noncitizen in removal proceedings a statutory right of access to non-confidential records pertaining to his or her admission or presence in the United States. Specifically, the statute provides:

> **(2) BURDEN ON ALIEN.** In the proceeding the alien has the burden of establishing—
>
> **(A)** if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 212; or
> **(B)** by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.
>
> In meeting the burden of proof under subparagraph (B), the alien *shall have access* to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.[6]

This provision, which has been referred to as a "mandatory access law,"[7] was added to the INA in 1996.[8]

By its terms, the mandatory access law would appear to be limited to noncitizens in removal proceedings seeking to establish that they are lawfully present in the United States pursuant to a prior admission. However, in one unpublished opinion, the Board of Immigration Appeals (BIA or Board) remanded a case involving an individual who had conceded removability to the Immigration Judge so that he could view the contents of his A-file.[9] In any case, there can be no doubt that individuals improperly charged as inadmissible under INA §212 rather than as deportable under INA §237, and those claiming to be U.S. citizens, among others, can and should leverage the mandatory access law to obtain documents bearing on their defense, particularly where the FOIA process will not bear fruit in time.

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[6] INA §240(c)(2) (emphasis added).
[7] *Dent v. Holder*, 627 F.3d 365, 374 (9th Cir. 2010); *Gahagan v. USCIS*, 111 F. Supp. 3d 754, 757 (E.D. La. 2015).
[8] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. 104-208, 110 Stat. 3009, §304 (Sept. 30, 1996).
[9] *Matter of Juan Lopez-Lopez*, A205 920 665 (BIA Dec. 11, 2014).

Dent v. Holder

In *Dent*, the U.S. Court of Appeals for the Ninth Circuit held that noncitizens in removal proceedings have a statutory right to access their A-files and that in that case, where Mr. Dent had requested but was refused copies of his records, his right to a fair hearing was violated because documents in his A-file would have supported his claim that he was a U.S. citizen.[10] The government argued, citing 8 CFR §103.21 (2010), that the noncitizen's sole means of obtaining a copy of his A-file was to request it under FOIA.[11] The court rejected that argument because of the due process concerns it would raise. As the court explained, if the regulation applied in removal proceedings it would prevent some noncitizens from obtaining records Congress mandated they have access to, "because FOIA requests often take a very long time, continuances in removal hearings are discretionary, and aliens in removal hearings might not get responses to their FOIA requests before they were removed."[12] As the court put it, "[i]t would indeed be unconstitutional if the law entitled an alien in removal proceedings to his A-file, but denied him access to it until it was too late to use it."[13]

Where the BIA stands on Dent and the Mandatory Access Law

The BIA has not issued a precedential decision discussing *Dent* or construing INA §240(c)(2). In the few unpublished decisions we reviewed, it was inconsistent. It twice overruled immigration judges who ordered DHS to turn over copies of respondents' entire A-files.[14] On the other hand, it has also held that *Dent* afforded a respondent who sought his A-file in order to establish his U visa eligibility "an absolute right to view the contents of his A-file."[15]

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[10] 627 F.3d at 374. For a detailed discussion of *Dent*, please see the American Immigration Council's 2012 Practice Advisory entitled "*Dent v. Holder* And Strategies For Obtaining Documents From The Government During Removal Proceedings," which is available at www.americanimmigrationcouncil.org/practice_advisory/dent-v-holder-and-strategies-obtaining-documents-during-removal-proceedings.

[11] 627 F.3d at 374.

[12] *Id*.

[13] *Id*.

[14] In *Matter of Jose Rosario Cuevas*, the Board sustained DHS's appeal of the immigration judge's order because it said that INA §240(c)(2) speaks only of visas, entry documents, and documents pertaining to a person's admission or presence in the United States. A095 282 946, 2012 WL 1951058 at *2 (BIA May 7, 2012). But the Board failed to explain why the statutory language, "documents … pertaining to the alien's *admission* or *presence* in the United States"—capacious on its face—does not encompass all documents in a noncitizen's A-file, as the Ninth Circuit expressly held in *Dent*. *Id*. And in *Matter of Julio Cesar Lopez Hernandez*, the Board confined *Dent* to its facts, finding that the reason the court required the government to provide Mr. Dent his A-file is that he would have otherwise lacked an opportunity to fully and fairly litigate his case, including his claim to citizenship. A089 653 692, 2012 WL 5476314 at *1 (BIA Oct. 9, 2012). This is arguably an unduly narrow reading of INA §240(c)(2) itself and of the Ninth Circuit's decision in *Dent* which at times speaks expansively of the respondent's right of access to records in the government's possession. *See, e.g.*, *Dent*, 627 F.3d at 374-75 ("The only practical way to give an alien access [to his file] is to furnish him with a copy."); *id* at 5 ("We are unable to imagine a good reason for not producing the A-file routinely without a request.").

[15] *Matter of Juan Lopez-Lopez*, A205 920 665 (BIA Dec. 11, 2014).

Dent *Outside the Ninth Circuit*

U.S. Immigration and Customs Enforcement (ICE) follows *Dent* only in the Ninth Circuit and continues to believe that FOIA is the appropriate mechanism for obtaining documents in a noncitizen's A-file.[16] Nevertheless, records requests under INA §240(c)(2) should be made to DHS in appropriate cases outside the Ninth Circuit.

Practice Pointers:

- Practitioners may make an informal request to DHS counsel for particular documents in a respondent's A-file or for the entire A-file.[17]
- If DHS refuses to furnish appropriate documents in response to the request, counsel should consider filing a motion with the immigration judge for an order compelling DHS to produce the relevant documents.
    - The motion should cite the mandatory access law, *Dent*, and due process as the bases for the document request.
    - Further, the motion should note that the Board has recognized that immigration judges are not prohibited from requiring DHS to produce certain documents, like applications for Temporary Protected Status, and that their authority to do so stems from their general power to regulate the course of removal proceedings. *Matter of Henriquez Rivera*, 25 I&N Dec. 575, 579 (BIA 2011).
    - In support of the motion, counsel should file copies of prior requests made to DHS for the records sought, as well as any responses received.
- In light of DHS's resistance to furnishing copies of A-files and the Board's inconsistent stance on the mandatory access law, practitioners would be well-advised to *not* forego making FOIA requests.

USING DISCOVERY TOOLS IN REMOVAL PROCEEDINGS TO OBTAIN PRODUCTION OF BOOKS, PAPER, AND OTHER DOCUMENTARY EVIDENCE

Although seldom invoked,[18] the INA and federal regulations empower immigration judges to issue subpoenas and order depositions as well as interrogatories.[19] In this section, we discuss how to invoke these discovery mechanisms. Bear in mind that if the records or witnesses you seek are in the possession or employ of a federal agency, compelling their production will require compliance with the relevant agency's *Touhy* regulations, which are discussed in the section that follows this one.

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[16] "AILA/ICE Liaison Minutes" (April 14, 2011), AILA Doc. No. 11051260.

[17] Such requests may be particularly useful in cases where counsel is retained immediately prior to a hearing, especially a hearing at which a continuance is unlikely to be granted.

[18] Geoffrey Heeren, "Shattering the One-Way Mirror," 79 Brook. L. Rev. 1569, 1581 (2014).

[19] INA §240(b)(1); 8 CFR §§1003.35(b) (subpoena procedure); 1287.4(a)(2)(ii) (same); 1003.35(a) (depositions); 1003.35(b)(4) (interrogatories).

Strategic Uses of a Subpoena: Obtaining Documents and More

When a client is unable to obtain essential evidence, counsel should consider making an application for a subpoena directing a witness to appear with or without an accompanying demand to produce particular documents. The practice can be useful in a number of contexts:

- DHS submits an affidavit of a former spouse in a marriage fraud case, and your client wants to cross-examine the declarant.
- In an asylum case, DHS submits the report of a third party, such as the Forensic Document Lab, concluding that a respondent's police report is forged and you want to inspect the exemplars and methods the Lab used to draw that conclusion. In a case like this, where the documents you seek are in the custody of the federal government, you will have to comply with the *Touhy* regulations, which we discuss below.
- Counsel identifies a necessary witness in a cancellation of removal case, but the witness's employer will not permit the witness to voluntarily appear.

Immigration judges are empowered to exercise their subpoena authority either upon application by a party or on their own initiative.[20] The regulatory scheme requires the applicant to explain what he or she expects to prove with the desired evidence, and the efforts already made to obtain the evidence.[21] It will be particularly important to establish before the immigration judge why the evidence the subpoena would uncover is essential to your client's opportunity to present his or her case.[22]

Showing a Subpoena is Necessary

Before filing a motion with the immigration court for issuance of a subpoena, it is imperative that you first show that the evidence is essential and that you made a full effort to obtain the documents before asking for the subpoena.[23]

When assessing whether a particular document is "essential," consider the totality of the circumstances of your case and the burden of proof at issue. For example, in asylum cases, anything that bears upon credibility may be essential, particularly where the documentary evidence is sparse.[24] Thus, if a particular document may bolster your client's credibility, you can reasonably argue that it is "essential" within the meaning of 8 CFR §1003.35(b)(3). Similarly, where your client has one piece of evidence to

[20] 8 CFR §§1003.35(b)(1)–(2); 1287.4(a)(2)(ii)(A)–(B).
[21] 8 CFR §§1003.35(b); 1287.4(a)(2)(ii).
[22] *See, e.g.*, *Malave v. Holder*, 610 F.3d 483 (7th Cir. 2010) (immigration judge improperly declined to issue subpoena upon speculative belief that the desired witness could not be located); *Kaur v. INS*, 237 F.3d 1098 (9th Cir. 2001) (immigration judge erred in finding that asylum office documents were not "essential").
[23] 8 CFR §§1003.35(b)(2)–(3).
[24] *See, e.g.*, *Rusu v. INS*, 296 F.3d 316, 323 (4th Cir. 2002) (adverse credibility claim usually fatal to asylum application).

corroborate her story, and DHS alleges that the evidence is fraudulent based upon a third party's report (such as a Forensic Document Lab report), there is a strong argument that it is essential that the respondent obtain the purportedly authentic exemplar documents the lab used to compare to the respondent's evidence to judge its authenticity.

The regulations require that you show "diligent effort" to produce the desired witness or document before the immigration judge can grant your application for a subpoena. 8 CFR §1003.35(b)(2). *If the witness or document you seek is employed by or in the custody of a federal agency, like DHS, you must comply with the Touhy regulations, which we discuss below*. If the witness or document you seek is not employed by or in the custody of a federal agency, then you need not comply with *Touhy*, and you may simply request that the potential witness or document-bearer produce him– or herself or the relevant documents. Needless to say, you should keep copies of your correspondence to present to the immigration court as evidence of your diligence.

Preparation and Service of the Subpoena

The party seeking the subpoena prepares and files a "Motion for Subpoena" with the Immigration Court. Your argument in support of issuance of the subpoena must set forth why the documents or witnesses the subpoena concerns are essential to the underlying proceeding, and the steps you took to obtain the document or testimony. You must state what you expect to prove by such witnesses or documentary evidence. You must furnish a proposed subpoena (much like a proposed order) with your motion. The subpoena does not need to be on any particular form, but it must contain essential identifying information including the respondent's name and alien number, the type of proceeding, the name and address of the person required to testify and/or the documents he or she is required to produce. There is a sample subpoena in the appendix of the Immigration Court Practice Manual.

The motion for a subpoena can be made in writing or orally, although it would be advisable to request the subpoena in writing and develop a robust record for appeal, because immigration judges seldom grant motions for subpoenas. 8 CFR §1003.35(2).

Practice Pointer:

- Be careful to identify the documents you would like with sufficient particularity to avoid confusion and secure production of everything you seek. For example, if you only request documents in a person's "possession" instead of "possession or control" you may not obtain the documents you seek simply because they are not literally in the possession of the subject of the subpoena.

If the court grants the motion—and it *must* if the immigration judge is convinced that the evidence sought is essential and cannot be otherwise obtained, 8 CFR §1287.4(a)(2)(ii)(C)—it will return the subpoena to the requesting party for service upon the subject of the subpoena. As in federal civil litigation, the subpoena must be served by a non-party who is over 18 years old. 8 CFR §§1287.4(a)(2)(ii)(C), 287.4(c). The executed subpoena is thereafter filed with the immigration court.

Where the subpoenaed witness is at a distance of more than 100 miles from the place of the removal proceedings and the opposing party objects to the witness' appearance, 8 CFR §1003.35(b)(4) states that the subpoena shall provide for the witness' appearance at the nearest immigration to respond to oral or written interrogatories. An interrogatory is a question submitted to an opposing party in a legal proceeding. Under the Federal Rules of Civil Procedure, interrogatories are to be answered under oath. Fed. R. Civ. P. 33(b)(3). Because responses to interrogatories are often drafted by counsel seeking to disclose as little as possible while still responding to the question, interrogatories are not the most valuable discovery tool, but they can be an effective and inexpensive means of obtaining basic background information, like the names and addresses of relevant witnesses and the location and nature of records.[25]

If the Immigration Judge Does Not Issue The Subpoena, Try Again or Appeal

If the court refuses to issue the subpoena, consider filing a renewed application with additional argument addressing any reasons given by the immigration judge for denying the first subpoena. In your renewed application, explain any further efforts on your part to obtain the desired evidence. You should specifically address how the court should weigh the evidence currently in the record if the motion is not granted. For example, if the court admits the derogatory written statements of the respondent's ex-spouse in a marriage fraud case, but denies a subpoena directing the ex-spouse to appear in court for cross-examination, counsel has a strong argument that the court should exclude or give little-to-no weight to the written statements. This was the situation in *Malave v. Holder*, 610 F.3d 483 (7th Cir. 2010). There, the Seventh Circuit reversed the immigration judge who denied the respondent's request for a subpoena directing the ex-spouse to appear in court based upon a belief that the ex-spouse could not be found. 610 F.3d at 488.

If the immigration judge denies your motion for a subpoena, you may challenge his or her decision on appeal. If your client chooses to appeal,[26] you may wish to argue that the immigration judge's decision to deny your motion for a subpoena violated your client's constitutional right to due process under the Fifth Amendment as well as his or her statutory rights under INA §240(b)(4) to "a reasonable opportunity to examine the evidence against [him or her], to present evidence on [his or her] own behalf, and to cross-examine witnesses presented by the Government[.]"

Enforcing the Subpoena

[25] Sample interrogatories can be found in AILA's Immigration Litigation Toolbox, §240, 5th Ed. (2015).

[26] Though seldom entertained by the Board, consider filing an interlocutory appeal, arguing that the interests of judicial efficiency would be best served by resolving the issue while the matter is before the immigration judge. *See* BIA Practice Manual §4.14 (interlocutory appeals). The immigration judge may choose to hold proceedings in abeyance pending the appeal.

Where a court-issued subpoena is ignored, counsel should move the immigration judge to invoke his or her authority under 8 CFR §1003.35(b)(6), and request that the U.S. Attorney for the U.S. District in which the subpoena was issued report the witness's failure to the local U.S. District Court and request an order requiring the witness and evidence to be produced. In *Saidane v. INS,* 128 F.3d 1063 (9th Cir. 1997), even though a DHS witness—the respondent's former spouse—disobeyed a subpoena, the immigration court admitted into evidence her written statement, and on the basis of the statement, ordered the respondent deported. The Ninth Circuit reversed, finding that the government had impermissibly shifted the burden of producing its own witness onto the respondent.[27] The court deemed the proceedings fundamentally unfair to the respondent.[28]

The Dithering Immigration Judge

Where the court is dilatory in ruling upon an application for a subpoena, counsel can file a motion for a ruling on the pending application, and may want to file a motion for a pre-hearing conference to discuss the evidentiary issues in the case. Imm. Ct. Practice Manual Ch. 4.18(a) (pre-hearing conference). Using motion practice to establish your record of efforts will ensure a solid record for appeal, if necessary.

Practice Pointer:

- Sometimes simply moving for a pre-hearing conference can draw the court's attention to a pending motion. Where the court denies counsel a pre-hearing conference to discuss evidentiary issues and counsel feels a continuance is necessary to obtain more evidence or pursue the subpoena, the court will be hard-pressed to justify denying the request if the record reveals that counsel used every means to obtain needed pre-trial rulings.

Depositions

Depositions are permitted in immigration proceedings.[29] An immigration judge may order a deposition if he or she "is satisfied that a witness is not reasonably available at the place of hearing and that said witness' testimony or other evidence is essential[.]"[30] Like subpoenas, depositions may be ordered on a judge's own volition or by motion. An order granting a deposition "shall designate the official by whom the deposition shall be taken, may prescribe and limit the content, scope, or manner of taking the deposition, and may direct the production of documentary evidence."[31]

If the person you wish to depose is employed by a federal agency, comply with the relevant *Touhy* regulations discussed below.

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[27] *Saidane*, 128 F.3d 1063 (9th Cir. 1997).
[28] *Id*. at 1065.
[29] 8 CFR §1003.35(a).
[30] *Id*. For a discussion on establishing that certain evidence is essential, see the section entitled "Showing a Subpoena is Necessary."
[31] 8 CFR §1003.35(a).

TOUHY **REGULATIONS: HOW TO OBTAIN FEDERAL AGENCY DOCUMENTS AND WITNESSES**[32]

Introduction to **Touhy** *Regulations*

A scenario: Your client, Manuel, was detained by a Border Patrol agent while he was waiting for a bus in the Greyhound bus terminal. Manuel claimed that he was asleep when the agent sneaked up on him from behind and grabbed him. He was ordered to open his pockets and gave the agent all of his ID documents. He was issued a Notice to Appear charging him as an alien who entered the United States without permission.

You suspect that the agent lacked reasonable suspicion to detain him and so you filed a motion to suppress and terminate proceedings in the immigration court. In order to prove that the agent's conduct was unlawful, you need access to the government documents and the officers, including the one who detained your client. What can you do? You can file a FOIA request to obtain documents from the relevant government agency—here, U.S Customs and Border Protection (CBP) however, you cannot request a witness's testimony under FOIA.

You want the immigration judge to issue a subpoena against the Border Patrol agent who detained Manuel.[33] The immigration judge can subpoena a private party or a government official. However, if you want the Border Patrol agent to testify, you need to first satisfy the federal regulations called, *Touhy* regulations. Why is this necessary? It is because before you can file a motion for subpoena, you need to show the immigration judge that you made diligent efforts in securing the testimony to no avail, and the compliance with these regulations constitutes such diligence.[34]

The term "*Touhy* regulations" derives from the U.S. Supreme Court's decision in *United States ex rel. Touhy v. Ragan*, 340 U.S. 462 (1951). In *Touhy*, an inmate of the Illinois State Penitentiary sought the testimony of an FBI agent, seeking evidence for use in a federal habeas corpus case alleging that his criminal conviction had been obtained by fraud. The agent refused to comply with the subpoena, citing an order promulgated by the U.S. Department of Justice (DOJ) under the authority of the Federal Housekeeping Statute, former 5 USC §22 (now 5 USC §301) which authorizes agencies to adopt regulations regarding "the conduct of [their] employees . . . and the custody, use, and preservation of [agency] records, papers, and property."). The district court issued a contempt order against the agent. The Supreme Court reversed, holding that the contempt citation was improper because the DOJ's regulation, which gave the Attorney General the power to decide whether to comply with a subpoena, was valid, and the agent was simply obeying an instruction from a superior. In the wake of *Touhy*, federal agencies proceeded

[32] The authors thank Javier Maldonado for sharing the article entitled, "*Preparing Touhy Requests for Government Witnesses and Filing Motions to Subpoena Witnesses,"* which he co-authored with Luis A. Medina for AILA.
[33] INA §240(b)(1); 8 CFR §1003.35(b).
[34] 8 CFR §1003.35(b)(2).

to abuse it by denying requests for production of documents and witnesses. Congress stepped in, and in 1958 amended the Federal Housekeeping Statute to clarify that it "does not authorize withholding information from the public or limiting the availability of records to the public."[35]

The term "*Touhy* regulations" thus refers to regulations setting forth the procedure for seeking testimonial and documentary evidence from employees of federal agencies.

DHS's **Touhy** *Regulations*

DHS has its own *Touhy* regulations. DHS regulations for *Touhy* requests are found at 6 CFR Part 5, Subpart C. Under the regulations, a DHS employee or former employee's testimony and production of documents is prohibited unless approved by the Office of General Counsel or the delegates.[36]

The Office of the General Counsel is authorized to receive and accept subpoenas, or other demands or requests directed to the Secretary, the Department, or any component thereof, or its employees, whether civil or criminal in nature, for: (1) Material, including documents, contained in the files of the Department; (2) Information, including testimony, affidavits, declarations, admissions, responses to interrogatories, or informal statements, relating to material contained in the files of the Department or which any Department employee acquired in the course and scope of the performance of his official duties; (3) Garnishment or attachment of compensation of current or former employees; or (4) The performance or non-performance of any official Department duty.[37]

The party seeking such release or testimony must (except as otherwise required by federal law or authorized by the Office of the General Counsel) set forth in writing, and with as much specificity as possible, the nature and relevance of the official information sought. Where documents or other materials are sought, the party should provide a description using the types of identifying information suggested in 6 CFR §5.3(b). According to 6 CFR §5.45(a), "[r]equesters must describe the records sought in sufficient detail to enable DHS personnel to locate them with a reasonable amount of effort. … To the extent possible, requesters should include specific information that may assist a component in identifying the requested records, such as the date, title or name, author, recipient, subject matter of the record, case number, file designation, or reference number."

DHS is to weigh the following factors in deciding whether to release requested testimony or documents: (1) Whether compliance would be unduly burdensome or otherwise inappropriate under the applicable rules of discovery or the rules of procedure governing the case or matter in which the demand arose; (2) Whether compliance is appropriate under the relevant substantive law concerning privilege or disclosure of information; (3)

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35 Act of Aug. 12, 1958, Pub. L. No. 85-619, 72 Stat. 547.
36 6 CFR §§5.42(a); 5.44.
37 6 CFR §5.43(a).

The public interest; (4) The need to conserve the time of Department employees for the conduct of official business; (5) The need to avoid spending the time and money of the United States for private purposes; (6) The need to maintain impartiality between private litigants in cases where a substantial government interest is not implicated;(7) Whether compliance would have an adverse effect on performance by the Department of its mission and duties; and (8) The need to avoid involving the Department in controversial issues not related to its mission.[38]

Submitting a Touhy *Request*

First, a *Touhy* request must be submitted to the DHS General Counsel's Office in the form of a letter. The request must state what you are seeking, the reasons you need it, and why there is no alternative way to obtain it. The letter should be as detailed as possible. In other words, the request should not be used as an "open-ended" fishing expedition and should not be a duplicate FOIA request.

Filing a Motion to Subpoena a Government Employee in Immigration Court

If the DHS General Counsel's Office declines to produce the testimonial or documentary evidence sought by your request, the next step is to move the Immigration Court to issue a subpoena. As part of the regulatory requirement of demonstrating diligence to secure the witness or documents without the help of the court, 8 CFR §1003.35(b)(2), your motion must show compliance with the *Touhy* regulations and explain in detail why the witness' documentary or testimonial evidence is absolutely essential to the underlying proceedings. In addition to the items identified above in the general discussion on motions for subpoenas, your motion to subpoena government employees should include a sworn statement by your client, a record of the written *Touhy* requests made to the agency and their responses, if any, as exhibits.

If the immigration judge denies your motion for a subpoena, consider filing a second motion or appealing his or her decision, or both.[39]

CONCLUSION

Practitioners should use the strategies discussed above to obtain the documentary and testimonial evidence necessary to prevail in removal proceedings.

AILA-RELATED RESOURCES CITED IN THIS PRACTICE POINTER

- American Immigration Council Practice Advisory, FOIA for Immigration Lawyers, *available at*

[38] 6 CFR §5.48(a).

[39] For suggestions on filing a renewed motion for a subpoena and appealing a denial of a motion for subpoena see the discussion above entitled "If the Immigration Judge Does Not Issue the Subpoena, Try Again or Appeal."

www.americanimmigrationcouncil.org/practice_advisory/foia-immigration-lawyers.

- American Immigration Council Practice Advisory, *Dent v. Holder* And Strategies For Obtaining Documents From The Government During Removal Proceedings, *available at* www.americanimmigrationcouncil.org/practice_advisory/dent-v-holder-and-strategies-obtaining-documents-during-removal-proceedings.
- *AILA's Immigration Litigation Toolbox*, 5th Ed. (2015).