Pretrial Preparation Is the Cornerstone of a Successful Removal Defense

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Effective representation begins when your client walks through your door. By the time that the merits hearing occurs, an attorney should have already laid the groundwork for a respondent's defense against removal and applications for relief.

In this article, we discuss several tools available to counsel during the pretrial stage that can help narrow the issues being reviewed and establish the respondent's eligibility for relief. First, we will discuss pretrial conferences, motions, briefs, and other pleadings. Second, we will discuss using discovery to identify relief and develop removal defenses, including depositions, subpoenas, and arguments to obtain access to the Department of Homeland Security's (DHS) file. The third part of this article is focused on strategies to avoid surprises by avoiding unknown or rebuttal evidence. Finally, we will address stipulations, concessions, and agreements and what to do with a reneged agreement.

MAKE THE IMMIGRATION JUDGE YOUR FRIEND: EFFECTIVE MOTIONS AND PRETRIAL PRACTICE

> *Tough: That was his job. Tough was hearing 1,500 cases per year while federal judges decided 440. It was sharing one law clerk with other immigration judges while each federal judge had four clerks of his own. It was being scheduled to sit on the bench for 36 hours a week and listen to asylum cases that detailed people's escapes from gangs, rapes, beheadings, human trafficking and torture; and then having to objectively ask those people for the documents, for the scars, for the proof; and then making a judgment about the character of those people, first through a video feed and then through an interpreter; and then judging the merits of their cases in the shifting landscape of immigration law; and finally taking a*

> *deep breath, synthesizing so much information, and rendering a lawful, smart, artful, confident decision on the spot, because the schedule allowed little time for reflection or written decisions before the next case began.*[1]

This is just a glimpse into the fast-paced, overburdened immigration court system from the perspective of the immigration judge (IJ). Part of being a successful advocate within this often impatient and unforgiving system requires developing a precise and thoughtful motions and pretrial practice.

Follow the Rules

An effective motions practice in immigration court first requires a good grasp of the rules governing proceedings. The *Immigration Court Practice Manual* (ICPM) creates uniform rules and standardized protocols for practice before the immigration courts.[2]

The guidelines and rules set out in the ICPM are binding on the parties. Chapters 3 and 5 of the ICPM cover filing documents and motion practice. Motions that do not comply with the technical and format requirements may be rejected by court staff, and some courts are particularly strict about these requirements.[3] Some of the more common reasons for rejection include no proposed order, no pagination, untimely motion, compound motion, mistakes on the certificate of service, mistakes on the EOIR-28, and failure to two-hole punch the submission.

> **Practice Pointer:** It is a good idea to create internal filing checklists since stringent compliance with the ICPM helps avoid issues with late and rejected filings. In the seven years since the ICPM was implemented, its rules have become entrenched; court staff and immigration judges expect attorneys to follow it to the letter.

Another resource for advocates is the *Immigration Judge Benchbook*, which has a motion section that walks through the standards and regulations for some of the more common motions that are filed in immigration court.[4] Since it is designed as a tool for the judges, it can also offer valuable insight on the Executive Office for Immigration Review's perspective and expectations regarding motions practice.

Be on Time and on Task

In non-detained cases, motions generally must be submitted 15 days before the next hearing. Responses are due 10 days after the motion is filed.[5] By regulation, the immigration judge may

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[1] Journalist Eli Saslow, describing the job of Immigration Judge Lawrence Burman. Available at www.washingtonpost.com/national/in-a-crowded-immigration-court-seven-minutes-to-decide-a-familys-future/2014/02/02/518c3e3e-8798-11e3-a5bd-844629433ba3_story.html.
[2] The ICPM is available at www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm.
[3] ICPM 3.1(d) (explaining rejection of filings).
[4] The Immigration Judge Benchbook is available at www.justice.gov/eoir/vll/benchbook/.
[5] *See* ICPM 3.1(b)(i)-(ii).

set different deadlines and extend existing time limits for filing.[6] An application or filing "shall be deemed waived" if it is not filed on time.[7] A motion is deemed "unopposed" if the other party does not file a timely response.[8] Where documents or applications will be filed out of time, counsel should file a separate "motion for extension" in compliance with the dictates of ICPM 3.1(c) *by the original filing deadline* or file a "motion to accept untimely filing" along with the late filing.[9]

The courts discourage compound motions, so each motion should request singular relief.[10] If possible, counsel should confirm the position of U.S. Department of Homeland Security (DHS) trial counsel before filing the motion. Where counsel states in the motion caption that it is unopposed, it will go straight into the judge's queue for a decision instead of waiting the 10 days for DHS to respond.

Clear up the Docket – Everyone Wins!

Motions to Dismiss: A respondent may move to dismiss removal proceedings due to procedural errors or deficiencies with the Notice to Appear (NTA), such as: 1. the NTA was issued by an unauthorized officer;[11] 2. the NTA was not properly served on alien;[12] and 3. the NTA does not make out a prima facie case of deportability. For example, the NTA fails to notify the respondent of acts or conduct alleged to be violation of law or fails to identify the statutory provision alleged to have been violated.[13] Motions to dismiss can eliminate some or all of the removal charges.

Filing a written motion in advance of a master calendar hearing can assist counsel in making a forceful argument in opposition to a removal charge and gives the IJ and DHS counsel time to consider the arguments.

Motion for Administrative Closure. Administrative closure of a case temporarily removes a case from an immigration judge's calendar or from the Board of Immigration Appeal's (BIA or Board) docket.[14] Since 2011, DHS has been engaged in an active exercise of prosecutorial discretion, including agreeing to administratively close low priority cases.[15] In cases where DHS refuses to administratively close a case, a respondent may move for administrative closure directly to the court. "[T]he Immigration Judges and the Board may, in the exercise of independent judgment and discretion, administratively close proceedings under the appropriate

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[6] 8 CFR §1003.31.
[7] *Id.*
[8] 8 CFR §1003.23(a).
[9] See ICPM 3.1(c) - (d).
[10] ICPM 5.4.
[11] 8 CFR §239.1(a). However, the list in the regulation may not be not exclusive because the authority can be delegated pursuant to 8 CFR §2.1 or by an agency delegation order. *See also Dailide v. Att'y Gen. of the U.S.*, 387 F.3d 1335, 1341 (11th Cir. 2004) (finding that individual not listed in regulation had authority to issue NTA).
[12] 8 CFR §1003.14
[13] *See* INA §§239(a)(1)(C)-(D); *Chowdhury v. INS*, 249 F.3d 970, 974-75 (9th Cir. 2001).
[14] *See Mickeviciute v. INS*, 327 F.3d 1159, 1161 n. 1 (10th Cir. 2003).
[15] *See* AILA prosecutorial discretion repository, *published on* AILA InfoNet at Doc No. 11120971 (February 2, 2012); AILA administrative reform repository, *published on* AILA InfoNet at Doc No. 14032850 (February 17, 2015).

circumstances, even if a party opposes."[16] The immigration judge's decision whether to administratively close a case turns on all relevant factors, including "(1) the reason administrative closure is sought; (2) the basis for any opposition to administrative closure; (3) the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of removal proceedings; (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings (for example, termination of the proceedings or entry of a removal order) when the case is recalendared before the immigration judge or the appeal is reinstated before the Board."[17] After a case has been administratively closed, either party may move to recalendar proceedings. For example, a respondent may move to recalendar and dismiss proceedings because he or she now has an approved provisional waiver and wishes to consular process.

Other Motions. A motion is just a way of asking the court to do something. The types of motions that an attorney can file are limited only by the attorney's imagination. Motions are useful to deal with housekeeping matters and keep the case on track. Motions also provide a forum for a respondent to raise legal and constitutional arguments and to preserve the record on appeal. Common motions include motions to suppress, motions to consolidate, motions to sever, motions to expedite or continue, and motions to change venue.

Pleadings

Typically, an attorney and respondent are asked to plead to the factual allegations and removal charges at a master calendar hearing. At times, pleadings can be made in writing. When a motion to change venue is filed before the first hearing, some judges prefer respondents to plead to the NTA.[18]

The ICPM also provides for the submission of written pleadings if the respondent concedes proper service of the NTA.[19] If an attorney concedes proper service of the NTA, this could foreclose a contrary argument in the future. The ICPM sets forth the requirements for a written pleading. A respondent is not required to admit the factual allegations or concede removability as party of a motion to change venue or written pleadings.

> **Practice Pointer:** If an attorney admits a factual allegation or concedes a removal charge, this binds the respondent. It can be very hard for a respondent to get out from under an attorney's concession.[20] Pleadings should not be undertaken without consent from a fully informed client.

[16] *Matter of Avetisyan*, 25 I. & N. Dec. 688, 697 (BIA 2012).
[17] *Id.* at 696.
[18] ICPM 5.10(c)
[19] ICPM 4.15(j). A sample is provided at Appendix L of the ICPM.
[20] *Hanna v. Holder*, 740 F.3d 379, 387-89 (6th Cir. 2014); *Matter of Velasquez*, 19 I&N Dec. 377, 382 (BIA 1986).

A benefit to a written pleading is that if it is combined with a properly filed application for relief, the IJ can cancel the master calendar hearing and set the matter for an individual hearing. This can save time and expense for the attorney and respondent.

Pre-hearing Statement and Brief. Like most filings in immigration court, the pre-hearing statement and pre-hearing brief are typically due 15 days before the individual removal hearing unless the IJ orders a different due date.

The pre-hearing statement provides a roadmap for the individual hearing, including a list of proposed witnesses, a statement regarding any stipulations between the parties, and an indexed list of exhibits that are attached to the prehearing statement.[21]

> **Practice Pointer:** A well-organized, detailed and annotated exhibit list can synthesize the case and serve as a checklist for the IJ. Including direct quotes or medical diagnosis from experts or articles within the index can help highlight the favorable evidence in the case.

The pre-hearing brief, which can be filed together with the pre-hearing statement, summarizes the relevant factual and legal issues.[22] The pre-hearing brief should identify any conceded or stipulated issues and the argument section of the brief should hone in on the factual and legal issues actually in dispute. There is generally no need to include a lengthy summary of general immigration law concepts. This brief is a central tool in the case because it provides an opportunity to tell the story of the case in a compelling and directed way.

The ICPM does not require pre-hearing statements and briefs but some judges request or prefer them. Even if not requested, they can be useful in cases involving complicated facts or legal issues or a lot of evidence. Preparing these documents in advance of a hearing can also help counsel identify strengths and weaknesses in a case while there is still time to do something about it.

Pre-hearing Conferences[23]

Pre-hearing conferences are between the parties and the IJ. They help in narrowing issues, entering into stipulations, or discussing the scope of hearings. They can also be very helpful in understanding what the IJ thinks are the real issues in the case. For instance, the IJ may comment that he expects the respondent to explain the family dynamics that lead to a domestic violence incident, or why there appears to be a gap in employment, or other issues that may go to eligibility for relief or a discretionary finding. Often, it may be an issue that you were aware of but did not realize would be an important focus of the hearing, thereby alerting you to prepare more on that issue.

[21] 8 CFR §1003.21(b); ICPM 4.18.
[22] ICPM 4.19.
[23] 8 CFR §1003.21(a); ICPM 4.18(a).

Either party can request a pre-hearing conference. The specific way to request it, orally or in writing, may depend on the practice of a specific court or IJ. In many courts, pre-hearing conferences are not common, and may even be discouraged. That does not mean that you cannot request one, particularly if you believe your case has unique issues that would make such a conference helpful.

Besides requesting an official pre-hearing conference, it can also be helpful to contact DHS counsel before a hearing to discuss the case, including any stipulations, confirming if statutory eligibility for relief is disputed, or what specific discretionary issues should be the focus. It is also a good opportunity to address issues like confirming biometrics, or making sure both parties received each other's filings. In many jurisdictions, DHS attorneys do not want to discuss a case, either because it has not been assigned yet, or they're too busy, or they prefer the element of surprise. Even if that is the case, it can still be helpful to reach out to them. If an issue arises in court that could have been resolved, you can let the IJ know that you offered to discuss that very issue but were rebuffed; there is much to be said for appearing as the reasonable and fair-minded party.

Practice Pointers:

- Bring up the idea at a Master Calendar and ask the IJ if a pre-hearing conference would be possible, and if it should be requested in writing;
- Be specific as to why you believe a conference is warranted. Always include that it would be efficient and time-saving, and streamline proceedings;
- Contact DHS counsel to ask their position on a conference. If they agree, or don't object, you can make your motion "Joint" or "Unopposed";
- Even if an official pre-hearing conference is not held, always contact DHS counsel prior to an Individual Hearing to at least address issues like biometrics, receipt of exhibits, or the possibility of stipulations. Even if your request is ignored, you can appear like the reasonable one if an issue arises in court that could have been avoided.

Depositions and Subpoenas: Yes, There Really is Discovery in Immigration Court

The regulations grant the IJ the authority to order a deposition and to subpoena witnesses.[24] These can be useful tools in preserving the testimony of a witness who might be unavailable for a merits hearing, obtaining documents from a nonparty, or in securing the testimony of a reluctant witness.

Depositions

If the IJ determines that a witness is not reasonably available at the place of the removal hearing and that the witness has essential testimony, the IJ can order the taking of a deposition.[25] The IJ can order a deposition on his or her own motion or at the request of a party.

[24] 8 CFR §§1003.35(a) and (b).
[25] 8 CFR §1003.35(a).

Depositions can be a useful discovery tool because it allows an attorney to question a government or adverse witness to obtain more information about DHS's case and to engage in fact-finding. Depositions are also useful if counsel is concerned that a witness might move or die before a merits hearing.

In formulating a deposition request, it is important to explain what steps counsel has taken to question the witness, why it was unsuccessful, what is to be gained by a deposition, and the prejudice that would result from the denial of the request.

If the IJ denies the request and counsel feels that the deposition is the only way to preserve the witness's testimony, counsel can notify DHS counsel of his or her intention to preserve the witness's testimony under oath and invite DHS counsel to participate. While the IJ may not accept this out-of-court statement as evidence or give it diminished weight, it will help perfect the record for appeal.

Subpoenas

The IJ can subpoena a witness to testify in court or to produce documentary evidence (a *subpoena duces tecum*). The IJ can issue a subpoena sua sponte or on the application of a party.[26]

As with depositions, when requesting a subpoena counsel should explain what steps counsel has taken to secure the witness's testimony or the production of documents, why it was unsuccessful, what is to be gained by the subpoena, and the prejudice that would result from the denial of the request.[27]

It can be appropriate to subpoena a witness who will not voluntarily appear at a hearing or one who wants to appear but cannot get time off of work without a subpoena. Also, if a witness lives more than 100 miles away, the subpoena should provide for the witness to appear at the immigration court nearest the witness for oral or written interrogatories or to testify. This can be useful if a distant witness cannot travel to the hearing location.

A subpoena duces tecum is a way to obtain documents from a nonparty that the party cannot or will not produce voluntarily, such as because of privacy laws.

If the witness does not comply with the subpoena, the IJ shall request the U.S. Attorney for the district where the subpoena was issued to report this to the district court and to request that the district court issue an order requiring compliance with the subpoena.

> **Practice Pointer:** Counsel should include a proposed subpoena with the application. For example, a subpoena duces tecum should require that the target of the subpoena send the requested documents to counsel by a certain date. However, be aware that IJs may rewrite the subpoena to direct the target to send the documents to the court. If you are not sure what information is contained in

[26] 8 CFR §1003.35(b)(1); ICPM 4.20. A sample subpoena is found at ICPM Appendix N.
[27] 8 CFR §1003.35(b)(2).

the documents or know that it may contain information adverse to the respondent, keep this possibility in mind when deciding whether to apply for a subpoena.

Access to the A-File and Using *Dent v. Holder*

Access to the documents in your client's A-file is crucial to representing a client in removal proceedings. The documents provide the most detailed account of an alien's immigration history, and may also contain documents related to criminal history or other matters that are relevant to the grounds of removability and eligibility for relief.[28]

In *Dent v. Holder*[29], the U.S. Court of Appeals for the Ninth Circuit held that it was a due process violation to deny respondent access to his A-file. By withholding his A-file, the government "denied [Respondent] an opportunity to fully and fairly litigate his removal."[30] The court found that Congress had passed a "mandatory access law," and the regulatory hurdles of the Freedom of Information Act (FOIA)[31] process cannot thwart that access. *Dent* holds that "the only practical way to give an alien access is to furnish him with a copy."[32]

Although *Dent* is from the Ninth Circuit, there is no contrary law in other circuits. Therefore, all practitioners should request access to their clients' A-files, even though Chief Counsels' offices outside of the Ninth Circuit are not complying with *Dent*[33].

Practice Pointers:

- Submit a FOIA request as soon as possible (once you have a Notice of Court Date to allow an expedited Track 3 request);
- Send a letter or make some other informal request to DHS requesting access to the A-file;
- File a Motion to Compel Production of A-file, which includes proof of attempts to obtain it and why an Order is required (FOIA delays, having received a redacted copy, DHS refusal);
- Indicate why the A-file is relevant in your case. It is arguably relevant in every case, but the more specific you are, and the more you can show prejudice, the better chance you have and the better record you have for appeal;
- Always constitutionalize your request and argue a violation of due process, in addition to any statutory or regulatory citations;
- Make the request at every stage: IJ, BIA, and court of appeals, to comply with exhaustion requirements[34];

[28] INA §240(c)(2)(B) requires DHS to provide "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" when an alien challenges removability.
[29] 627 F.3d 365 (9th Cir. 2010).
[30] *Id*. at 374.
[31] 5 USC §552, as amended by Pub. L. No. 104-231, 110 Stat. 3048.
[32] *Id*. at 374–75.
[33] AILA/ICE Liaison Minutes (Apr. 14, 2011), AILA InfoNet Doc. No. 11051260.
[34] INA §242(d)(1).

- Offer to go to DHS counsel's office and to maintain confidentiality as an officer of the court; If you are looking for something specific and DHS denies it exists, ask for an *in camera* review by the IJ.

NO SECRETS HERE: USING *BRADY V. MARYLAND* TO MINIMIZE OR ELIMINATE THE UNKNOWN OR DHS REBUTTAL EVIDENCE

Counsel should not rely on DHS to share helpful information through FOIA, *Dent* requests, or subpoenas. Counsel should conduct an independent investigation into a respondent's immigration and criminal history to proactively identify potentially helpful or harmful information and then develop a strategy to deal with it.

The deadlines for the submission of evidence and other documents that apply to respondent also apply to DHS. These deadlines do not apply to rebuttal evidence.[35] In the authors' experience, DHS often does not submit adverse evidence until the day of the hearing and then seeks to introduce it as rebuttal or impeachment evidence. It is important as counsel to try to identify and obtain this evidence in advance. To effectively respond and preserve the issue of prejudice, counsel can request time to review this new evidence with respondent and can also request a continuance to conduct further investigation.

While some DHS counsel will voluntarily provide favorable evidence to a respondent, others will not take the effort to look for it or if found will not provide it. Again, it is important as counsel to try to identify and obtain this evidence in advance. For example, DHS might not provide information relating to a respondent's entry or that could establish their eligibility for relief.

In *Brady v. Maryland*,[36] the U.S. Supreme Court held that prosecutors in a criminal trial have a duty to disclose favorable evidence to the defendant.[37] Removal proceedings are civil in nature, so respondents do not receive the full range of protections that criminal defendants receive. However, the courts have somewhat chipped away at this distinction because deportation is such a severe penalty.[38]

> **Practice Pointer:** When making a *Brady* request and responding to a denial of the request, it is critical to show diligence and reasonableness on the part of counsel, a lack of alternative means to obtaining the evidence, and prejudice from the denial. An appeal will require the exhaustion of remedies and a perfection of the record below.

CAN'T WE ALL JUST GET ALONG: STIPULATIONS, CONCESSIONS, AGREEMENTS, AND RENEGED AGREEMENTS

[35] ICPM 3.1(b)(ii)(A).
[36] *Brady v. Maryland*, 373 US 83 (1963).
[37] 373 U.S. 83, 87 (1963).
[38] *See Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010).

Concessions and Stipulations

Practices vary widely, but in some jurisdictions DHS trial counsel will review written or telephonic requests for prosecutorial discretion beyond administrative closure, such as cancelling the NTA, repapering the case, stipulating to a grant of relief, or conceding what would otherwise be contested legal or factual issues in the case. Confirm local practices because some jurisdictions have forms or standardized protocols for making these requests, similar to requests for administrative closure. Typically, DHS counsel would like a summary of the case and any information about negative discretionary issues, such as criminal history and may request criminal records, discretionary evidence, and/or evidence of hardship.

Where there is no formal method to request stipulations or concessions, counsel can contact DHS counsel at some point prior to the merits hearing to see if they are willing to "narrow the issues" in the case or stipulate to a grant of relief. This request should be done after the trial attorney has had a chance to review the written submissions, including legal arguments or evidence in the case. So, as a practical matter, that conversation typically happens after the respondent submits his or her pre-hearing statement and brief in the case.

Even if DHS counsel stipulates to a grant of relief, the respondent still needs to comply with filing deadlines with the immigration court and submit the evidence in support of relief since the judge ultimately has the sole decision-making power in the case.

It happens that one party or the other will seek to break an agreement. Sometimes respondents will withdraw an application for relief in exchange for a continuance or other benefit, only to later seek to revive the withdrawn application.[39] When this happens, counsel has to proceed carefully to minimize the adverse consequences to the respondent. In some instances, counsel may have to withdraw as representative either because respondent may want to blame counsel for entering into the agreement or because counsel cannot ethically proceed with the matter.

Although respondents are often bound by counsel's concessions, DHS can amend the NTA at any time before the entry of a final order of removal[40] or argue positions contrary to the NTA.[41] It is important to get a concession, agreement, or stipulation in writing or on the record because that can be a forceful tool in holding ICE to the agreed upon bargain, particularly if respondent can argue that there was a *quid pro quo* involved in the agreement or otherwise show prejudice caused by the revoked promise. Extraneous to the removal proceedings and administrative and judicial appeal, counsel can consider filing complaints with the appropriate disciplinary agencies if DHS counsel violates an agreement, although this is an extreme remedy that can poison counsel's relationship with DHS.

CONCLUSION

[39] *See, e.g., Suarez-Diaz v. Holder*¸ 771 F.3d 935 (6th Cir. 2014).
[40] 8 CFR §1003.30.
[41] *Santana-Albarran v. Ashcroft*, 393 F.3d 699, 703-05 (6th Cir. 2005).

Much can be gained or lost during pretrial proceedings. Counsel can use pretrial proceedings, motions, and discovery tools to strengthen respondent's position, weaken DHS's position, and narrow the issues that need to be litigated to save time and money for everyone involved.