

Continuance Motions During Covid In Immigration Court

Practice Advisory

First edition, August 28, 2020

Introduction

This practice advisory discusses filing continuance motions in immigration court during the Covid-19 pandemic. We at Legal Services NYC focus on NYC cases, so this advisory focuses on practice for the non-detained docket in NYC Immigration Courts. We think similar principles and issues apply non-detained dockets in other cities. The safety of advocates and clients is a major priority. Covid-19 has made worse the barriers that exist for advocates and clients. Legal Services NYC unsuccessfully sought an injunction in a lawsuit that we filed in April 2020 in the Southern District of New York for NYC non-detained cases.

This advisory contains information about immigration law and is intended for lawyers. It is not legal advice. If you have a case, you should get legal advice from a reputable immigration attorney or nonprofit organization in your area. In many parts of this advisory, we discuss general principles that apply to many cases, but will not be appropriate for every case or in every state. Please get legal advice from someone who can analyze your specific case's facts under the law that applies in your state and who can check for the latest ideas or developments that do not appear in this advisory.

Advocates should strongly consider filing continuance motions for non-detained EOIR hearings. Continuances can be important to safeguard the health of advocates, clients, and their families. It also can be critical to have a chance to prepare and present the case.

This advisory is a work-in-progress. We created a sample continuance motion that is also a work-in-progress. We plan to make revised editions this advisory and the sample motion to incorporate new developments and tips that advocates send us. The sample motion includes many suggestions that we hope would work well. However, we are not certain what will work best with a particular immigration judge.

What we know:

EOIR has not published or shared any guidelines regarding social distancing protocols and the safety of staff and clients. EOIR has not explained if it will use any health metrics to decide whether to open or close immigration courts. Hearings in non-detained cases at all NYC immigration courts are postponed through, and including, Friday, September 11, 2020, though this information will probably become obsolete soon. Check EOIR's web site and Twitter account to find out how far EOIR has extended postponements for non-detained dockets in courts that have not yet reopened. The NYC Broadway Immigration Court and the NYC Federal Plaza Immigration Court have issued standing orders stating that anyone with a non-detained master calendar hearing who has a lawyer can appear telephonically without filing a motion to ask to appear by phone. There is no guarantee how long the standing orders will remain in place

so it is unclear whether we can assume they will still be in place on any particular date in the future.

LSNYC’s April 2020 Lawsuit In NYC: Ali v. Barr

In April 2020, LSNYC filed a lawsuit in the Southern District of New York challenging filing deadlines in non-detained NYC immigration court cases. In June 2020, the court refused to issue an injunction, concluding it had no jurisdiction to review the case and that we should instead exhaust all avenues of relief by asking for a continuance in immigration court, appealing to the BIA, and then appealing to the circuit court. This advisory will not go into detail about jurisdictional rules under 8 U.S.C. § 1252 or how to sue EOIR about immigration court procedures. Please contact us if you want to discuss that. This advisory will instead focus on key steps that advocates should take to defend specific people on the non-detained docket.

Check existing standing orders for the specific immigration court where the case is. One question is whether postponing the merits hearing for a non-detained case would also postpone the evidence filing deadline in the case. For example, it is not clear from the Immigration Court Practice Manual whether a deadline that a judge set for a specific date would be postponed if the merits hearing is postponed due to Covid. Soon after LSNYC raised this concern, all three NYC immigration courts issued standing orders on May 8, 2020. The standing orders postpone evidence filing deadlines where merits hearings are postponed due to Covid. If you have a case in a NYC immigration court, check whether the May 8, 2020 standing order is still in effect. If your immigration court does not have a similar standing order, either file a motion to get clarification whether a filing deadline will be postponed if the merits hearing is postponed or be ready to argue the issue if it comes up later in the case.

The federal judge in LSNYC’s lawsuit urged advocates to file continuance motions and preserve issues for appeal. If an immigration court unfairly refuses to postpone a filing deadline and it is too dangerous to meet the deadline, consider missing the deadline and preserving the issue for appeal rather than endangering your health. Consider analyzing the ethics rules that apply in your state, which can offer guidance about what to do if the client disagrees with refusing to attend and whether you must withdraw in a manner that reasonably protects the client’s interests.

Advocate Actions

If your client has an upcoming EOIR hearing and you or your client believe that the health conditions that will exist on the hearing date will make an in-person court appearance unreasonable or unsafe for you, your client, or your families, consider taking the following steps:

1. Prepare and file continuance motions outlining public health conditions; practical burdens that arise from working remotely; and health concerns specific to you, your client, or their immediate families.
2. Detail the dangers that clients and advocates may face by being forced to appear in court range from the lack of availability of plexiglass, sanitizer, and masks in the courtroom, to the exposure they may face when using public transportation. This is compounded by the strain on your client’s mental health, knowing that he or she will enter a space that may further expose him or her might cause more anxiety and stress.

3. When possible, outline what evidence would be available to you and your client if the current Covid-19 restrictions were not in place. You are building a record in case you appeal the case later. Therefore, put things into the record if you think our particular immigration judge would already know. It is important to keep in mind the circuit court's standard of review.
4. Include language in your motion to ask to appear by video or by phone if the court denies your motion. Advocates should also request that the client's presence is waived for telephone appearances. If your immigration court currently has a standing order, consider making a motion anyway because the courts have not promised that the standing orders will remain in place. They could rescind the standing orders just before your hearing.
5. If you are submitting a motion to an immigration court that does not have a helpful standing order, consider referring to the other courts' standing orders as something that might persuade the immigration judge to do something similar, even though it is not binding.
6. Before filing your motion, briefly try to find out ICE counsel's position is on the motion. Advocates sometimes reach ICE counsel quickly and ICE counsel sometimes says they do not oppose the motion.
7. We created a template motion of continuance with sample language touching on each of these points. We hope to make revised editions using insights that we get from people who read our materials. Please use a specific link listed at the end of this advisory to obtain the latest edition. The link is only valid for a limited time, so please ask us for an updated link to see if there is a new edition.
8. EOIR has not given information or guidance about how it decides whether to resume or postpone hearings in an immigration court. To the degree EOIR does not give any indication how it decides or whether its decision is purely based on science, argue that there is little reason to expect EOIR to make a thoughtful decision. The low confidence in EOIR's decisions weighs in favor of granting continuances.
9. The sample motion includes some ambitious arguments that will be very hard to convince an immigration judge to grant. Be cautious and think carefully before trying them. For example, if you have little experience with a particular immigration judge, you might skip those arguments if you are concerned that you would make a bad first impression by making ambitious arguments. You might also consider whether making ambitious arguments would actually make a great first impression.
10. Consider filing continuance motions a few months before your filing deadline or hearing. There is no restriction on how early we can file a motion. Your court might have a standing order that says you cannot file a motion by email if it is more than three months before a hearing, but that standing order still allows you to file the materials on paper. The standing order probably only blocks you from filing by email. Check your specific court's standing orders carefully.
11. Watch out that EOIR might lose a motion you submit by email. You should be concerned even if EOIR issues an email receipt. In one case, EOIR sent an automated email receipt but then lost the motion and said it did not think there had been any motion filed. Always assume that EOIR might lose your motion,

even if EOIR emailed that they got it. Call the court if there has been no ruling on your motion and ask whether EOIR has your motion.

12. Consider at some point asking for subpoenas and document production about key facts. If the immigration judge seems unsure whether EOIR lacks science-based justification for resuming hearings, ask the judge to approve a subpoena to compel EOIR to produce documents about how they go about deciding when to resume hearings, who makes the decision, where they get their data, and when they decide to close courthouses. Depending on your immigration judge, you might not ask for this immediately if you hope the judge will take notice of all these facts and grant your motion.
13. Please give us case stories and feedback at this Google Form so that we can update our materials: <https://forms.gle/BJ8aPBHuacVBjEiJA>

Additional Issues

Timing: Whether to submit a motion for continuance 30, 60, or 90 days before the hearing depends on the views of the advocate and the client. File continuance motions as soon as it is clear that it is unreasonably difficult to prepare the case. If you are unsure how soon the court will rule on your motion, consider filing your motion even earlier.

NYC Broadway Court and NYC Federal Plaza Court Standing Orders: The current standing orders at the NYC Broadway Court and the NYC Federal Plaza Court say that all master calendar hearings for represented respondents will be conducted telephonically without the need for us to ask to appear by telephone. They also waive the presence of represented respondents for master calendar hearings. If you are prepared to attend the hearing telephonically despite how it is imperfect, we recommend that you file a motion to appear by telephone and to waive the client's appearance. You should ask for this even if a standing order grants this because there is no guarantee that EOIR will leave the standing order in place. EOIR has said that in some courts, they have set up a system for some immigration judges to review motions. It is unclear how many judges review the motions or how long they take. Please be aware that for any merits hearing, if you want to appear by phone, you must file a motion for telephonic appearance before the hearing. The standard orders say that your motion must include a sworn affidavit or declaration from the client indicating that he or she has waived the right to proceed in-person. Please be aware that appearing by phone for a merits hearing is not ideal and the immigration judge may require you to sacrifice some of your rights.

Standard of Review: many circuit courts apply a very deferential standard of review to an immigration judge's refusal to continue a case. That will make it harder to win on appeal. You should keep in mind what you would need for a circuit court appeal when you file your continuance motion because you should put enough evidence and legal arguments into the record so that if the immigration judge rules against you, you would be in the best possible position to appeal. The Second Circuit usually will not grant an appeal of an immigration judge's denial of a continuance motion unless there is: (1) an error of law, (2) a clearly erroneous factual finding, or (c) the decision is not within the range of permissible decisions. It is very difficult to win a circuit court appeal. In addition, it is very time-consuming and expensive to appeal to the BIA and then to appeal to a circuit court.

Conclusion

EOIR has not properly addressed everyone’s concerns about health, safety, and access.

Consider filing continuance motions in every case until EOIR proves that it will use appropriate procedures that protect the health and safety of clients, advocates, and EOIR staff. Please give us suggestions and feedback so that we can revise this advisory and the sample motion to help defend immigrants across the country.

The primary authors of this practice advisory are LSNYC Immigration Director Rex Chen, LSNYC Summer 2020 Intern Catherine J. Perez, and LSNYC Summer 2020 Intern Jessica YH Wang. Special thanks to AILA and I-ARC for analyzing continuance motions and to the LSNYC team that litigated in the Southern District of NY, which included Rex Chen, Veronica Cook, Ana Guillcatanda Paguay, Carolina Guiral Cuervo, Isabel Heine, Adam Heinz, Luis Henriquez Carrero, Grace Huddleston, Ed Josephson, Michal Katcher, Pavita Krishnaswamy, Chris Lamb, Roopal Patel, Stephanie Taylor, and Razeen Zaman. We also appreciate everyone who has been working on immigration court issues, including Innovation Law Lab, Southern Poverty Law Center, Perkins Coie LLP, the National Immigration Project of the National Lawyers Guild, Cleary Gottlieb, AILA’s NJ Chapter, Gibbons P.C., and the National Association of Immigration Judges. Keep fighting!

Related materials

We are providing a sample continuance motion as a separate Word file.

Please give us feedback at this Google Form: <https://forms.gle/BJ8aPBHuacVBjEiJA> You can submit feedback anonymously. Thanks!