Removal Hearings

Adapted from Philip G. Schrag, et al, Asylum Law Manual (Center for Applied Legal Studies, Georgetown University). This article was adapted by the Immigrant and Refugee Rights Project, Washington Lawyers' Committee from course materials prepared by the Center for Applied Legal Studies (the asylum law clinic at Georgetown University Law Center) and is used by permission from Georgetown University and the authors.

I. The Master Calendar Appearance 2

II. Pleading 3

III. Pre-Hearing Contacts With Officials 4
- A. Meetings with the DHS Trial Attorney 5
- B. Motions 6
- C. Pre-Hearing Conferences 7
- D. Prohibition Against Ex Parte Contact 8

IV. Preparing for the Hearing 8
- A. Hearing Plan 8
- B. Preparing Your Client 10
- C. Preparing Your Witnesses 12
- D. Moots 13

V. The Hearing 13
- A. The Hearing Process 13
- B. Note-taking During the Hearing 16
- C. The Judge's Decision 17

VI. Hedging Against a Loss 18

VII. Special Issues 18
- A. Rebuttal Documents 18
- B. Compromise Offers 19
- C. Voluntary Departure 20

Removal Hearings[1]

Your client may be facing a removal hearing as a result of any of three procedural events: (a) your client may have applied affirmatively for asylum and after being interviewed by an Asylum Officer was referred for a removal hearing; (b) your client may have been apprehended at the border because s/he did not have a valid visa to enter the United States,[2] or (c) your client may have been apprehended within the United States before making any asylum claim. In all of these circumstances, the client may claim asylum as a defense to removal.

The removal hearing may offer a better chance than an Asylum Office interview to present a case, because due process will be afforded in both a technical sense (e.g., the opportunity for you to direct your client's testimony, which you could not do in an Asylum Office interview, and the requirement that reasons be given for the adjudicator's decision) and in a practical sense (the Immigration Judge may not have as rushed a schedule as the asylum officer). However, a removal hearing is also something of a "last chance." Although a denial can be appealed to the Board of Immigration Appeals and then to the Federal Court of Appeals, relatively few decisions by Immigration Judges are overturned and your client will generally not be able to obtain work authorization pending appeal, if s/he had not obtained it prior to the Immigration Judge's denial of the asylum claim.

I. The Master Calendar Appearance

---

[1] Hearings held before April 1, 1997, were termed "deportation hearings" or "exclusion hearings" depending on whether the alien had entered the United States (and the government was seeking to deport the alien) or had been apprehended at the border (in which case the government was seeking to exclude the alien). The procedural rights of the alien were affected by the type of hearing. For example, appeals from Board of Immigration Appeals decisions in deportation cases were lodged in the Courts of Appeal, while appeals in exclusion cases went to a U.S. District Court. Section 304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), P.L. 104-208, Division C, replaced these types of proceedings with a single "removal proceeding." Certain provisions contained in IIRIRA purport to strip federal courts of jurisdiction over immigration matters. However, federal courts still retain jurisdiction over asylum-related issues and such appeals must be filed with the Court of Appeals.

[2] If this is the case, and your client arrived in the United States after April 1, 1997, then it is likely that your client was already subject to expedited removal procedures, during which s/he was required to prove to either an Asylum Officer or an Immigration Judge that s/he had a so-called "credible fear of persecution." Failure to meet this burden would have resulted in expedited removal of your client to his or her home country. The phrase credible fear of persecution is carefully defined to mean "that there is a significant possibility, taking into account the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum." Persons who pass the "credible fear" stage are then granted a full blown hearing before an Immigration Judge.

The Notice to Appear requires the respondent to appear before an Immigration Judge at a Master Calendar hearing, an event at which procedural details (such as whether the respondent needs counsel and an interpreter) are attended to and an Individual Hearing date is set. In some cases (e.g., where the first Master Calendar resulted only in a continuance so that the respondent could obtain counsel, and the client was told to return), a client appears at more than one Master Calendar. If your client has not cleared background and security checks by the date of the Master Calendar hearing, it is possible that the Immigration Judge will not schedule an Individual Hearing, but will instead schedule another Master Calendar hearing.

II. Pleading

At a Master Calendar hearing, the respondent will be asked to plead to the charge that s/he is inadmissible or deportable.[3] (If your client was represented by someone else, the pleading may have occurred before you received the case). To plead for your client, you must:

- carefully review with your client each of the allegations in the Notice to Appear and the relevant facts underlying the charge of deportability;
- admit or deny each of the allegations in the Notice to Appear;
- concede or contest that your client is inadmissible or deportable as charged;
- request asylum and any other relief that may be applicable.[4] In most cases you will seek relief in the form of withholding of removal and/or withholding under the Convention Against Torture, in the alternative, if asylum is denied. Asylum is almost always the preferred form of relief but may not be available because of one-year deadline or other bars. You may also request alternative relief in the form of voluntary departure;

---

[3] Pleading is often done in open court, during a Master Calendar, but the rules permit an alternative procedure of serving and filing a written pleading in advance. See, e.g., Arlington Office of the Executive Office for Immigration Review, Local Operating Procedures, Procedure 3 (B) (which also specifies filing requirements). If there is no other need to be present at a Master Calendar appearance (e.g., to work out a date for the hearing), a representative may use this alternative procedure to avoid having to go (with the client) to court.

[4] If the respondent has not previously filed an I-589 form (i.e., asylum is being claimed for the first time as a defense in a removal proceeding), the I-589 must be filed with the Judge at a Master Calendar hearing. A new I-589 cannot be filed by mail or at the window. See EOIR Operating Policies and Procedures Memorandum (00-01 rev. 8/1/01). If your client's affirmative application was "denied" rather than "referred", then you must also submit a new I-589 at a Master Calendar hearing. If the client was referred from the Asylum Office, the I-589 is already considered filed and is part of the record before the Court.

- state whether an interpreter will be needed;
- state what country your client should be deported to (subject to the willingness of that country to receive your client), if removal is ordered;[5] and
- estimate how many hours of hearing time you will need.[6]
- advise the Court whether there is a companion case which should be heard jointly with that of your client. This is particularly applicable in the situation where both a husband and wife may be in proceedings simultaneously. Because the facts of their cases often are intertwined, it may be appropriate to ask the Court to hear the cases together.

Immigration attorneys have different approaches to pleading, particularly with respect to admitting deportability.[7] Some make this admission routinely unless they have a basis for claiming that their client is not removable. By doing so, they demonstrate to the court that they are only asserting an asylum claim and that they are not engaged in an effort to try to keep their client in the United States through some procedural technicality. Other attorneys believe that lawyers should force the government to carry its burden of proof, in the case of aliens who have entered the United States, on the issue of deportability.[8] There appears to be no literature on criteria lawyers might use for a case-by-case determination of when to deny deportability, or whether that decision should be made by the lawyer or the client.

III. Pre-Hearing Contacts with Officials

---

[5] An alien has a right to designate any country (other than Canada or Mexico) to which removal should be made. But as you counsel your client, consider whether a designation of your client's own country will be construed as evidence that your client doesn't really have a well-founded fear of persecution. Some representatives reserve designating until the hearing on the merits. If, at that time, your client does not designate a country for removal, the court will order removal to the client's country of origin. Therefore, be sure you have discussed this with your client before the hearing on the merits.

[6] Local Operating Procedures for Arlington and Baltimore. Hearings tend to last from two to five hours.

[7] This admission means that the applicant concedes that s/he does not have a lawful right (e.g., U.S. citizenship or a visa) to remain in the United States, aside from defenses such as a claim of asylum.

[8] Some advocates believe that conceding deportability "is often a mistake. The government must establish by clear and convincing evidence that the respondent is deportable. Frequently, the government alleges facts which are not true or which it cannot prove. By requiring the government to prove its case, sloppiness and factual defects in the government's evidence may be uncovered which would otherwise go undetected. If the government cannot meet its burden, the case will be terminated." Immigrant Legal Resource Center, Winning Asylum Cases 10-6 (1993 ed.). Frequently, however, the government will have all documents necessary to establish deportability, as alleged on the Notice to Appear, in the government file. On occasion, the trial attorney will even let the client's attorney review the file, if asked.

You might decide that your client's case would be helped by some contact with officials before the day of the hearing. There are three methods by which such contacts might occur: (a) informal meetings with the opposing counsel assigned to the case, (b) motions, and (c) pre-hearing conferences. A fourth possibility, meeting with or speaking to the Judge informally, without opposing counsel present or on the telephone, ordinarily constitutes an improper ex parte contact with the adjudicator.

A. Meetings with the DHS Trial Attorney

You may see some benefit in meeting with the DHS Trial Attorney (i.e., the opposing attorney) before your client's removal hearing. For example, if you have a very strong case, you might be able to persuade him or her not to contest the application for asylum. Although you may still have to go through with the hearing (because the Judge may want to have a record justifying a grant of asylum), the trial attorney's statement that the government is not contesting the case will make success very likely.[9] Even if you can't achieve a full concession on the merits, one or more conversations with the trial attorney may have some benefits. For example, the trial attorney may concede one or two sub-issues; s/he may show you the file with any evidence against your client; you may learn what lines of cross-examination the government plans to pursue; and you may be able to obtain written stipulations as to facts, or as to the admissibility of documents that you plan to offer into evidence. Judges welcome stipulations, because they make hearings run more smoothly. Some judges may even frown on your failure to contact the trial attorney to resolve such issues before the hearing.

On the other hand, many trial attorneys are so busy that they usually do not even open the file on a case until just before the hearing, and your request for a meeting may cause the trial attorney to prepare for the case more thoroughly than s/he otherwise would. Furthermore, while you would probably hope to learn something about the government's case in any such meetings, you are unlikely to leave such meetings without also revealing something of your client's case. That's not necessarily bad, because you may reveal a strong case, or the government might already know about any weaknesses, or you might be confident that those weaknesses will soon emerge anyway. A decision about whether to initiate contact with the trial attorney must

---

[9] Be prepared for a full adversary hearing, however, because opposing attorneys sometimes change their minds at the very last minute.

therefore be made on a case-by-case basis. Because they are so busy, DHS trial attorneys rarely if ever initiate contact with respondents' representatives.[10]

The Baltimore Office of the Chief Counsel assigns cases to trial attorneys 30-60 days before the hearings, which will facilitate early communication with opposing counsel. In Arlington (the Washington office), trial attorneys are often not assigned until closer to the merits hearing date (approximately two weeks).

It should be noted that contacting the trial attorney is not necessarily easy. The trial attorneys are responsible for many cases and spend much of their time in court. Therefore, it is possible to leave telephone messages for them, but it may be difficult to find a time when they are in their offices, and they may not return your calls.

Mail is equally problematic. We have found that letters about cases that are sent to trial attorneys or to the Chief Counsel are often put unread into the file, and looked at only on the day of trial. If you are sending a letter or document to the trial attorney that you want the trial attorney to read, it is best to alert the trial attorney by telephone that a letter is on its way. You might ask for permission to fax the document.

B. Motions

The regulations permit you to serve and file written motions,[11] and the local rules authorize but do not require Judges to permit oral argument on such motions.[12] Some common motions are motions to schedule cases for individual hearings, motions to permit telephonic testimony, motions to consolidate cases of two family members, and motions for depositions.[13]

---

[10] In order to find out who will be opposing counsel in your case, you should contact the Office of the Chief Counsel and find out who has been assigned to your case. If counsel has not yet been appointed and it would be detrimental to wait, then contact the respective Chief Counsels, Javier Balasquide in Arlington and George Maugans in Baltimore.

[11] 8 CFR §1003.23.

[12] Executive Office for Immigration Review, Arlington and Baltimore, Local Operating Procedure 1.

[13] While an Immigration Judge may issue subpoenas for witnesses and order depositions, your client has no right to discovery from the government. 8 CFR §1208.12. You must use FOIA to obtain documents about your client from the government. In 1992, the government settled Maycock v. INS, No. C-85-5169 (N.D. Cal., May 22, 1992) by issuing a memorandum (reprinted at 69 Interpreter Releases 916, July 1992) directing its officials to expedite FOIA requests when a person's life or safety would be threatened by failure to process the request immediately. We do not know of any precedent on the question of whether governmental failure to honor a FOIA request requires a Judge to postpone a hearing or whether the employment authorization clock would stop running during such a postponement.

But there exists no exhaustive list of the types of motions a lawyer can make. The common law has grown, in part, through lawyers inventing new types of motions.

If you make a motion, take note of the local formal requirements, particularly the requirement that you include three copies of a proposed order for the Judge to sign. Don't forget to serve the opposing counsel and to give the Court a Certificate of Service so that the Court will know that you served the motion on the government.

Formal motions involve a fair amount of work – for you, the government, and the Court. Sometimes, it is possible to avoid some of this work (e.g., writing a memorandum of law in support of the motion) by asking the opposing counsel to consent to the motion, and then informing the court, in your motion, that the government's lawyer has consented. If you follow this procedure, your motion should state the name of the particular lawyer who consented. Even with consent, you must serve and file the motion, but there is a high likelihood that the Court will grant the motion because of the consent.

An application for issuance of a subpoena (to a witness unwilling to appear in court) is not a formal motion. However, like a motion, it should be submitted well in advance of the scheduled hearing, so that it can be served on the witness in time.[14]

C. Pre-Hearing Conferences

The regulations also permit Judges to hold pre-hearing conferences "to narrow issues, to obtain stipulations between the parties, to exchange information voluntarily, and otherwise to simplify and organize the proceeding."[15] Some judges hold such conferences routinely, others don't. If you think your client would be helped by a pre-hearing conference, you may request one (in writing, with a copy to opposing counsel). If you want to meet with the Trial Attorney, for example, but you can't get your phone calls returned, a request for a pre-hearing conference might solve the problem. Or you might think that a pre-hearing conference that educated the

---

[14] See 8 CFR §1003.35 for the requirements of subpoena applications. Motions and requests for subpoenas, like other strategic choices, should be carefully considered and evaluated in original and revised case plans.

[15] 8 CFR §1003.21(a).

Judge about the case would be beneficial in its own right,[16] or might give you some idea – in time for remedial action – about what aspects of your case the Judge thinks are weak.[17]

D. Prohibition Against Ex Parte Contact

Ex parte contact is contact between one party and the Court outside of the presence of the other party or parties. Ex parte contact regarding the substance of a case is strictly prohibited. Therefore, nearly any time you have contact with the court you must ensure that it is in the presence of an opposing attorney. Similarly, any written materials that you submit to the court – whether it is a letter, a motion, a brief, or exhibits – must also be sent to the opposing counsel. Some small allowances for contact are permitted with regard to administrative matters. For instance, you may contact the clerk of the court or a judge's clerk to handle such administrative matters as determining whether a motion has been ruled upon, a hearing date has been set, or a filing has been received. You may also contact the clerk to arrange a time to review the file that the Immigration Court has on your client.

IV. Preparing for the Hearing

A. Hearing Plan

You might want to draft a hearing plan to help you prepare. Such a plan might include:

- your goals for the hearing (more detailed than merely "winning");
- your plans for preparing for the hearing;
- the division of labor between the attorneys working on the case before and during the hearing;
- obstacles you face;
- any unusual legal issues that may arise, your research to date on those issues, and what research remains to be conducted;
- a description of any factual research still to be done;
- whether you plan to file a brief (if so, why, and if not, why not);

---

[16] "The conference should be viewed as an opportunity to begin familiarizing the Judge with the complexities of the case which will be heard later." Lawyers Committee for Human Rights, Representing Asylum Applicants 12-1 (interim ed. 1993).

[17] Your client might or might not attend a pre-hearing conference, and this variable further adds to the possibilities for such an event.

- any pre-hearing contacts with officials that you have had or anticipate, and what you are doing to achieve those contacts;
- any preliminary matters that may come up at the beginning of the hearing (e.g., problems about interpreters);
- whether you want to make an opening statement, and, if so, what you want to accomplish in it;[18]
- what facts you plan to elicit from your client, any possible weaknesses in your client's direct testimony, and how you intend to address these;
- what witnesses (including expert witnesses) you plan to call, in what order, and what you expect each of them to say, keeping in mind that most or all of the hearing rooms are equipped with speaker phones for taking testimony, if need be, from witnesses who are unable to attend the hearing, including witnesses who are abroad;
- what witnesses the government might call and your plan for refuting the substance and/or credibility of their testimony through cross-examination;
- what documents you plan to pre-file and introduce, the reason for introducing each of them, any evidentiary problems you anticipate, and your plans for overcoming those problems;[19]
- the weaknesses in your case, including any adverse evidence that may be in the file or introduced and any difficult cross-examination that may be expected, and how you plan to deal with these weaknesses;
- any models or visual aids you plan to use, and any evidentiary problems involving them;
- what you want to accomplish in your closing statement;[20]

---

[18] It is our experience that most Judges in Baltimore and Arlington permit opening statements.

[19] As discussed, the Rules of Evidence do not apply strictly in immigration proceedings, but the Judges often uphold evidentiary objections by either side. Thus, leading questions are usually not permitted on direct examination, and although evidence that could be excluded as "hearsay" in a court can be admitted, sometimes Judges exclude hearsay if an objection is made. Even before a Judge who says that s/he does not apply the Federal Rules of Evidence, an opposing counsel, applying the evidentiary standard of "fundamental fairness," might nevertheless claim that your evidence is so unlikely to be reliable that it should be excluded, or a Judge might accept your evidence but discount it because of a flimsy foundation. The closer you can come to compliance with the rules of evidence, the more confident you can be that you won't have a problem.

- anything else you think important; and
- a revised calendar, showing when everything will happen between now and the hearing date. The calendar should include, among other things, dates for filing exhibits and a date for the moot.

B. Preparing Your Client

You should prepare your client well for the moot and the hearing. Before the formal moot, you should explain the stages of the hearing. Advise your client that there may be preliminary skirmishes between you, opposing counsel, and the Immigration Judge about legal issues or admission of evidence before the client is called to the stand. Make sure you give your client a copy of the entire asylum application and affidavit for review and study. If your client does not speak English, a cassette recording of the affidavit in her native language might be helpful. You should go over the story with your client again, first in a general way, and then in question-and-answer format, so that your client can get used to testifying. As you prepare, you can refine your direct examination questions, and your client can sharpen his or her answers to those questions. After you practice the revised direct examination questions and answers, you should give your client experience in answering probing cross-examination questions, particularly about any inconsistencies revealed by the documentary evidence (e.g., within the I-589 form, or between that form and other documentation). If you have asked the court to supply an interpreter, use an interpreter for the rehearsal sessions (and the moot) so that you and your client can get used to the pace of interpreted testimony.

As you prepare your client, keep in mind your legal theory. It will help to determine what you must show in order to carry your burden of proof, and what other evidence may help to persuade the Judge to rule in your favor.[21]

---

[20] Often, closing statements are used to draw favorable inferences and conclusions from the evidence, to apply the facts of your case to the law, and to address any problems that have arisen during the hearing, particularly problems that the Judge apparently regards as significant. To this extent, closing statements cannot be fully planned in advance, and they must be extemporized after representatives see what happens during the hearing. Nevertheless, a representative can establish goals and can make contingency plans for a closing statement, in case there are no glaring problems. Some Judges typically do not permit closing statements.

[21] At this point you might want to reflect again on the advantages and disadvantages of sharing with your clients your ideas on legal theory.

Your client's testimony will be under constant scrutiny as the Judge focuses on making a credibility determination. In making this determination, the Judge will evaluate factors such as inconsistencies in your client's testimony, inconsistencies between your client's claim and country reports, and inconsistencies between your client's testimony and the affidavit. As you prepare for the hearing, your client may remember or reveal new information, even at this late date. You probably want to encourage rather than discourage this development. It is better to learn this information now than to learn it for the first time just before – or during – the hearing.

If your client's memory is poor, rehearsal may be a good way to refresh it. If your client's memory nevertheless fails during the hearing and your client says that s/he cannot remember facts in response to your question, keep in mind that you can refresh his or her recollection with documents that s/he has previously seen that are in evidence, including his own I-589 form and affidavit.[22] Another method of refreshing a witness's recollection is to prompt the witness with leading questions, but these are objectionable on direct examination, and the Judge may well instruct you not to lead a witness, whether or not opposing counsel objects. You should remind your client that it is perfectly fine to state that s/he does not remember facts in response to a question by you, opposing counsel, or the judge. S/he should never make up facts in response to a question. It is much more important to be honest than to be able to recollect facts in response to every question.

It is also important to remind your client that s/he should understand every question before s/he begins to answer it. If the question is vague or otherwise difficult for the client to understand, remind him or her of the right to have the question repeated or reframed before answering. Encourage him or her to ask that a question be repeated or rephrased during the hearing if s/he doesn't understand it.

Also keep in mind that the Judge's credibility determination will hinge, in part, on an evaluation of your client's demeanor. As you prepare your client, you may want to consider the kinds of non-verbal messages your client is sending and how they may influence the Judge. For instance, what if your client does not make eye contact with you, the Judge, or the opposing attorney? How may that influence the credibility determination? What can you do to improve the Judge's perception of your client? Does your client want to try to make eye contact despite

the fact that it is a sign of disrespect in his or her culture? Or would you prefer to elicit testimony to explain to the Judge why your client is not making eye contact? What are the advantages of each approach? What are the risks?

C. Preparing Your Witnesses

You should also prepare your witnesses well for the moot and the hearing. If the witnesses have never before testified in court (which is often the case for relatives and friends of the applicant), you should prepare those witnesses in the same way that you prepare your client. Other witnesses, such as expert witnesses, may have considerable experience testifying in court settings. For example, expert witnesses may have testified in several other asylum hearings. Even though they have experience, you should nevertheless prepare expert witnesses for your case. They should be aware of the particular facts of your client's situation and know what issues you would like them to testify about. The trial attorney may imply that your client lacks credibility, trying to weaken the subsequent witness' support for your client's asylum application – for instance, the Trial Attorney may ask psychological experts about whether the client could be malingering. You must prepare witnesses for such tactics.

If at all possible, helpful witnesses should testify in court. If a witness is unable to attend the hearing in person, there are several ways to try to enter the testimony into the record. The easiest is to have the witness testify telephonically,[23] although you will likely need to file a motion for this purpose and some judges do not permit such testimony at all. Alternatively, you could ask the witness to write an affidavit documenting his first hand knowledge about the issue(s) you want him or her to discuss and his or her basis for such knowledge. In virtually all cases, judges will accept such affidavits without more, particularly if you can show that the witness is unavailable. If you believe the government will object to your affidavit, you can plan

---

[22] Federal Rules of Evidence 612. See also, Steven Lubet, Modern Trial Advocacy, 2d ed, pp. 158-59.

[23] If the judge or trial attorney object to expert testimony by telephone, you may wish to refer to a BIA Index decision in which the Board found that the IJ should have permitted testimony from the expert by telephone. Note that ultimately, however, the BIA held that the asylum-seeker suffered no prejudice and did not reverse the denial of his claim. In re ___, BIA Index denial (July 19, 2000). Copy on file with WLC. The past practice in hearings has been that at the appropriate time, the Judge turns the phone over to counsel, who dials the number at which the witness can be reached. Generally the government pays for the call. Note that the Regulations provide an alternative method for using the testimony of someone who cannot be at the hearing: depositions. 8 CFR §1003.35. If you want to take a deposition, make a plan long in advance, because you will have to make a motion, arrange for the deposition, and obtain a stenographic record or, if the Judge permits it, a tape recording.

ahead and offer them one of two possibilities: (a) a telephonic deposition, with the witness sworn by a notary on the phone, which would then be transcribed and submitted to the court, or (b) written, sworn answers to interrogatories, in response to questions opposing counsel submits.[24] If the government refuses to do either of these and you still believe they will object to an affidavit because of the inability to cross-examine, you can ask the judge for a pre-hearing conference. A Judge who won't allow telephonic testimony will probably browbeat the government into either waiving cross and accepting the affidavit or going with the deposition or interrogatories. Alternatively, in some cases you may wish to simply accept a ruling of the Court admitting the affidavit with the understanding that its weight may be diminished as a result of the trial attorney's inability to cross-examine the witness.

In general, if the asylum applicant has close family members in the area, it may be advisable to ask them to come to the hearing and be prepared to testify if necessary. Some Immigration Judges draw a negative inference if family members are not available for this purpose.

The Immigration Courts will usually provide interpreters for any witnesses you may have. In the case where a witness speaks a different language from the applicant, you must request an interpreter for that witness in writing. It is also advisable to telephone the court before the hearing to make sure an interpreter will be provided for the witness.

D. Moots

We strongly encourage all volunteer attorneys to conduct a moot hearing to provide you, your client and other witnesses a realistic practice session. Preparing for, and conducting, such a mooting is a major undertaking, and should be extremely valuable for all concerned.

V. The Hearing

A. The Hearing Process[25]

---

[24] It might be possible to use US Embassy facilities for depositions in other countries.

[25] You may wish to view Attachment A for some suggestions on items to bring to Court and things to keep in mind during the hearing.

Be certain that your client arrives on time,[26] because if the respondent fails to appear, the Judge can hold the hearing anyway and order removal.[27] Bring paper, pens, your case file and sufficient copies of any documents you hope to submit that have not already been submitted; don't forget a copy for opposing counsel.[28] In addition, you should have a copy of all relevant legal authority, such as the statute, regulations, relevant case law, this Manual, and any other information you may need to rely on. Also be sure to bring your client's original passport, if any, and the originals of any documents submitted, such as any personal identity documents (birth and marriage certificates), police/prison /medical records, affidavits, etc. If you are going to ask for voluntary departure as an alternative remedy, your client should also have the travel documents needed to show that s/he will be able to depart for another country. Remember to turn off all pagers and cell phones.

The hearing will presumptively be open to the public, but you may request and the Judge may order a closed hearing. This is a judgment call which you and your client should discuss. If your client is worried that things he or she might say could lead to reprisals against relatives in another country, s/he might prefer a closed hearing. On the other hand, if the human rights abuses are egregious, you and your client might want to invite members of the press, to convey to the Judge that his or her decision will have high visibility. Whether the hearing is open or

---

[26] In Baltimore, your client will not be allowed upstairs (to the court room floor) without a photo ID or hearing notice. It is best either to take your client to the hearing or to meet your client at the guard desk on the first floor.

[27] 8 CFR §1003.26. If an alien fails to appear for a hearing, the Immigration Judge may order him or her deported "in absentia" where the government demonstrates by clear and convincing evidence that written notice was provided in person or by certified mail either to the respondent or his or her representative. If ordered removed "in absentia," an alien is barred for ten years from the date of the removal order from requesting voluntary departure, cancellation of removal, registry, adjustment of status, or change of status. This bar applies only if the alien received both written and oral notice of the hearing in the alien's native language or a language he or she understands. The only exception is when the person failed to appear due to "exceptional circumstances beyond the control of the alien," which is very narrowly defined by the Act. If a person can demonstrate such "exceptional circumstances," a motion can be filed within 180 days of the order to set it aside and reopen the hearing. It goes without saying that it is very important for you to do what you can so that your client does not miss the hearing or arrive late.

[28] As noted above, if you have not pre-filed an exhibit, it probably will not be accepted by the Judge without a particularly extraordinary explanation for the delay in submission.

closed, you should consider inviting other attorneys from your firm for the purpose of familiarizing them with the process, and encouraging them to accept such cases.[29]

In the hearing, you should simply execute the most recent version of your hearing plan – and also be flexible enough to react to any surprises.[30] You will deliver an opening statement, present direct testimony from your client and any other lay or expert witnesses, redirect the witnesses after any damaging cross-examination, introduce documents into evidence, cross-examine any adverse witnesses, and make a closing statement (if permitted).[31]

Two other points regarding Immigration Court hearings deserve some mention. First, the Immigration Court has no formal rules of evidence. However, EOIR has given all Immigration Judges a two-volume "Bench Book" collecting principles of evidence applicable to immigration cases. (The Bench Book is available at asylumlaw.org). Most of the book is concerned with issues that do not arise in asylum cases. We should caution, however, that the "rules" in this Bench Book are not necessarily followed by or binding on particular judges, and we are not even sure that all of the Immigration Judges in Arlington and Baltimore are aware of them. That is, the Judges might not apply these principles either in your favor or against you. Put another way, these "rules" may be more in the nature of tools that you or your adversary might use, and some may have more binding effect, or more binding effect for particular judges, than others.

---

[29] The opposing lawyer will probably invoke "The Rule" in which witnesses who will be testifying, other than your client, must leave the court room until they testify.

[30] Sometime during the hearing (preferably at the beginning), you should see that the records of both the opposing counsel and the Immigration Judge reflect the correct spelling of your client's name. If the name has been misspelled on Court or government documents, which often happens, you should also inform the Court in writing of the misspelling. If the misspelling is not corrected, problems may arise when your client applies for an employment authorization document as the government relies on the Court Order for the proper spelling. If you think it might be helpful in your particular case, you may also want to provide the Immigration Judge and opposing counsel with a list of key names, places, etc., with the proper spelling to facilitate their ability to follow your client's story. You should make sure that the Court and the government have correct addresses for your client and witnesses.

[31] If the case involves an alien who has entered the United States, and deportability has been conceded, then your client has the burden of showing that he or she should be granted asylum. Therefore, you make the first opening statement, put your case on first, and make the first closing statement. If you have contested deportability, the opposing lawyer goes first. Also, if you have submitted a new Form I-589, the Judge may begin the proceedings by having your client swear to the contents of the application and sign it. If any changes need to be made to the I-589 (e.g., if your hearing preparation has revealed additional or different facts from those you wrote in the I-589 filing), you should advise the Judge of the need for changes, before your client swears to the application's contents.

Second, explicit EOIR policy requires that Immigration Judges limit off-record dialogue.[32] As soon as an off-record discussion is completed, the Immigration Judge must summarize the discussion on the record. If your judge or opposing counsel attempt to go off-record, you should, ordinarily, insist that these procedures be followed (unless there is some strategic advantage to keeping off the record). It is very important to have a complete record for any appeal.

B. Note-taking During the Hearing

Few of us can conduct a hearing and take notes at the same time. It will be helpful to you to have an assistant or co-counsel at the hearing to accomplish some essential functions. The first of these other functions is to observe everything in the court room, including the reactions of the opposing counsel and of the judge. The second is to make unobtrusive suggestions, when necessary, to the partner conducting that part of the hearing. These suggestions could be made through whispers, notes, or (if the matter can wait), conversations during recesses, but of course they have to be made in a way that will not be disruptive. The third is to take very accurate notes, in part to recall exactly what was said by the witnesses during the hearing (for use in cross and redirect examination, and in crafting a closing statement), and in part because a good record of what transpired may be necessary for a Notice of Appeal.

Taking accurate notes when the words are whizzing by is an art, and some tricks may help. We are rapidly moving into the electronic age, and if you have a laptop and enough battery life (don't count on plugging into the courtroom's sockets), you might take notes on a computer. But if you plan to take notes by hand (they may be easier to review on a pad than on a screen anyway), you could think of methods that would simplify your task. For example, you could try drawing a line down the middle of your pages before you start. On the right side of the line, writing as quickly as you can, you could try to write the exact words of key questions and answers. On the left side, you could make quick notes to yourself or use symbols such as stars and arrows to mean "come back to this on redirect," or "mention this in closing."

Taking a lot of notes during a hearing may seem difficult at first, but it's not impossible. Not all areas of testimony or legal argument are as critical as others. What may enable you to

---

[32] OPPM 03-06, Procedures for Going Off-Record During Proceedings, October 10, 2003, can be found at http://www.usdoj.gov/eoir/efoia/ocij/OPPMLG2.htm.

write quickly enough to take near-verbatim notes on crucial subjects is your knowledge of what is really important in the hearing, so that you can focus your concentration and energy on those portions of the testimony or argument.

You may also want to create a comprehensive Exhibit Check List of all documents which the court admits into evidence on its own initiative, at your request and at the request of the government. This list should name each document (or have a space to insert the name of documents which will be introduced at the hearing by the government) with a space beside each item to check off as admitted or not admitted into evidence by the court and the number of the exhibit assigned by the court. Remember to include all the normal items which the court itself introduces into evidence as part of the record of proceedings – such as the NTA, and the asylum application itself. Of course, your list should include all of the supporting documentation which you wish entered into evidence. Generally, the same documents are entered into evidence by the court in most asylum hearings. There are not many surprises.

C. The Judge's Decision

At the end of the hearing, the Judge will probably deliver an opinion from the bench. Don't be surprised if you are not able to determine the final grant or denial until the very end of the Immigration Judge's oral decision. Some judges keep lawyers in suspense until the last sentence, creating emotional highs and lows while delivering the decision. You and your client will typically know by the end of the hearing whether asylum (or withholding of removal or protection under the Convention Against Torture) is granted or denied.

On occasion, the judge will not issue a decision at the end of the hearings, but will instead take the case under advisement. If the Judge in your case does this, you will not know the outcome at the end of the hearing. Occasionally judges have continued cases for several days of hearings, spread out over several weeks, when an initial hearing did not allow enough time. Both you and your client should be aware of this possibility before the hearing.

If asylum, withholding, and CAT are denied and you asked for voluntary departure as alternative relief, the Judge will probably set the conditions for voluntary departure at this time.

<u>You should make detailed (preferably near-verbatim) notes during the Judge's rendition of an opinion</u>. This is especially true if the opinion is a denial since the notice of appeal, due thirty days after the decision is served, must include a statement of alleged error(s). If the

opinion is favorable, there is still a possibility that the government will appeal, so your notes will prove useful along with the Court transcript. Be sure to check the Court's order to see whether the Judge has indicated whether or not the government has waiver or reserved appeal. If the government has waived appeal, that will expedite your client's ability to get refugee benefits, as well as an I-94 and work authorization.

VI. Hedging Against a Loss

If your client does not prevail, the judge will tell you and the client the final date for filing an appeal. The client will have only about 30 days in which to file a notice of appeal. If you decline to represent the client on appeal, the client will have little time to find another representative. Therefore, you should decide as quickly as possible – preferably before the hearing – whether you would be willing to file a Notice of Appeal or commit to handling the appeal itself, if your client should lose. You should also ascertain the filing fee for an appeal and consider whether your client will be eligible for a waiver of that fee. A fee waiver petition appears in the Forms section of this Manual. Finally, if your client is eligible for and is requesting the alternative relief of voluntary departure, notify your client about the $500 bond requirement. These steps will enable you to discuss appeal with your client, and to provide appropriate counseling, in a timely fashion -- if that becomes necessary.

VII. Special Issues

Any number of quirky things might occur in a moot or a real hearing. Some that have proven especially problematic include:

A. Rebuttal Documents

Although DHS is bound by the rules requiring documents to be submitted no later than 10 days before the hearing, occasionally a trial attorney will seek to evade the rule by offering a document solely for "rebuttal" purposes. For example, where a client testifies (on direct and on cross) in detail about the date and location of a particular political rally, the trial attorney may proffer a newspaper article containing contradictory data. Or where a client testifies about the cultural traditions of the ethnic minority he claimed to be a member of, the trial attorney may produce a document describing those traditions in a rather different way, implying that the client was not, in fact, truly affiliated with that group.

When you object to these last minute surprise documents, the government attorney may reply that "rebuttal" documents, offered exclusively to contradict what a witness says on direct, are not required to be produced in compliance with the 10-day rule, because until hearing the direct examination, the trial attorney doesn't know whether s/he will seek to introduce the item. If something like this occurs in your case, you should remain calm until you see what the proffered document actually says – it may not, after all, be very harmful to your case, and perhaps you could fix any problems on redirect. You could also object to admission of the document, based on the 10-day rule, or on some argument about "fundamental fairness" and the avoidance of surprises. You might also ask for a brief recess, or for a few days' continuance, to allow time to figure out how to respond to the new material, although, of course, a motion for a continuance might not be granted and if it is granted, the rescheduled hearing might be calendared for an unpredictable date.

B. Compromise Offers

Sometimes, the trial attorney has suggested, overtly or with some subtlety, a proposed "deal," such as: if the client waives the claim to asylum, the trial attorney will stipulate to a grant of withholding. Sometimes, too, the Immigration Judge participates in this bargaining, perhaps after hearing most or all of the contemplated testimony (and perhaps in an environment in which it has been difficult for us to read the Immigration Judge's attitude regarding the client's credibility and the likely outcome of the case).

This sort of proposed deal is unusual (and, to our minds, obnoxious and illegitimate), but it might be worth considering how to respond, if it is made. Some possible responses (although the pros and cons of each will vary enormously with the situation) could include:

- accept the offer;
- reject the offer;
- try to persuade the trial attorney not to force us to make such an awful choice, but instead agree that the hearing will proceed to its conclusion, and if the Immigration Judge denies both asylum and withholding, the trial attorney will agree to withholding, and the interns will agree to waive any appeal as to asylum; or that the DHS will offer both withholding for the applicant and humanitarian parole for members of the applicant's family;

- reject the offer, proceed with the hearing, and put formally onto the record the fact that the offer was made – in the hope of influencing the Immigration Judge or an appellate body;
- ask the trial attorney what the basis is for concluding that the client meets the higher standard for withholding, but not the lower standard for asylum. If the answer is that the trial attorney is stuck on the one-year bar, or another comparable issue, try to persuade him or her to stipulate to withholding on the record, and proceed to litigate just the issue of the possible bar;
- go over the trial attorney's head, by calling the District Counsel, and try to negotiate a better deal.

Again, it may be worth discussing this delicate issue in advance with your client, and considering how you might respond if the issue arises. You might also address whether, and how, you might wish to integrate this possibility into your pre-hearing mooting or other preparations.

C. Voluntary Departure

Your client may be eligible for voluntary departure and you will need to counsel your client about seeking and accepting voluntary departure if s/he fails to obtain other relief. Voluntary departure may be an attractive alternative to removal because it does not carry the 10 year bar to re-entry that is imposed on individuals who leave the U.S. under a removal order.[33] However, it carries substantial risks for certain clients, which must be carefully calculated. You should contact the organization that referred the case to you to discuss whether voluntary departure is relevant in your case.

---

[33] INA §240B allows an Immigration Judge to grant certain aliens a period of time in which to depart the country voluntarily, in lieu of being removed. The conditions under which a judge may grant this relief are elaborated below.