



Filing Motions Before EOIR

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Best Practices

- ▶ **Follow the Immigration Court Practice Manual -**
 - ▶ Online: <https://www.justice.gov/eoir/office-chief-immigration-judge-0>
 - ▶ Chapter 5 - Motions before the Immigration Court (p. 89) Contains basic requirements for all motions before the immigration courts.
 - ▶ But each specific type of motion may have additional requirements found in other sections.
- ▶ **Obtain DHS position and State it In Your Motion**
 - ▶ This is mandatory (p. 92): “The party filing a motion should make a good faith effort to ascertain the opposing party’s position on the motion. The opposing party’s position should be stated in the motion. If the filing party was unable to ascertain the opposing party’s position, a description of the efforts made to contact the opposing party should be included.”

Best Practices

- ▶ Multiple Motions – When multiple motions are filed, the motions should be accompanied by a cover letter listing the separate motions (p. 93).
- ▶ File as Early as Possible - There is no “mailbox rule” and even motions without a specific deadline may be more likely to be meaningfully considered if filed early enough for the IJ to consider it.
- ▶ Consider your judge



Pretrial Motions

- ▶ Motions to Continue (p. 100)
 - ▶ Should be in writing
 - ▶ Must “set forth in detail the reasons for the request and, if appropriate, be supported by evidence”
 - ▶ Include the date and time of the hearing
 - ▶ List the preferred dates that the party is available to re-schedule the hearing.
 - ▶ For “good cause shown” – 8 CFR § 1003.29 – *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009).

Pretrial Motions

- ▶ Motion to Change Venue (p. 101)
 - ▶ a detailed explanation of the reasons for the request
 - ▶ date and time of the next scheduled hearing
 - ▶ admission or denial of the allegations and charge(s) in the Notice to Appear (Form I-862)
 - ▶ designation or refusal to designate a country of removal
 - ▶ description of the basis for eligibility for relief from removal
 - ▶ Client's address and telephone number
 - ▶ if the address has changed, a properly completed Change of Address Form (Form EOIR-33/IC)
 - ▶ Matter of Rahman, 20 I&N Dec. 480 (BIA 1992), 8 C.F.R. § 1003.20.

Pretrial Motions

- ▶ Motions to Administratively Close
 - ▶ *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012) - DHS doesn't have to agree.
 - ▶ This is the primary vehicle for prosecutorial discretion.
 - ▶ Practice Manual is silent regarding requirements.
- ▶ Motions to Recalendar (p. 103)
 - ▶ Make sure to include a Change of Address Form (EOIR-33/IC).
 - ▶ not subject to any time and number restrictions.

Pretrial Motions

- ▶ Motions to Extend Deadlines (p. 38) - Must list:
 - ▶ When the filing is due
 - ▶ The reason(s) for requesting an extension
 - ▶ That the party has exercised due diligence to meet the deadline
 - ▶ that the party will meet a revised deadline
 - ▶ if the parties have communicated, whether the other party consents to the extension.



Pretrial Motions

- ▶ Motion to Appear Telephonically (p. 76)
 - ▶ State the date and time of the master calendar hearing
 - ▶ Explain the reason(s) for requesting a telephonic appearance.
 - ▶ State the telephone number of the representative or respondent.
 - ▶ Representative's telephonic appearance is not a waiver of respondent's appearance.
 - ▶ Must be available during the entire master calendar hearing.
 - ▶ Cellular telephones "should not be used for telephonic appearances" unless expressly permitted.(p. 76)
 - ▶ Client still must appear unless waived.



Pretrial Motions

- ▶ Motion to Waive Appearance (p. 76)
 - ▶ State the date and time of the hearing;
 - ▶ Explain the reason(s) for requesting a waiver of appearance.
- ▶ You need separate motions to waive attorney vs. client appearance.



Pretrial Motions

- ▶ Motion to Request an Interpreter (p. 77) – Must include:
 - ▶ The name of the language requested, including any variations in spelling
 - ▶ The specific dialect of the language, if applicable
 - ▶ The geographical locations where such dialect is spoken, if applicable
 - ▶ The identification of any other languages in which the respondent or witness is fluent
 - ▶ Any other appropriate information necessary for the selection of an interpreter.



Pretrial Motions

- ▶ Motion to Present Video Testimony (p. 78)

- ▶ Must include an explanation of why the witness cannot appear in person.
- ▶ Parties wishing to present video testimony must comply with the requirements for witness lists.

- ▶ Motion to Present Telephonic Testimony (p. 78)

- ▶ Must include an explanation of why the witness cannot appear in person.
- ▶ The witness's telephone number and the location from which the witness will testify.
- ▶ Must be available to testify at any time during the course of the individual calendar hearing.
- ▶ Cellular telephones should not be used unless expressly permitted.
- ▶ If international telephonic testimony is permitted, the requesting party should bring a pre-paid telephone card to the Immigration Court to pay for the call.

Pretrial Motions

- ▶ Motion for a Subpoena Duces Tecum (p. 86)
 - ▶ Provide the court with a proposed subpoena
 - ▶ State what you expect to prove by such witnesses or documentary evidence
 - ▶ Show affirmatively that you have made diligent effort, without success, to produce the witnesses or documentary evidence.
- ▶ Sample subpoena - Appendix N

**United States Department of Justice
Executive Office for Immigration Review
Immigration Court
[the court's location (city or town) and state]**

SUBPOENA

In the Matter of :[the respondent's name and A number] Date: _____

To: [the name and address of the individual being subpoenaed]

[If testifying in court]

Pursuant to 8 C.F.R. § 1003.35(b), you are hereby commanded to appear before Immigration Judge [name] at [the court's address] on [the date and time of the hearing] to give testimony in connection with the [removal, deportation, etc.] proceedings being conducted under the authority of the Immigration and Nationality Act, relating to [the respondent's name], concerning [the topic(s) of testimony].

[If testifying by telephone]

Pursuant to 8 C.F.R. § 1003.35(b), you are hereby commanded to give telephonic testimony before Immigration Judge [name] on [the date and time of hearing] in connection with the [removal, deportation, etc.] proceedings being conducted under the authority of the Immigration and Nationality Act, relating to [the respondent's name], concerning [the topic(s) of testimony].

[If necessary]

You are further commanded to bring with you the following items: [books, papers, documents, etc.].

[name]
Immigration Judge

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Pretrial Motions

▶ Motion for a Deposition Subpoena

- ▶ 8 CFR § 1003.35(a) lists the requirements. Must prove:
 - ▶ Witness is not reasonably available at the place of hearing and
 - ▶ Witness' testimony or other evidence is essential.
- ▶ Order must “designate the official by whom the deposition shall be taken, may prescribe and limit the content, scope, or manner of taking the deposition, and may direct the production of documentary evidence.”
- ▶ No mention of this in the practice manual

Other Pretrial Motions

- ▶ Motion to Accept Untimely Filings (p. 40)
- ▶ Motion to Waive Fees (p. 54)
- ▶ Motion to Close Hearing (p. 63)
- ▶ Motion for a Pre-Hearing Conference (p. 82)
- ▶ Motion for Consolidation (p. 86)
- ▶ Motion for Severance (p. 86)
- ▶ Motion to Amend a Filing (p. 103)
- ▶ Motions to Advance (p. 101)



Post-Trial Motions

BEST PRACTICES

- ▶ Consider timing – if you're filing an appeal, the IJ will lose jurisdiction over any post-trial motions. So, if you're planning a post-trial motion to reconsider, for example, file it early in case you end up having to file an appeal.
- ▶ Consider exhaustion – Issues not raised at the IJ level may be deemed abandoned by the Board.
- ▶ Consider your judge – If the IJ made an obvious mistake that you're certain they would be willing to correct if brought to their attention, you may want to move to reconsider first, in lieu of having to appeal.



Post-Trial Motions

- ▶ **Motions to Reopen** (p. 94)

- ▶ Might require a filing fee (p. 53)

- ▶ Might have a time limit

- ▶ Might have a number limit

- ▶ Layout for motions to reopen at p. 46

- ▶ Reasons for Reopening Often Dictate Motion Requirements. For example:

- Matter of Lozada motions – do you have to file a bar complaint first?

- Reopening for New Relief – pay the fee & attach the application to your motion.

- Reopening for Asylum / Changed Country Conditions – no fee, no time limit.

- Reopening After the Deadline Because of a Change: always request both Sua Sponte Reopen and Equitable Tolling. *Mata v. Lynch*, 135 S. Ct. 2150 (2015).

Post-Trial Motions

- ▶ Motion to Reopen an In Absentia Order (p. 98)
 - ▶ Must argue that
 - ▶ failure to appear was because of **exceptional circumstances**; or
 - ▶ failure to appear was because the immigrant **did not receive proper notice**; or
 - ▶ failure to appear was because the immigrant was **in federal or state custody** and the failure to appear was through no fault of the alien
 - ▶ No filing fee
 - ▶ Time limit depends on the basis for the motion
 - ▶ Counts toward total motion to reopen number limit
 - ▶ **Automatic Stay of Removal** – “The removal of the alien is automatically stayed pending disposition by the Immigration Judge of the motion to reopen to rescind an in absentia order in removal proceedings.” (p. 100)

Post-Trial Motions



- ▶ Motions to Reconsider (p. 96)
 - ▶ Might require a filing fee (p. 53)
 - ▶ Due within 30 days of decision
 - ▶ Limited to 1 motion to reconsider
 - ▶ Layout for motions to reconsider at p. 46
 - ▶ Might be required for “exhaustion” purposes.
Omari v. Holder, 562 F.3d 314, 319 (5th Cir. 2009)

Post-Trial Motions

- ▶ Motion to Challenge Waiver of Appeal (p. 106)
 - ▶ Theoretically possible. Practice Manual says to file “a timely motion filed with the Immigration Judge that explains why the appeal waiver was not valid”
 - ▶ Rarely a Good Idea. In practice this is almost never suggested, because the 30-day deadline for filing an appeal is not tolled by filing this motion.
 - ▶ Preferred method for challenging an appeal waiver: Just file an appeal directly with the Board of Immigration Appeals “that explains why the appeal waiver was not valid.” *Matter of Patino*, 23 I&N Dec. 74 (BIA 2001).



Miscellaneous Motions

▶ **Motions to Withdraw** (p. 24) Should include all of the following:

- ▶ Reason(s) for the withdrawal “in conformance with applicable state bar or other ethical rules”
- ▶ The last known address of the respondent
- ▶ A statement that the attorney has notified the respondent of motion or an explanation of the efforts made to notify her.
- ▶ Evidence of the respondent’s consent to withdraw or a statement of why evidence of such consent is unobtainable
- ▶ Evidence that the attorney notified or attempted to notify the client, with a recitation of specific efforts made, of
 - (a) pending deadlines;
 - (b) the date, time, and place of the next scheduled hearing;
 - (c) the necessity of meeting deadlines and appearing at scheduled hearings; and
 - (d) the consequences of failing to meet deadlines or appear at scheduled hearings

Miscellaneous Motions

- ▶ Motion for Bond Redetermination (p. 124)
 - ▶ File with IJ who has jurisdiction over the proceedings *Even if Your Client Has Been Transferred.*
 - ▶ Consider INA 204(c) – are they eligible for bond?
 - ▶ Is the detainee a flight risk?
 - ▶ Is the detainee a danger to the community?
- ▶ Motion for Substitution of Counsel (p. 23) Should include:
 - ▶ the reason(s) for the substitution of counsel, in conformance with applicable state bar and other ethical rules
 - ▶ " evidence that prior counsel has been notified about the motion for substitution of counsel "
 - ▶ evidence of the alien's consent to the substitution of counsel

Responses to Motions

- ▶ Must comply with the deadlines and requirements for filing. See 8 C.F.R. § 1003.23(a).
- ▶ A motion is deemed unopposed unless timely response is made. Parties should note that unopposed motions are not necessarily granted.



Questions?

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