



ETHICAL CONSIDERATIONS WHEN ICE MOVES TO DISMISS REMOVAL PROCEEDINGS UNDER THE DOYLE PROSECUTORIAL DISCRETION MEMO

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On April 3, 2022 the U.S. Immigration and Custom Enforcement (ICE) Office of the Principal Legal Advisor (OPLA) Kerry E. Doyle issued a [memorandum](#) (“the Doyle memo”) which empowers ICE attorneys to exercise prosecutorial discretion in handling the cases of noncitizens who are not considered enforcement priorities under the criteria laid out in the earlier [Mayorkas memo](#). The goal of the ICE prosecuting attorney under the new policy is to achieve justice rather than removing the noncitizen. Indeed, under the Doyle memo, the ICE attorney’s role as the government’s representative in removal proceedings is to proactively alert the immigration judge to potentially dispositive legal issues and viable relief options they have identified.

For cases where removal proceedings have not yet been initiated, the Doyle memo encourages ICE attorneys to consider not filing a Notice to Appear (NTA). If an NTA has already been issued, the Doyle memo prescribes filing a motion to dismiss the case, whether or not the noncitizen consents to the dismissal. The memo also outlines some of the other tools ICE prosecutors can employ as an exercise of discretion, including stipulations to issues or relief, continuances, not pursuing appeals, joining in motions to reopen, and administrative closure, which temporarily halts removal proceedings by taking a case off a court’s docket for the time being. However, the Doyle memo states that OPLA’s strong preference is to remove nonpriority cases from the docket permanently through dismissal or similar means, so that resources can instead be devoted to priority matters.

Some of the guidance provided in the Doyle memo will provide helpful relief to individuals in removal proceedings, or individuals who have not yet been placed in proceedings, the memo also raising some ethical conundrums for practitioners of immigration law. As mentioned above, the Doyle memo authorizes ICE prosecutors to file motions to dismiss nonpriority cases, even if the noncitizen does not agree with the dismissal. If an individual in a removal proceeding has an application for relief pending before EOIR such as an application for cancellation of removal and the case is outright dismissed, the noncitizen might lose work authorization or another benefit associated with the pending application. This individual will also be deprived of the ability to pursue the application and win cancellation of removal. Dismissal will put the noncitizen back to square one as an undocumented person. It is possible that a noncitizen who has been granted cancellation of removal but is waiting in the queue for a number can also be subject to a unilateral motion to dismiss by an ICE prosecutor. Thus, it is crucial for attorneys to promptly notify clients of an outright dismissal and any associated consequences. Board of Immigration appeals case law also provides a basis for attorneys to be able to challenge outright dismissals that are deleterious to their clients. In [*Matter of G-N-C*](#), 22 I&N Dec. 281 (BIA 1998), the BIA held that once the NTA is filed an Immigration Judge must not simply cancel a charging document upon USCIS' invocation of prosecutorial discretion, but should adjudicate the motion to dismiss on the merits, considering arguments from both sides.

Certain noncitizens have a right to be placed in removal proceedings. One whose affirmative asylum application is not granted must be referred for removal proceedings pursuant to 8 CFR 208.14(c)(1). Similarly, under 8 CFR 216.4(d)(2) and 8 CFR 216.5(f), the denial of a joint I-751 or waiver I-751 petition requires the issuance of an NTA. A dismissal of such an application would clearly be in violation of not just the applicable regulations but also the Doyle memo. Still, the IJ can dismiss a proceeding where a meritless asylum application was filed with the USCIS for the sole purpose of seeking cancellation of removal in immigration court. See [*Matter of Andrade*](#), 27 I&N Dec. 557 (BIA 2019). Thus, attorneys must be vigilant to contest a motion to dismiss if the facts of the case can be distinguished from *Matter of Andrade*. For instance, even if the asylum application may have been filed with the intention for seeking cancellation of removal, but the asylum application had merit, this would not be a basis for an IJ dismiss the proceeding.

The Doyle memo also encourages ICE attorneys to employ other tools in exercising prosecutorial discretion, such as filing joint motions to dismiss. There is often a short time frame to respond to these motions, so advocates must be vigilant in ensuring that they inform clients and submit a timely response. Advocates should ensure that clients have an avenue for relief before joining a motion to dismiss, and should inform clients about what a dismissal would mean for their case and any negative consequences.

The Doyle memo states that OPLA attorneys may agree to administrative closure when the noncitizen does not oppose and the specific facts of the case warrant administrative closure over other means of clearing the case from the docket. In some instances, though, OPLA can unilaterally seek administrative closure regardless of the wishes of the noncitizen. Immigration attorneys should inform their clients of the impact that an administrative closure would have on their case, and vigorously oppose if the clients' interests would be harmed. It is also important to recognize that administrative closure is not a permanent termination of removal proceedings, so attorneys must continue to monitor administratively closed cases and seek more lasting forms of relief for their clients.

Despite its beneficial aspect, the methods for exercising prosecutorial discretion suggested in the Doyle memo could place noncitizens in uncertain situations and raise ethical dilemmas for their immigration lawyers. The attorney must be competent, diligent and must communicate with the client to ensure that the client is not worse off than in pending removal proceedings. Most important, the attorney must obtain the client's informed consent before responding to any initiative by the ICE prosecutor under the Doyle memo or reaching an agreement with the government. The pros and cons of seeking relief under prosecutorial discretion over seeking relief under the INA must be carefully considered and discussed with the client. Because OPLA does not include language in motions that would preserve a noncitizen's ability to work, dismissal of the case often means that a noncitizen will lose work authorization with little warning. Dismissal of a case may also leave individuals with essentially no authorization to remain in the US, giving them little choice but to work without authorization, not pay taxes, and potentially violate the law in other ways. Immigration attorneys must carefully analyze these issues and advocate for their clients when a dismissal or administrative closure may do more harm than good.

(This blog is for informational purposes and should not be viewed as a substitute for legal advice).

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