



Practice Pointer: Options for Responding to OPLA's Unilateral Motions to Dismiss

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Background

On April 3, 2022, Principal Legal Advisor Kerry Doyle issued a memorandum titled [Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion](#) (Doyle memo). The Doyle memo implemented DHS Secretary Mayorkas's September 30, 2021, memorandum [Guidelines for the Enforcement of Civil Immigration Law](#) (Mayorkas Memo), which provided guidance on the exercise of prosecutorial discretion to DHS component agencies. Federal courts have subsequently enjoined the government from implementing the Mayorkas Memo. For more information on these memos and the subsequent litigation, see [Practice Alert: Affirmative Prosecutorial Discretion Requests May Still Be Made](#) and [Government Asks SCOTUS to Stay Vacatur of Mayorkas Memo](#), as well as the additional resources listed below.

OPLA Preference for Dismissal and Immigration Judge Grants

The Doyle Memo states that "OPLA strongly prefers dismissal of proceedings as a discretionary tool in nonpriority cases," and OPLA repeatedly emphasized this preference in [subsequent conversations](#) with AILA. As a result, following the issuance of the Doyle memo, AILA members across the country widely reported that OPLA was moving to dismiss cases it deemed to be "non-priority" cases, often without obtaining the position of respondents' counsel before moving to dismiss. OPLA attorneys were also regularly moving for dismissals orally in open court rather than filing written motions. AILA learned oral motions to dismiss were expected to be the predominant means of moving to dismiss in many jurisdictions.

AILA members also reported that immigration judges were routinely granting OPLA motions to dismiss 1) even when those motions were opposed by the respondent, or 2) without providing sufficient time for the respondent to file a response. According to the Immigration Court Practice Manual, immigration judges should provide a minimum of ten days before ruling on such a motion to allow the respondent time to respond. See ICPM App. C (allowing 10 days for response *after the motion is received* by the immigration court); ICPM §§ 3.1(b); 5.12. AILA subsequently emphasized to EOIR that immigration judges should be waiting this ten-day period before granting a motion to dismiss where the respondent has not filed a response.

Effect of Litigation on Doyle Memo and OPLA's Exercise of Discretion

Soon after federal courts enjoined the Mayorkas Memo in June 2022, OPLA updated its [website](#) to state that it is no longer applying or relying on the Mayorkas memo in any matter, including when making decisions on whether to exercise prosecutorial discretion in a case. In the interim, the AILA ICE Liaison Committee has received confirmation that ICE OPLA may continue to accept affirmative requests for prosecutorial discretion. In reviewing such requests, OPLA attorneys retain their inherent authority to exercise prosecutorial discretion on a case-by-case basis and where appropriate.

AILA members thus can and should continue to request prosecutorial discretion by citing ICE's longstanding, inherent authority to exercise prosecutorial discretion on a case-by-case basis, but should not rely on or cite the Doyle Memo in discretion requests. For more information on filing prosecutorial discretion requests following the federal courts' decisions, see [Practice Alert: Affirmative Prosecutorial Discretion Requests May Still Be Made](#).

Options for Responding to a Unilateral Motion to Dismiss

It is unclear whether OPLA attorneys will be filing as many motions to dismiss and/or moving to dismiss in hearings following the federal courts' decisions to enjoin the Mayorkas Memo. However, the AILA EOIR Liaison Committee and the AILA ICE Liaison Committee offer the following practice pointers on a few ways to respond to such motions in the event that OPLA does continue to move for dismissal or in the event that federal courts allow the Mayorkas Memo to go into effect again:

File Motions Opposing Written Motions to Dismiss: If OPLA files a motion to dismiss and the respondent does not want the case dismissed, members should file a written response opposing the motion to dismiss. The written response should include detailed information on why the respondent does not want proceedings dismissed, including compelling information such as whether the respondent is eligible for relief that is only available in proceedings, the hardship facing the respondent's family members if proceedings are dismissed, and/or the effect dismissal might have on qualifying relatives that could age out. For more information and a template opposition motion, see NIPNLG and ILRC's [Practice Advisory: Advocating for Prosecutorial Discretion in Removal Proceedings Under the Doyle Memo](#) (June 21, 2022).

Be Ready to Oppose Oral Motions to Dismiss: Members should be prepared for oral motions to dismiss and, if appropriate, request that the court give them the requisite 10 days to submit a written opposition to dismissal before ruling on the motion. See ICPM App. C (allowing 10 days for response *after the motion is received* by the immigration court); ICPM §§ 3.1(b); 5.12.

Appeal Unilateral Motions to Dismiss Granted by IJs Before 10 Days: In cases where the respondent opposes dismissal but the judge rules on OPLA's motion without allowing time for the respondent to file its opposition, members should consider first asking OPLA to join a motion to reopen or a motion to reconsider. Ultimately, however, members may need to file an appeal of the judge's decision, and the deadline for the appeal may occur before the judge has an opportunity to rule on a motion to reconsider or joint motion to reopen. In the event that a notice of appeal is filed before the judge rules on a motion to reconsider or reopen, the judge will lose jurisdiction over the case. See ICPM 5.7(h); 5.8(h). Following the filing of a notice of appeal to the BIA, members can engage with local OPLA to seek a joint motion to remand based on the immigration judge's failure to give 10 days for the respondent to file an opposition to the DHS motion. Members should also tell the AILA EOIR Liaison Committee by filling out the form on their [committee website](#) and use the topic "IJ Grants MTD Without Waiting 10 Days."

Additional Resources

[Practice Alert: Affirmative Prosecutorial Discretion Requests May Still Be Made](#) (July 13, 2022)

[Government Asks SCOTUS to Stay Vacatur of Mayorkas Memo](#) (Updated July 8, 2022)

[AILA Liaison Meeting with ICE \(4/7/22\)](#) (April 7, 2022)

[Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion](#) (Doyle Memorandum) (April 3, 2022)

[NIPNLG & ILRC Practice Advisory: Advocating for Prosecutorial Discretion in Removal Proceedings Under the Doyle Memo](#) (includes link to template motions) (June 21, 2022)

[ABA Practice Advisory: Seeking Prosecutorial Discretion](#) (includes template motions) (Last Updated April 2022)

[Report a Trend to AILA's EOIR Liaison Committee](#)

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