NATIONAL IMMIGRATION PROJECT
Lawyers for the Movement

Practice Alert

Pleading to Protect: Holding Immigration Judges to Their Obligations to Respondents[1]

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As the Executive Office for Immigration Review (EOIR) hires new Immigration Judges (IJs) who may not have adequate training in immigration law, issues guidance encouraging IJs to quickly dispose of cases, and publishes Board of Immigration Appeals (BIA) decisions that elide or undermine respondents' rights, practitioners should take every opportunity to enforce and protect their clients' rights. The EOIR-suggested Notice to Appear (NTA) pleading practices, which are aimed at efficiency for the court rather than upholding noncitizens' rights, is one such opportunity. While it is common practice for practitioners to adopt EOIR's sample pleadings to promptly obtain an individual hearing date and, ultimately, adjudication of applications for relief, there is no guarantee that IJs will hold an individual hearing or adjudicate applications for relief on the merits. In this new environment where IJs are increasingly more loyal to directives[2] than to due process,[3] practitioners should reconsider their default pleading practices. This practice alert suggests an alternative oral pleading and provides insight into how an alternative pleading practice can ensure that clients understand the grave nature of removal proceedings and the rights afforded to them by statute and regulation.

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[2] *See, e.g.,* Memorandum from Sirce E. Owen, Acting Director, EOIR, Pretermission of Legally Insufficient Applications for Asylum (Apr. 11, 2025), https://www.justice.gov/eoir/media/1396411/dl?inline; Memorandum from Sirce E. Owen, Acting Director, EOIR, Case Priorities and Immigration Court Performance Measures (Sept. 12, 2025), https://www.justice.gov/eoir/media/1413981/dl?inline; Sirce E. Owen, Acting Director, EOIR, Adjudicator Independence and Impartiality (Aug. 22, 2025), https://www.justice.gov/eoir/media/1411796/dl?inline ("Adjudicatory outliers or statistically improbable outcome metrics, particularly relative to EOIR's overall adjudicator corps and after controlling for sample size and relevant docket characteristics, may be indicative of a systematic bias or failure to adhere to applicable law that warrants close examination and potential action.").

[3] *See Reno v. Flores*, 507 U.S. 292, 306 (1993) ("it is well established that the Fifth Amendment entitles [noncitizens] to due process of law in deportation proceedings."); *Matter of M-D-*, 23 I&N Dec. 540, 542 (BIA 2002) ("The Due Process Clause protects [noncitizens] in removal proceedings and includes the right to a full and fair hearing.").

Reconsider the EOIR Sample Pleading. The Immigration Court Practice Manual provides sample oral and written pleadings.[4] Historically, practitioners have relied on EOIR's sample pleadings without considering the consequences of adopting EOIR's language. While 8 CFR § 1240.10(a) sets forth numerous requirements for the IJ to orally explain the respondents' rights, the sample oral pleading relieves IJs of these duties by including language that waives these requirements. In fact, EOIR's sample oral pleading never mentions 8 CFR § 1240.10 despite citing to other regulatory provisions.[5] EOIR's sample oral pleadings also waive other rights, such as the INA § 240(b)(7) oral notice requirement, resulting in prejudice to the respondent if they later receive an in absentia order. In light of the changed realities in immigration court, practitioners who have the choice between entering oral or written pleadings may wish to proceed with oral pleadings at a Master Calendar Hearing and modify EOIR's sample oral pleading to hold IJs to their duties where it is strategically in their client's interests.[6] If an IJ has requested written pleadings, but the respondent prefers to proceed with oral pleadings, the practitioner could modify the EOIR Sample Written Pleading to include a request for oral advisals.

Consider Not Waiving a Formal Reading of the NTA. Respondents, whether represented or pro se, have a right pursuant to 8 CFR § 1240.10(a)(6) to have the IJ formally read the NTA's factual allegations and charges of law in open court in "non-technical language."[7] It is a time-consuming process, which is perhaps why the first sentence of the sample oral pleading suggests that the respondent waive this right: "I, [state your name], on behalf of [state the name of your client], do concede proper service of the Notice to Appear dated [state date of the NTA], *and waive a formal reading thereof*."[8] Indeed, some practitioners may have already sufficiently explained the NTA to their client, but it is nonetheless beneficial for respondents to hear the IJ explain the NTA in detail because repetition helps cement understanding. If the respondent has questions about the NTA, the respondent may pose those questions on the record and the IJ can decide to either answer the questions or provide respondent's counsel time to respond to those questions. Of course, if the respondent does not waive the reading and the IJ fails to read the allegations and the charges in the NTA to the respondent and explain them in non-technical

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[4] *See* https://www.justice.gov/eoir/policy-manual-eoir/part-VII/appendices/j (Sample Oral Pleading); https://www.justice.gov/eoir/policy-manual-eoir/part-VII/appendices/i (Sample Written Pleading).

[5] For example, the Sample Oral Pleading cites to 8 CFR § 1003.31(c) (untimely applications for relief will be deemed abandoned) and 8 CFR § 1003.47(d) (failure to comply with biometrics will constitute abandonment of the application).

[6] If a client is not required to appear in person at a Master Calendar Hearing and is scared to do so, the practitioner may determine that this strategy is not in the client's interests, especially if Immigration and Customs Enforcement recommences detentions at immigration courts. Practitioners should also discuss with their clients the likelihood of the IJ moving their case to the end of the docket resulting in a longer Master Calendar Hearing.

[7] *See* 8 CFR § 1240.10(a)(6).

[8] Note that the written pleading sample omits reference to this right altogether. The clause in the second sentence of the pleading, "I represent to the court that I have discussed specifically the allegations of facts and the charge(s) of removability," reinforces a waiver of this right by confirming that respondent's counsel has taken on this responsibility.

language and the respondent is prejudiced[9] by this violation, the respondent can raise this issue on appeal.[10]

Enforcing the right to a formal reading of the NTA also benefits EOIR and the IJ, especially if the IJ is new to immigration law. By reading the NTA to a respondent, the IJ will more easily identify incorrect or contradictory information on the NTA that they otherwise may have overlooked in their haste to complete the case.[11] Identifying NTA errors early on saves EOIR resources by avoiding protracted removal proceedings and unnecessary appeals.

Consider Not Waiving the Respondent's Right to an Explanation of Their Rights. IJs are required under 8 CFR § 1240.10(a)(4) to:

> Advise the respondent that he or she will have a reasonable opportunity to examine and object to the evidence against him or her, to present evidence in his or her own behalf and to cross-examine witnesses presented by the government (but the respondent shall not be entitled to examine such national security information as the government may proffer in opposition to the respondent's admission to the United States or to an application by the respondent for discretionary relief).[12]

This regulation mirrors the rights included under the Immigration and Nationality Act (INA) at section 240(b)(4)(B). However, 8 CFR § 1240.10(a)(4) includes an additional right not expressly found in INA § 240(b)(4)(B): "a reasonable opportunity to object to the evidence against him or her."

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[9] While prejudice is generally required to prevail on appeal, *see Guerrero de Nodahl v. Immigration and Naturalization Service*, 407 F.2d 1405 (9th Cir. 1969) (affirming the BIA's deportation order because the respondent, through counsel, knowingly waived former 8 CFR § 242.16 and was unable to show any harm resulting from the alleged denial of 8 CFR § 242.16), prejudice is presumed "where an entire procedural framework, designed to insure the fair processing of an action affecting an individual is created but then not followed by an agency," *Matter of Garcia-Flores*, 17 I&N Dec. 325, 329 (BIA 1980). The U.S. Court of Appeals for the Second Circuit has particularly favorable case law excusing a showing of prejudice where a government agency failed to follow regulations that were intended to benefit noncitizens. *See Picca v. Mukasey*, 512 F.3d 75, 78–79 (2d Cir. 2008); *Reid v. Bondi*, 132 F.4th 109, 127 (2d Cir. 2024).

[10] *See* Rami M. Hammad, AXXX XX6 722, 2009 WL 3063830 (BIA September 16, 2009) (unpublished) (sustaining the represented respondent's appeal "[i]n view of the evident procedural shortcomings that characterized the respondent's hearing" and "determin[ing] that it is in the best interests of the United States that the record be remanded to the [IJ] for a new removal hearing that complies more faithfully with the requirements of 8 CFR § 1240.10(a)" without considering prejudice). As illustrated by this unpublished decision, while a violation of 8 CFR § 1240.10(a)(6) alone may not prejudice the respondent, prejudice may exist if there was a violation of multiple 8 CFR § 1240.10(a) rights.

[11] An example of contradictory information on an NTA includes where the "You are an arriving alien" box is marked yet DHS has charged the person under INA § 212(a)(6)(A) instead of INA § 212(a)(7)(A).

[12] *See* 2020 Immigration Judge Training Materials, Removability & Relief Under the Immigration & Nationality Act Presented by Daniel "Doc" Daugherty, Assistant Chief Immigration Judge, https://www.muckrock.com/foi/file/1019456/embed/ (page 36 of the PDF).

Yet EOIR's proposed oral pleadings suggest that respondent's counsel waive the right to this advisal by the IJ. Three nonconsecutive sentences in EOIR's oral pleading amount to a waiver: "I represent to the court that I have discussed with my client the nature and purpose of these proceedings, [...] and further advised my client of his or her legal rights in removal proceedings [...] As to each of these points, I am satisfied my client understands fully." While practitioners should engage in these discussions with their client and assess if the client has understood the points, these statements, taken together, may incorrectly signal that the IJ's required oral advisals are unnecessary.

Even if practitioners regularly explain to their clients their legal rights in removal proceedings and the nature of the proceedings, it is important for IJs to advise the respondent of these rights. The value of repetition of crucial information to respondents is one reason it is beneficial for IJs to provide the information. More significantly, the IJ's oral acknowledgement on the record of a respondent's rights sets the tone and establishes a common understanding among the IJ and the parties in removal proceedings as to the respondent's rights. This common understanding may prevent IJs from acting arbitrarily and instead force IJs to consistently respect these rights in relevant contexts. So if IJs allows the Department of Homeland Security (DHS) to present untimely substantive evidence, IJs should allow the respondent an opportunity to examine and object to the evidence against them[13] or, if DHS presents a witness or files documentary evidence signed by a third party who is not present at the hearing, the IJ should allow the respondent the opportunity to cross examine witnesses. Finally, if the hearing transcript includes the IJ's citation of the respondent's rights which the IJ later disregards, the respondent makes a stronger record for appeal. Ultimately, both the practitioner and the IJ have an important role in ensuring that a respondent understands the nature and purpose of removal proceedings and their rights in those proceedings.

8 CFR § 1240.10(a) discusses other rights. 8 CFR § 1240.10(a)(1) requires IJs to inform respondents of their right to representation by authorized counsel of their choice and, for pro se respondents, requires respondents to state whether they desire representation. 8 CFR § 1240.10(a)(2) requires IJs to advise respondents of "the availability of pro bono legal services for the immigration court location at which the hearing will take place, and ascertain that the respondent has received a list of such pro bono legal service providers." Although both of these provisions are more relevant to pro se respondents, represented respondents should also hear these advisals. It is important for respondents to know that pro bono legal services exist should they no longer be able to afford their current representation, or if a nonprofit attorney has to withdraw from representation. Represented respondents should know that, if their current attorney-client relationship ends, they have the opportunity to obtain new counsel and should

[13] Note, however, the exception in 8 CFR § 1240.10(a)(4) and INA § 240(b)(4)(B) that "the respondent shall not be entitled to examine such national security information as the government may proffer *in opposition to the respondent's admission to the United States or to an application by the respondent for discretionary relief*." (Emphasis added.)

request time to do so. Respondents should also know that their new counsel must be authorized to practice before EOIR and not be an unauthorized practitioner of immigration law.

Consider Forcing the IJ to Provide the Oral Notice Required by INA § 240(b)(7). INA § 240(b)(7) requires that respondents receive specific oral notice at the time of the service of the NTA or hearing notice[14] about the consequences of failing to appear at an immigration hearing. If the respondent receives oral notice, "either in the [noncitizen's] native language or in another language the [noncitizen] understands, of the time and place of the proceedings" and of the consequences of failing to appear but subsequently fails to appear at a hearing, certain penalties apply.[15] Noncitizens provided such notice "shall not be eligible for relief under section 240A [cancellation of removal], 240B [voluntary departure], 245 [adjustment of status], 248 [change of nonimmigrant status], or 249 [registry]" for 10 years after the date of the final order.[16] In other words, these failure to appear penalties are predicated on whether the respondent received oral notice in accordance with INA § 240(b)(7). However, respondents are also subject to the INA § 240(b)(7) failure to appear penalties if they waive the right to the oral notice, which is what the EOIR sample oral pleading aims to do.

Practitioners who routinely follow the EOIR sample oral pleading waive the oral notice required by INA § 240(b)(7) by reading the line: "My client knowingly and voluntarily waives the oral notice required by section 240(b)(7) of the Act." In choosing to not follow EOIR's sample oral pleading, the practitioner is requiring the IJ to give this oral notice. While forcing the IJ to provide this oral notice will invoke the INA § 240(b)(7) penalties to discretionary relief, this is a better option than waiving the opportunity for the IJ to provide the required oral notice. It is in the respondent's interest for the IJ to explain the negative consequences of a future failure to appear in court so that it is less likely that the respondent will fail to appear. Indeed, even if the noncitizen signed the NTA certificate of service, it does not mean that the noncitizen actually received oral notice of the consequences of a failure to appear in a language that they understand, or, if oral notice was provided, that the noncitizen remembers receiving this notice. As such, an oral warning by the IJ may be the only time that the noncitizen receives notice of the consequences of failing to appear and knowing the consequences could prevent a future in absentia order. And, for those who signed the NTA certificate of service, prevention of an in absentia order means INA § 240(b)(7) will not limit any discretionary relief for which they may be eligible.

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[14] While EOIR Hearing Notices include a warning regarding the consequences of failing to appear, this warning is in English only and does not comply with the requirement that the government provide the notice orally. *See* EOIR Notice of Hearing Sample, https://www.justice.gov/eoir/page/file/1541721/dl?inline.

[15] INA § 240(b)(7).

[16] *Id*. This is assuming that the respondent has a forum available to request these discretionary benefits, which requires an approved motion to reopen or motion to rescind and reopen. Note, however, that USCIS has sole jurisdiction over a Form I-539, Application to Extend/Change Nonimmigrant Status, so reopening the in absentia removal order is not required to obtain a forum to pursue this benefit, but USCIS may view a removal order as a reason to not exercise its discretion.

Note that noncitizens often concede receiving the oral notice required by INA § 240(b)(7) by signing the NTA long before the pleading stage in removal proceedings, but this is not always the case. The NTA certificate of service states, "The [noncitizen] was provided oral notice in the [blank] language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act."[17] If a noncitizen signed this certificate of service following personal service of the NTA, and the noncitizen subsequently receives an in absentia order, the INA § 240(b)(7) penalties apply because their signature signals DHS compliance with INA § 240(b)(7). However, if the noncitizen refused to sign the NTA certificate of service at the time of personal service, the INA § 240(b)(7) penalties do not generally apply because there is no proof that the respondent received oral notice of the penalties. Likewise, if the NTA is served by mail, then the noncitizen did not receive oral notice of the consequences of a failure to appear in a language they understand at the time of NTA service. In these situations—where there is no evidence in the record that the noncitizen received the penalties' notice—it is especially important for the practitioner to not waive the oral reading of the penalties. [18]

Conclusion

Justice Ruth Bader Ginsburg said, "You can have all the rights in the world, but if you can't enforce them, they aren't worth very much."[19] While respondents should have more rights in removal proceedings than they are afforded, the rights they do have are not always upheld by IJs despite their duties to follow certain procedures before deciding a noncitizen's fate in the United States. It is time for practitioners to hold IJs to their duties and fully enforce their clients' rights. The pleading stage is the perfect place to start.

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[17] *See* Sample Notice to Appear, https://portal.ice.gov/pdf/I-862NTA(English)version6.2022.pdf.

[18] Although forcing the IJ to provide this oral advisal will preclude the noncitizen from raising a reopening argument based on *Matter of M-S-*, 22 I&N Dec. 349 (BIA 1998) (en banc), adopting the EOIR Sample Oral Pleadings also precludes this argument through a waiver from counsel without the benefit of the respondent receiving oral notice of the consequences of failing to appear. Generally, if a respondent receives an in absentia order, the respondent would seek rescission and reopening pursuant to INA § 240(b)(5)(C), but the BIA in *Matter of M-S-*, held that where the respondent did not receive oral warnings of the consequences of failing to appear at a hearing, rescission of the order pursuant to INA § 240(b)(5)(C) is not required and the respondent may instead seek reopening pursuant to INA § 240(c)(7) within 90 days of the in absentia order based on newly available relief, including discretionary relief. A respondent with an in absentia order who received oral notice of the consequences for failing to appear may still proceed under INA § 240(b)(5)(C), the rescission and reopening statute.

[19] Aaron L. Nielson, *Remembering Judge Ruth Bader Ginsburg: A Legend of the D.C. Circuit*, YALE J. ON REG. (2020), https://www.yalejreg.com/nc/remembering-judge-ruth-bader-ginsburg-a-legend-of-the-d-c-circuit/.

Revised Sample Oral Pleading

I, [state your name], on behalf of [state the name of your client], do [or do not] concede proper service of the Notice to Appear dated [state date of the NTA], and [do not] waive a formal reading thereof.

I represent to the court that I have discussed with my client the nature and purpose of these proceedings, discussed [that they have a right under 8 C.F.R. § 1240.10(a)(6) to have the IJ read the factual allegations and the charges in the notice to appear to the respondent and explain them in non-technical language], and [informed them that they have a right under 8 C.F.R. § 1240.10(a) to have the IJ advise them of their rights]. [Optional: At this time, the respondent is ready for the IJ to read the factual allegations and the charges in the notice to appear to the respondent and explain them in non-technical language and for the IJ to advise the respondent of his or her rights].

I further represent to the court that I have explained to my client the consequences of failing to appear for a removal hearing or a scheduled date of departure as well as the consequences under section 208(d)(6) of the Act of knowingly filing or making a frivolous asylum application. My client [does not] waive the oral notice required by section 240(b)(7) of the Act.

~~As to each of these points, I am satisfied my client understands fully.~~ On behalf of my client, I enter the following plea before this court:

One, [he or she] admits allegation(s) # [charge number(s) from NTA] to [charge number(s) from NTA].

[and/or]

[he or she] denies allegation(s) # [charge number(s) from NTA] to [charge number(s) from NTA].

Two, [he or she] concedes the charge(s) of removability.

[or]

[he or she] denies the charge(s) of removability.

Three, [he or she] seeks the following applications for relief from removal: [state all applications, including termination of proceedings, if applicable].

My client acknowledges that, if any applications are not timely filed, the applications will be deemed waived and abandoned under 8 C.F.R. § 1003.31(c). [He or she] acknowledges receipt of the DHS biometrics instructions, and understands that, under 8 C.F.R. § 1003.47(d), failure to timely comply with the biometrics instructions will constitute abandonment of the applications.

I request until [state date to be filed] to submit such applications to the court with proper service on DHS.

I represent to the court that my client is prima facie eligible for the relief stated herein.

I request [time/hours] to present my client's case in chief.

I request an interpreter proficient in the [state name of language] language, [state name of any applicable dialect] dialect.

[or]

I represent that my client is proficient in English and will not require the services of an interpreter. If any witnesses require an interpreter, I will notify the court no later than thirty days prior to the individual calendar hearing.

My client designates [state name of country] as his/her country of choice for removal if removal becomes necessary.

[or]

My client declines to designate a country of removal.