On April 2, 2021, EOIR cancelled PM 21-05 and replaced it with a revised Case Flow Processing Policy Memorandum, PM 21-18, which applies to cases initiated on or after April 2, 2021. This practice pointer has not been updated to incorporate the changes made by PM 21-18.

CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

Practice Pointer[1]

EOIR Policy Memorandum (PM) 21-05: Case Flow Processing Model

Jan. 21, 2021

I. Introduction

On Nov. 30, 2020, Executive Office for Immigration Review (EOIR) Director James R. McHenry, III, issued a policy memorandum, PM 21-05,[2] purportedly to implement an "enhanced case flow processing model" for represented, non-detained respondents. Under this policy memo (PM),[3] EOIR will cancel most master calendar hearings of respondents who are represented and not detained, with immigration judges (IJs) issuing scheduling orders in their place, requiring practitioners to submit written pleadings and applications pursuant to those orders.[4] However, despite the stated goal of "ensuring efficient and fair adjudications and that each alien with a claim to relief or protection from removal receives a hearing in a timely manner,"[5] the new procedure places unnecessary burdens on practitioners in immigration court proceedings to rapidly prepare and submit applications for relief, even before removability has been established, and often months or years before appearing for the merits hearing date. More concerning, the new process forces practitioners to submit written

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[2] James McHenry, EOIR, Enhanced Case Flow Processing in Removal Proceedings (Nov. 30, 2020), justice.gov/eoir/page/file/1341121/download [hereinafter "PM" or "PM 21-05"].

[3] Many of the changes announced in the PM have also been added to the Immigration Court Practice Manual (hereinafter "ICPM"), which was updated twice in December 2020. On January 11, 2021, EOIR reorganized its website, and included the ICPM within a larger, newly issued Policy Manual. This newer version of the ICPM appears to leave out December updates to the ICPM, but the Policy Manual also apparently is still being revised. Thus, practitioners should be sure to check the EOIR website for any issues related to the ICPM. *See* justice.gov/eoir/eoir-policy-manual.

[4] Note that these scheduling orders differ from the Acting Chief Immigration Judge (ACIJ) scheduling orders that practitioners reported receiving starting in November 2020. *See* Priscilla Alvarez, *Justice Department places new pressure on immigrants facing deportation,* CNN, Nov. 24, 2020, cnn.com/2020/11/24/politics/immigration-justice-department/index.html. *See* docs.google.com/.../1FAIpQLSe4ObUbp5UG8Z.../viewform.

[5] *See* PM, *supra* note 2, at 1.

pleadings before the Department of Homeland Security (DHS) has met its burden of proving alienage thereby shifting the mandated burdens and prejudicing respondents. This practice pointer provides an explanation of PM 21-05, the impact of the "enhanced case flow processing model," and practice tips to prepare and protect a client's case adequately in light of this new process that prizes "efficiency" over fairness.

II. Background on PM 21-05, "Enhanced Case Flow Process in Removal Proceedings"

Through PM 21-05, Director McHenry instructs IJs to cancel master calendar hearings for represented, non-detained respondents and instead issue a scheduling order that "generally" sets a deadline of at least 45 days for filing written pleadings,[6] evidence on removability, and any applications for relief. Once the immigration court receives the pleadings, removability evidence, and applications, the IJ will issue a hearing notice for a merits hearing date and a second scheduling order setting a 30-day deadline for the filing of any motions, briefs, or supplemental proposed evidence in advance of the merits hearing.[7] On Dec. 9, 2020, Acting Principal Deputy Chief IJ Mary Cheng hosted an EOIR information session on the "Enhanced Case Flow Processing" PM.[8] During this session, Acting Principal Deputy Chief Immigration Judge Mary Cheng stated that the 30-day deadline in the scheduling order is for filing of applications only, not supporting evidence.[9] In cases where the practitioner has entered an appearance fewer than 15 days prior to the master calendar hearing, the IJ will issue a scheduling order at the master calendar hearing. As a result, PM 21-05 places a heavy burden on the practitioner at the beginning of the case, even though the merits hearing may be months or years away.

In eliminating the master calendar hearing from removal proceedings, the "enhanced case flow processing model" fails to account for respondents' right to hold DHS to its burden of proof. Historically, if the practitioner denied the allegations of fact and contested removability at the master calendar hearing, DHS would then have to meet its burden to prove alienage.[10] If DHS failed to

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[6] The ICPM, *see supra* note 3, has updated what should be included in the written pleadings. Practitioners should review the ICPM ch. 4.15(a), (j) and Appendix L before filing written pleadings to be sure that the pleadings comply with the requirements, including signatures by both the respondent and counsel.

[7] On Dec. 23, 2020, EOIR updated the ICPM to reflect this 30-day deadline. ICPM, *supra* note 3, ch. 3.1(b)(ii)(B) ("For individual calendar hearings involving represented, non-detained aliens, amendments to applications for relief, additional supporting documents, updates to witness lists, and other such documents must be submitted at least thirty (30) days in advance of the individual calendar hearing. This provision does not apply to exhibits of witnesses offered solely to rebut and/or impeach."). Prior to this change, the ICPM imposed a more generous 15-day deadline. With recent changes to the Policy Manual, it is unclear going forward whether the deadline is intended to be 15 or 30 days. *See supra* note 3.

[8] *See* EOIR Invitation, EOIR to Host Information Session on Enhanced Case Flow Processing Before the Immigration Courts (Dec. 4, 2020), justice.gov/eoir/page/file/1343186/download. Some information in this practice pointer derives from information that Acting Principal Deputy Chief IJ Cheng presented at that meeting. Information from this meeting will be referenced hereinafter as "Cheng, EOIR Info Session."

[9] *Id.* Cheng, EOIR Info Session.

[10] *See* 8 CFR § 1240.8.

provide evidence of alienage or deportability for those who have been lawfully admitted thereby failing to meet its burden of proof, the practitioner would move to terminate proceedings. The PM completely ignores, and thereby directly contradicts, the burden-shifting scheme.[11] In some cases, DHS would fail to meet its burden of proof because the Immigration and Customs Enforcement assistant chief counsel representing DHS at the master calendar hearing lacked the respondent's file or was otherwise unprepared. In other cases, DHS simply did not have evidence to support the allegations in the Notice to Appear (NTA) and, pursuant to a motion by the practitioner, the IJ would terminate proceedings. If DHS met its burden of proof, and/or if a respondent's motion to terminate was denied, only then would the practitioner indicate the relief sought.

However, pursuant to the PM, counsel must now tackle each of these steps—submitting pleadings, contesting evidence related to removability, and identifying and submitting any applications for relief or protection from removal—simultaneously by the deadline listed on the scheduling order. By forcing practitioners to complete all of these steps by the same deadline, Director McHenry assumes that practitioners will admit the allegations of fact, concede removability, and seek relief from removal. However, the expedited timeline laid out in the PM will make it even more crucial for practitioners to deny the allegations of fact and contest removability whenever possible, thereby forcing DHS to meet its burden of proof. The expedited new process will mean that in most cases practitioners will not have all of the information needed to determine whether the allegations in the NTA are correct or to determine the respondent's potential eligibility for relief. Pursuant to the PM, practitioners generally will not be able to file a Freedom of Information Act (FOIA) request for the respondent's file and receive the FOIA disclosures before having to submit written pleadings.[12]
While practitioners must proceed on an expedited timeline, DHS instead gains time to retrieve the respondent's file and submit evidence of alienage with the immigration court.

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[11] The Immigration Judge's Benchbook says, "Removal Proceedings: Under IIRIRA, the burden of proof is altered for persons who are charged with not being admitted or paroled (EWI). The burden of proof is now statutory. If the person is not an applicant for admission, DHS must first establish alienage 8 CFR § 1240.8(c). Unless respondent can show by clear and convincing evidence that he is lawfully present in the United States pursuant to a prior lawful admission, he must show he is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged. INA § 240(c)(2), 8 U.S.C. § 1229a(c)(2), 8 CFR § 1240.8(b). If the person meets that burden, DHS has the burden to show by 'clear and convincing evidence' that the person is deportable. INA §§ 240(c)(2)(B), (c)(3)(A), 8 U.S.C. §§ 1229a(c)(2)(B), (c)(3)(A)." Excerpt of Immigration Judge Benchbook at 7, justice.gov/eoir/page/file/988046/download. The elimination of this burden on DHS appears to be based on Director McHenry's claim that "removability is not contested in most cases." PM at 3. Prior to the Trump administration, practitioners often did not contest removability because IJs usually provided practitioners ample time to research removability and identify and file applications for relief, and DHS exercised prosecutorial discretion. However, given the control that the executive branch exercises over immigration policy and that each presidential administration has different immigration goals and priorities, practitioners should reconsider this approach and instead consider establishing a culture of holding DHS responsible to meet its burden of proof, as long as EOIR keeps this new procedure in effect.

[12] Because immigration proceedings are civil matters arising under Article II of the U.S. Constitution, FOIA is often the only discovery tool for accessing a client's full immigration case file. The FOIA statute provides EOIR 20 business days (or 30 business days if there are unusual circumstances) to respond to FOIA requests. 5 U.S.C. § 552(a)(6)(A)(i). However, EOIR routinely fails to comply and often takes many months to release the disclosures, in which case the practitioner should consider pursuing FOIA litigation in federal district court.

Furthermore, in the absence of a master calendar hearing, the respondent will not hear the legally-mandated advisals about the consequences of various actions,[13] and respondent's counsel will not have the opportunity to observe the IJ and determine their preferences.[14]

III. Practice Tips

Director McHenry's "enhanced case flow processing model" requires counsel to reconsider their practice and strategy on removal cases in order to ensure compliance with their ethical duties, especially their duty of competence. Since a complete pleading and all applications for relief may be due within a month or two of the practitioner entering their appearance, incorrect assessments at the beginning of the case and hasty pleadings could prejudice the respondent's ability to contest removability or prevail on their application for relief.[15] Given these concerns, practitioners may consider the following tips in order to preserve the opportunity to prepare and protect their client's case adequately.

a. Motion for IJ to Exempt the Case from the "Enhanced Case Flow Processing Model"

PM 21-05 makes clear throughout that "Immigration Judges retain the discretion to deviate from this model as appropriate."[16] Practitioners representing vulnerable respondents will often need more time to communicate with these clients, gain their trust, and prepare their cases. In such situations,

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[13] *See* 8 CFR § 1240.10(a) which requires the IJ to advise the respondent of the right to representation; to ensure the respondent has received a copy of appeal rights; to advise the respondent of their opportunity to examine, object to, and present, evidence, and to read the factual allegations and charges and "explain them in non-technical language." At the EOIR Info Session, Acting Principal Deputy Chief IJ Cheng stated that EOIR would provide written advisals in the absence of master calendar hearings. *See* Cheng, EOIR Info Session, *supra* note 8. However, written advisals would not satisfy the regulatory requirement that IJs "read" the factual allegations and charges. Moreover, in *Matter of J-F-F-*, 23 I&N Dec. 912 (A.G. 2006), the BIA states that IJ assistance in developing the record is "particularly" appropriate "where [a noncitizen] appears pro se and may be unschooled in the deportation process" but does not explicitly limit the IJ's role to cases where the respondent is unrepresented. Instead, the IJ's duty to develop the record applies to all respondents, but is heightened when a respondent appears *pro se*. In addition, the IJ has a duty under the regulations "to inform the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter and shall afford the alien an opportunity to make application during the hearing, in accordance with the provisions of Section 1240.8(d)[applications for relief from removal]." 8 C.F.R. § 1240.11(a)(2). There is no exception for represented respondents for the duty of an IJ to inform a respondent of their /her eligibility for relief.

[14] Under PM 21-05, in most cases practitioners will interact in person with the IJ for the first time at the individual hearing. It will therefore be critical for the practitioner to consult with colleagues and observe colleagues' individual hearings before the IJ prior to their own individual hearing to understand the IJ's style and preferences.

[15] *See, e.g., Dos Santos v. U.S. Attorney General,* 982 F.3d 1315 (11th Cir. 2020) (affirming BIA decision holding the respondent to her attorney's concession of unlawful entry over a decade previous to the proceedings even when she subsequently obtained documentation of an entry at age twelve on a tourist visa).

[16] *See* PM *supra* note 2 at 1, *see also id.* at 4 n.8 (noting IJ discretion to allow amendment or supplement to an application), *id.* at 5 ("[T]he Immigration Judge retains discretion to take any appropriate action consistent with the law.").

practitioners may need to file a motion to exempt the matter from processing under PM 21-05 and therefore the scheduling order. Practitioners should consider filing a motion to exempt the matter from the new "case flow processing model," and, where appropriate, a motion for a master calendar hearing,[17] in situations including the following:

- The respondent is a minor[18]
- There are competency or other mental health concerns, or[19]
- The respondent speaks a rare language.[20]

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[17] In late December 2020, following the issuance of PM 21-05, EOIR updated its ICPM and added "Motion for a Master Calendar" to its list of possible types of motions. However, the January 2021 revisions to the Policy Manual no longer include this motion in the list. It is unclear whether the removal of that motion was intentional or inadvertent, but practitioners should check the Policy Manual before filing to see whether or not Motion for a Master Calendar is listed as a category of motions at the time of filing. *See supra* note 3.

[18] *See* Memorandum from MaryBeth Keller, Chief Immigration Judge, EOIR, OPPM 17-03, Guidelines for Immigration Court Cases Involving Juveniles, Including Unaccompanied Alien Children (Dec. 20, 2017), justice.gov/eoir/file/oppm17-03/download (recognizing that children's cases are complicated and involve sensitive issues and may require special age appropriate procedures including courtroom orientation, scheduling accommodations, more explanations to child respondents about the procedure and testimony, etc.). Importantly, Acting Principal Deputy Chief IJ Cheng stated that the new process does not apply to "vulnerable populations" including unaccompanied minors but did not further define "vulnerable populations" or explain how they would be treated differently other than to state that attorneys representing "vulnerable" clients would be best positioned to alert the IJ to the client's vulnerability. She also stated that the PM does not apply to unaccompanied minors, irrespective of detention status, but did not elaborate on whom EOIR considers to be an unaccompanied minor. Cheng, EOIR Info Session, *supra* note 8. The PM itself contains no information about protections for vulnerable populations or minors, however the updated ICPM states, "Examples of circumstances that may warrant a master calendar hearing include cases in which the respondent is an unaccompanied alien child or exhibits indicia of mental incompetency." ICPM, *supra* note 3, ch. 3.1(c)(v).

[19] *See Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011) (discussing when a competency hearing and safeguards may be necessary for incompetent respondents including docket management to ensure a respondent can receive medical treatment to restore competency). Acting Principal Deputy Chief IJ Cheng stated that the new model will not apply to vulnerable populations. *See supra* note 18. However, there is no language in the PM itself that excludes vulnerable populations from the new procedure.

[20] *See* Rachel Nolan, *A Translation Crisis at the Border: for Migrants Who Speak Mayan Languages, a Grassroots Group of Interpreters Is Often Their Only Hope for Receiving Asylum,* THE NEW YORKER, Dec. 30, 2019, newyorker.com/magazine/2020/01/06/a-translation-crisis-at-the-border. For information on EOIR's commitment, generally, to providing competent interpretation *see* EOIR, The Executive Office for Immigration Review's Plan for Ensuring Limited English Proficient Persons Have Meaningful Access to EOIR Services (May 31, 2012), justice.gov/sites/default/files/eoir/legacy/2012/05/31/EOIRLanguageAccessPlan.pdf. *See also Bartolome v. Sessions,* 904 F.3d 803, 811 (9th Cir. 2018) (remanding case for BIA's improper finding that it lacked jurisdiction over petitioner's motion to reopen; petitioner was granted a short continuance to obtain a Chuj-language interpreter and to allow Bartolome's counsel to prepare.)

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Some other general situations where a motion to exempt the case from the new "case flow" process may be appropriate and/or where practitioners may want to make a motion for a master calendar hearing,[21] include the following situations, alone or in combination:

- If the case is a **candidate for the status docket**. PM 21-05 exempts cases that are on the status docket. However, a 2019 EOIR memo regarding the use of status dockets places limitations on when a case can be placed on a status docket.[22] For example, a case is appropriate for the status docket to await adjudication of certain applications by U.S. Citizenship and Immigration Services (USCIS), but an IJ cannot place a case on the status docket until the application is actually filed with USCIS.[23] If counsel has proof that the application has been completed and mailed but has no receipt from USCIS, it may make sense to move for the case to be exempt from the case from the "case flow processing model" since it is likely the USCIS receipt will arrive before any merits hearing date would occur. Once the practitioner receives the USCIS receipt, they could move to place the case on the status docket.

- In **particularly backlogged immigration courts.** In immigration courts where the first available merits hearings are a year or more away, a practitioner may consider asking for an exemption from the requirement that everything be filed within 45 days, especially if there are other factors making this deadline difficult to meet.[24] Practitioners could argue that with merits hearings scheduled years in the future, and immigration law subject to frequent change, legal standards are likely to change and an application that may be meritorious now may not be in several years or vice versa.

- If the respondent has a **medical condition** (*e.g.*, requiring bed rest or hospitalization) that may make case preparation difficult. In such a case, practitioners may consider filing a motion to exempt the case from the case processing model on the basis that respondent is a

[21] One of the changes to the ICPM that was added after the issuance of the PM is the addition of "motions for a master calendar hearing" to chapter 5.10(g), which lays out types of motions that can be filed, and to chapter 3.1(c)(v), which describes the requirements for a motion for a master calendar hearing. ICPM, *supra* note 3, chs. 5.10(g) & 3.1(c)(v). Note that motion for a master calendar hearing was left out of the newly issued Policy Manual, but, that Manual is apparently still be edited. *Id.* Attorney Matthew Hoppock drafted a template motion for master calendar hearing. *See* dropbox.com/s/rrcqiotar6k52jv/Motion%20for%20Master%20Calendar%20Hearing.doc?dl=0.

[22] *See* Memorandum from James R. McHenry III., EOIR Dir., Use of Status Dockets, PM 19-13 (Aug. 16, 2019), justice.gov/eoir/page/file/1196336/download.

[23] *Id.* at 3.

[24] Acting Principal Deputy Chief IJ Cheng stated that the deadline in the scheduling order is for filing of applications only, not supporting evidence. Cheng, EOIR Info Session, *supra* note 8. However, it can be very difficult to accurately answer questions on applications for relief, especially asylum applications, without first having the opportunity to examine relevant evidence. Moreover, with ongoing litigation on many proposed regulatory changes, it is difficult to predict today what law will govern the case months or years in the future.

vulnerable individual,[25] and ask that it be set for a master calendar, waiving the respondent's appearance if medically necessary, until the medical issue is resolved.

- If counsel has a **pending FOIA request**.[26] Before admitting the allegations of fact and conceding the charges in the NTA or completing the application(s) for relief, practitioners should review the documentation in the respondent's immigration file to ensure they have all available information. A concession of removability by counsel is binding on a respondent absent a showing of "egregious circumstances."[27] To prove such circumstances a respondent may have to file a bar complaint against counsel.[28]

  Completing an asylum application without access to a respondent's prior statements regarding a possible asylum claim, such as by reviewing credible fear interview results, could jeopardize the case by creating an apparent inconsistency that counsel could have avoided by reviewing the file first. For all these reasons, practitioners should move to exempt the case from the PM or to extend the deadline in the scheduling order until the respondent receives the disclosures resulting from their FOIA request for their immigration file.

- **When taking over a case from another attorney.** In this situation, current counsel will need time to obtain the previous counsel's file and review the documents in the DHS and EOIR files to competently proceed before the court, so new counsel may need to move to exempt the case from the PM or to extend the deadline in the scheduling order.

- When obtaining **documents from outside the United States**. It is not uncommon to experience delays in obtaining essential corroborative evidence for an asylum case. In some cases, practitioners may not be able to file the asylum application before receiving this evidence to avoid any potential inconsistency between information provided in the application and in the corroborative evidence. A motion to exempt the case from the "case flow processing model" or for an extension of the scheduling deadline, may be appropriate in such cases. Even if the motion is not granted, practitioners may be able to argue that minor inconsistencies between the late-received evidence and information in the application are the result of the inflexible, expedited scheduling timeframe.

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[25] *See supra* note 14.

[26] A recently decided class action suit requires USCIS and ICE to timely comply with FOIA requests for "A files." Practitioners may cite to this order in requesting more time before entering pleadings in immigration court. *Nightingale v. USCIS*, No. 19-CV-03512-WHO, --- F. Supp. 3d ---, 2020 WL 7640547, at *3 (N.D. Cal. Dec. 17, 2020) ("Timely access to A-Files is vital for noncitizens in removal proceedings.").

[27] *Matter of Velasquez*, 19 I&N Dec. 377 (BIA 1986).

[28] *See, e.g., Dos Santos v U.S. Attorney General*, 982 F.3d 1315, 1321 (11th Cir. Dec. 11, 2020) ("[A] petitioner may be released from a counseled concession only if she can show that 'egregious circumstances' are present. To make that showing, she must first demonstrate that the concession was untrue or incorrect. Only then can she argue that she should be released from the concession because it led to an unjust result or was the product of unreasonable professional judgment.").

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- **Obtaining an expert witness.** Recent decisions by attorneys general and the Board of Immigration Appeals (BIA) have made it more important than ever to secure expert testimony in many immigration matters. These decisions have increased the burden on respondents to demonstrate the cognizability of particular social groups in asylum cases,[29] increased the standard for showing exceptional and extremely unusual hardship in cancellation of removal cases,[30] and largely eliminated respondents' ability to accept stipulations by DHS to any element of a claim.[31] As a result, respondents should present an expert witness[32] in almost every case and may need to work with the expert witness *before* filing an application for asylum. For example, it may not be possible to identify a cognizable particular social group without first discussing the issues of "particularity" and "social distinction" with an expert.[33]

- **Changes in regulations, case law, or court practices.** During the four years of the Trump administration, and even during his final month in office, EOIR implemented dramatic changes in regulations, case law, and practices in the immigration court. The Trump administration engaged in more than a dozen rulemakings that would radically change immigration court procedures and substantive law in the last year. In December 2020 alone, Director McHenry issued eight policy memoranda. When new case law, regulations, or PMs are issued, practitioners may have to go back to the drawing board, and a motion to continue[34] or a motion for a master calendar hearing may be necessary. Even if the IJ denies the motion, filing the motion to exempt the case will help preserve for appeal due process concerns raised by the expedited scheduling.[35]

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[29] *Matter of A-B-*, 27 I&N Dec. 316 (AG 2018) and *Matter of A-B- (II)*, 28 I&N Dec. 199 (A.G. 2021) (challenges to showing a particular social group, or PSG, in asylum cases); *Matter of L-E-A-*, 27 I&N Dec. 581 (AG 2019) (challenges to showing a PSG in asylum cases, rejecting DHS concession).

[30] *Matter of J-J-G-*, 27 I&N Dec. 808 (BIA 2020) (discussing criteria for showing exceptional and extremely unusual hardship involving a medical condition).

[31] *Matter of A-C-A-A-*, 28 I&N Dec. 84 (AG 2020) (discussing PSG and nexus in asylum case, rejecting stipulations on elements of a case).

[32] *See also Matter of J-G-T-*, 28 I&N Dec. 97 (BIA 2020) (discussing the weighing and immigration judge should give to purported expert testimony).

[33] Likewise, it may be appropriate for the practitioner to file a motion to continue the merits hearing date in order to find and work with an expert. Practitioners should keep in mind that any motion to continue a merits hearing date should be filed as far in advance of that date as possible, since the performance goals for IJs can downgrade a judge for continuing too many merits hearings within 30 days of the hearing date. It is therefore very important to IJs that they have adequate time (generally 30 days) to fill open slots on their calendars with other individual hearings so that their performance evaluation is not affected by granting the continuance. *See* aila.org/File/DownloadEmbeddedFile/75495.

[34] Note that subsequent to the issuance of this PM, Director McHenry issued PM 21-13, Continuances, (Jan. 8, 2021) justice.gov/eoir/page/file/1351816/download. PM 21-13 largely reiterates the restrictive standards for granting continuances set forth in *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018) but sets the tone for IJs' consideration of continuance requests on page 1, where he says, "there is also a strong incentive by respondents in immigration proceedings to abuse continuances, and Immigration Judges must be equally vigilant in rooting out continuance requests that serve only as dilatory tactics."

[35] *See Matter of Garcia-Reyes*, 19 I&N Dec. 830 (BIA 1988) ("Objections to rulings of the immigration judge should be made on the record, or they cannot be adequately preserved for appeal.").

- In cases where the practitioner thinks **the respondent will benefit from the reading of the NTA**. Under 8 CFR § 1240.10(a)(6), the IJ is required to "[r]ead the factual allegations and the charges in the notice to appear to the respondent and explain them in non-technical language." The PM ignores this requirement by eliminating master calendar hearings prior the respondent entering written pleadings. In light of the serious and binding nature of concessions of removability, counsel may consider requiring the IJ to go through the formality of reading the allegations to the respondent (through an interpreter, when the respondent's "command of the English language is inadequate to fully understand and participate in removal proceedings"[36]) to ensure that the respondent takes the matter seriously and that it is on the record that the respondent understands them. A formal reading of the NTA by the IJ is another way to be certain the immigration court's NTA matches the one that was served on the respondent.

- In cases where counsel thinks **the respondent will benefit from the reading of the advisals**. Since this PM constitutes a significant change in how cases have been processed in the past, it is important for respondents to hear advisals directly from the IJ (read through an interpreter, when the respondent's "command of the English language is inadequate to fully understand and participate in removal proceedings."). A reading of the advisals by the IJ reinforces [37] counsel's explanations. In addition, given the change in court practice effectuated by the PM, it is important for the respondent to hear the advisals about the consequences of various actions from both counsel and the IJ to ensure that the respondent understands that the IJ may have limited procedural options to avoid issuing a removal order in the future.

b. General Tips for Navigating PM 21-05's "Case Flow Processing"

In some cases, it may be in the best interests of respondents to proceed pursuant to PM 21-05 in that it "encourages parties in immigration court to . . . resolve case through written stipulations,"[38] including "stipulated order[s] granting protection or relief from removal."[39] For cases that cannot be exempted from PM 21-05 or if it is in the best interests of the client to proceed pursuant to PM 21-05, the following tips may be helpful.

- Consider delaying the entry of appearance. With this new procedure, counsel will need more time up front for an intensive screening before being ready to make the first appearance, which will require being ready to plead and have applications for relief ready

[36] *See* ICPM, *supra* note 3, ch. 4.11.
[37] *Id.*
[38] *See* PM, *supra* note 2, at 1.
[39] *Id.*at 2 n.2. The language encouraging stipulations to grants of relief is certainly helpful to encourage IJs to accept the parties' stipulations despite some of the contrary language in such cases as *Matter of A-B-*, 27 I&N Dec. 316 (AG 2018), *Matter of A-B- (II),* 28 I&N Dec. 199 (A.G. 2021), *Matter of J-G-T-*, 28 I&N Dec. 97 (BIA 2020), and especially *Matter of A-C-A-A-*, 28 I&N Dec. 84 (AG 2020).

in 45 days. Thus, unless counsel is ready to enter pleadings and file applications for relief within 45 days, counsel may choose to not file the entry of appearance until within 15 days of the next master calendar hearing, which will provide an opportunity to appear before the IJ and explain the status of the case preparation and why more preparation time is required.

Note, however, that the PM appears to encourage IJs to report any efforts counsel takes to postpone proceedings as potential ethical violations. McHenry states:

> "Although EOIR recognizes that this new case flow processing model presents opportunities for gamesmanship for representatives seeking to delay proceedings for respondents, it nevertheless expects all representatives to comport themselves in an ethical and professional manner. Efforts to deceive an Immigration Judge regarding a respondent's representation may constitute grounds for disciplinary action. See 8 CFR § 1003.102(n)."[40]

Practitioners should be prepared to push back against this veiled threat if securing more time is in their client's best interest. The comment to ABA Model Rule 1.3 states in part, "A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."[41] Therefore, if there are legitimate reasons to delay filing a notice of appearance or to seek to exempt a case from the new "case flow processing," practitioners should do so and remind IJs of counsel's ethical obligations to advocate for their client's interests.

- Be careful in conceding service of the NTA. The concession of service of the NTA can preclude eligibility for certain types of relief from removal by, for example stopping the clock in non-lawful permanent resident cancellation of removal cases.[42] DHS must comply with added regulatory service requirements for certain respondents, including minors, those who are incompetent, or those who are confined to penal or mental institutions.[43]

- Be careful in admitting and conceding the allegations and charges in the NTA. Without access to DHS and EOIR files, respondent's counsel cannot determine whether the NTA

[40] *See* PM, *supra* note 2, at 5.
[41] Model Rules of Prof'l Conduct r. 1.3 cmt. (Am. Bar. Ass'n 1983), americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_3_diligence/comment_on_rule_1_3/.
[42] *See* INA § 240A(d)(1).
[43] *See* 8 CFR § 103.8(c)(2)(ii) (requiring service "upon the person with whom the incompetent or the minor [under 14 years of age] resides; whenever possible, service shall also be made on the near relative, guardian, committee, or friend"); *see also* 8 CFR § 103.8(c)(2)(i) for service requirements for respondents who are confined.

received by the respondent conforms with all of the statutory requirements[44] and is the same as the NTA in the immigration court file. Considering the binding nature of an attorney's concessions of removability,[45] and how they may limit the availability of relief to a respondent, it is important to be careful in admitting and conceding the allegations in the NTA. It is no more "gamesmanship" or unethical to hold a party to their burden of proof and ask the court to adhere to the formal requirements in the law than it is for a court to terminate or deny a case for failure to meet deadlines.

- Consider advising the respondent to take the Fifth Amendment invoking the privilege against self-incrimination where answering questions relating to removability could result in criminal prosecution (such as admitting to an entry without inspection or the commission of fraud) on any application for relief. An individual may invoke the Fifth Amendment privilege "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory."[46] The IJ may draw an adverse inference from a respondent's assertion of the Fifth Amendment privilege, and based on that and other evidence deportability can be established.[47] However, an adverse inference alone is insufficient to meet the DHS burden to show removability.[48]

- Preserve due process arguments. One of the biggest problems with the case management system in PM 21-05 is that it can require a respondent to submit applications for relief before removability has been established. In doing so, it creates the possibility that information in those applications could be used by DHS to meet its burden to establish removability. For this reason, if the respondent has contested removability in pleadings required by the scheduling order, a practitioner may object to the requirement that they simultaneously file all applications for relief as violating their right to due process before the immigration court.[49]

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[44] *See Pereira v. Sessions,* 138 S. Ct. 2105 (2018) (holding that an NTA that does not designate the specific time or place of a hearing does not trigger the stop-time rule disqualifying an individual from non-LPR cancellation of removal); INA § 240B(b)(1)(A) (providing that service of the NTA within one year of a respondent's entry into the United States makes them ineligible for voluntary departure at the conclusion of proceedings); *see also Niz-Chavez v. Barr,* 789 F. App'x 523 (6th Cir. 2019), *cert. granted,* 141 S. Ct. 84 (Mem.) (U.S. June 8, 2020) (No. 19-863) (argued at the Supreme Court on November 9, 2020 on the issue of whether a second hearing notice can cure an NTA that did not specify the time or date of hearing).

[45] *Matter of Velasquez,* 19 I&N Dec. 377 (BIA 1986).

[46] *Kastigar v. United States*, 406 U.S. 441, 444 (1972).

[47] *See, e.g., Barradas v. Holder,* 583 F.3d 754 (7th Cir. 2009).

[48] *Matter of Guevara,* 20 I&N Dec. 238 (BIA 1991).

[49] By relieving DHS of its initial burden of proof, the PM violates the regulatory burden shifting scheme. *See* note 8, *supra. See also, Matter of Garcia-Flores,* 17 I&N Dec. 325 (BIA 1980) (holding that violations of regulations intended to benefit the noncitizen may result in the exclusion of evidence or the termination of proceedings where the violation prejudices the noncitizen); *accord Sanchez v. Sessions,* 904 F.3d 643, 655 (9th Cir. 2018); *Montilla v. INS,* 926 F.2d 162, 164 (2d Cir. 1991) ("The notion of fair play animating [the Fifth Amendment Due Process Clause] precludes an agency from promulgating a regulation affecting individual liberty or interest, which the rule-maker may then with impunity ignore or disregard as it sees fit. The INS may not fairly administer the immigration laws on the notion that on some occasions its rules are made to be broken.").

- Be ready to file a motion to terminate. The PM states that the initial scheduling order requires that DHS submit any "evidence related to removability" within 45 days.[50] Be ready to file a motion to terminate for DHS's failure to meet this deadline, or any more specific DHS filing deadline laid out in the scheduling order, or failure to sustain their burden of proof if they do not submit evidence in a timely fashion or the evidence they submit is insufficient to meet their burden of proof.

- Advocate for adequate time to prepare before the date set for the merits hearing. The PM is silent on when the actual date for the merits hearing should be set. In response to the scheduling order, practitioners should explicitly request a specific period of time before the hearing is set to be sure the respondent has enough time to get documents from FOIA, witness statements, documents from respondent's home country, experts' reports, etc.

This list of potential actions is neither exhaustive, nor a suggestion that any one of these actions is appropriate in any or all cases. Practitioners must consider the individual facts and circumstances of each client's case. Practitioners must also realize that while IJs may be annoyed or frustrated at practitioners for undertaking any of the above strategies, it is very important not to concede issues or waive advisals or other formalities in these cases to preserve all possible issues, including violation of the respondent's right to due process, for appeal.

III. CONCLUSION

This PM, coupled with other changes to procedures brought about by regulations and case law, appears designed to speed up proceedings, even if doing so prejudices the rights of the noncitizen. It is therefore more important than ever for practitioners to avoid making concessions in pleadings merely because it has been customary to do so. Instead, practitioners should ensure that DHS meets its burden of proof and should only concede service, factual allegations, and the charges when it is in their clients' interest to do so. With the issuance of this PM, and other pressures on IJs to move cases to resolution as quickly as possible, practitioners should be prepared to litigate every issue in every case and put every argument in writing, and preserve every issue for appeal to safeguard their clients' rights. Making these strategic choices will often require the practitioner to push back against the new "case flow processing" as the practitioner may not have all of the necessary information, for example, through FOIA disclosures, to make informed decisions on case strategy. Ultimately, practitioners must ensure that their clients receive due process in their immigration court proceedings.

[50] *See* PM, *supra* note 2, at 3. CLINIC has obtained a scheduling order issued by the Denver Immigration Court pursuant to the PM. Under that scheduling order, issued by the court's Assistant Chief Immigration Judge, DHS does not need to file anything, including any proposed evidence related to removability, until 10 days after the respondent's filing. It is not clear whether this staggered filing will be the norm across the country. *See* Appendix A, sample scheduling order.