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4 Empowering DHS Trial Attorneys to Handle Cases More Professionally and More Efficiently

Many of our interviewees believe that DHS Trial Attorneys face extreme pressure to remove from the United States every person who comes before an Immigration Court, even if there is scant basis for doing so. This deport-in-all-cases culture distracts Trial Attorneys from the goal of seeking fair and just results under the law. According to one interviewee, a Trial Attorney argued that a man provided "material support" to terrorists, a group of Burundi rebels, based solely on the fact that the rebels robbed him of $4.12 and his lunch. This kind of blind obstinance caused one interviewee to refer to aggressive Trial Attorneys as "merchants of death."

DHS Trial Attorneys have only about 20 minutes to prepare each case, leaving them little time to respond even to routine questions.

Poor management decisions have made matters worse. DHS's practices of assigning Trial Attorneys on a hearing-by-hearing basis and limiting their prosecutorial discretion have clogged up the Immigration Courts. Interviewees complained time and again that Trial Attorneys often show up to hearings unprepared with excuses like "I can't find the file, Your Honor," or "That was a previous attorney." Moreover, in our interviews we found that Trial Attorneys typically do not return phone calls, refuse to negotiate to resolve issues or settle cases and fail to drop weak cases when prosecutorial discretion would warrant. Instead, many interviewees believe that Trial Attorneys invariably seek the worst outcome possible for the immigrant and unnecessarily drag out cases by litigating every issue, thereby undermining both the legitimacy and efficiency of Immigration Courts.

Partly because of these problems, Trial Attorneys are woefully overburdened. According to the ICE Principal Legal Advisor, in 2005 Trial Attorneys had only about 20 minutes to prepare each case, leaving them with little time to respond even to routine questions. One interviewee noted that it took her a week to find out whether the government had filed its motion before a deadline because no Trial Attorney responded to her inquiries and requests for a copy. The number of Trial Attorneys has increased somewhat since 2005 but has not kept pace with the burgeoning caseload. In addition to the burden on the Trial Attorneys themselves, these kinds of tactics by Trial Attorneys also increase the burden on the taxpayer. Litigation of extraneous issues that leads to delay means that immigrants are in detention longer, at a significant daily cost.

Appleseed therefore proposes the following action items to reduce the inefficiencies and improve the professionalism of DHS Trial Attorneys.

Remind Trial Attorneys that their mission is to enforce the law as written, not to deport every immigrant.

ICE's website states its mission is to "protect national security by enforcing our nation's customs and immigration laws." This focus on immigrants as national security threats unfortunately leads to the practice of trying to remove from the United States every immigrant who appears before an Immigration Court. But this focus is misplaced: from 2004 to 2006, only 126 cases in Immigration Court (or 0.0155 percent of all cases) involved terrorism or national security concerns, and the percentage of cases involving allegations of any type of crime amounted to only 13 percent. The vast majority of immigrants in Immigration Court present no

danger to the security of the United States.

Our interviews suggest that many Trial Attorneys do not recognize this fact and that a deport-in-all-cases mentality pervades many jurisdictions. A former Trial Attorney whom we interviewed told us that Trial Attorneys had previously been instructed to "see that justice is served" and operated with that mindset. In her view, the change to what she referred to as the current "zero-tolerance" directive is the primary source for the shocking Trial Attorney behavior identified by our interviewees. To restore an appropriate mindset, DHS should direct Trial Attorneys to approach each case objectively, with the goal of achieving the correct result under the law.

We also heard that the attitudes of Trial Attorneys vary due to inconsistent practices in the various DHS field offices. We repeatedly heard that Trial Attorneys are less influenced by pronouncements from Washington, D.C., than by the attitudes of their immediate supervisors. It is therefore critical that DHS require local Chief Counsels to ensure that Trial Attorneys under their supervision comply with these directives.

Enforce the DHS policy encouraging the use of prosecutorial discretion.

Existing DHS policy statements direct Trial Attorneys to exercise prosecutorial discretion in appropriate circumstances, but our interviews suggest that Trial Attorneys rarely do this in practice. Instead, they too often refuse to negotiate, charge ahead with losing cases and challenge even the clearest of issues at trial and on appeal. As one of our interviewees stated, "Even if nothing else changes, just re-training the attitude and direction of the Trial Attorneys could make a world of difference." Many factors constrain Trial Attorneys' discretion, including insufficient time to review cases, inexperience and orders from local supervisors who refuse to implement DHS prosecutorial discretion policy.

"Our reasoned determination in making prosecutorial discretion decisions can be a significant benefit to the efficiency and fairness of the removal process."
ICE Principal Legal Advisor

DHS should vigorously enforce its current prosecutorial discretion policy. DHS should remind Trial Attorneys that they are directed to enter into stipulations or settlements in suitable cases and to decline to appeal when appropriate in the interests of judicial economy and fairness. DHS Trial Attorneys should focus their efforts and marshal their scarce resources to go all out on those cases that present the highest priority—those in which the government seeks to remove immigrants who are a danger to national security or the communities in which they live. Moreover, there would be little benefit to assigning Trial Attorneys to cases or mandating pre-hearing conferences—two efficiency-enhancing suggestions described below—if Trial Attorneys cannot or will not exercise prosecutorial discretion when appropriate.

DHS should also hold local supervisors responsible for their own compliance with these policy directives and for the compliance of the Trial Attorneys they supervise. Our interviews suggest that Trial Attorneys follow the spoken or unspoken directives from their local supervisors in exercising prosecutorial discretion, even when those directives conflict with official DHS policy. For example, in a rare case related by an interviewee in which a junior Trial Attorney was willing to consent to relief, the Trial Attorney did not even try to confer with her supervisor, because the Trial Attorney believed her supervisor would not have allowed it. It is of course important that more senior lawyers oversee decisions by junior Trial Attorneys. It is equally important, however, that these senior lawyers follow official DHS policy.

Assign a Trial Attorney to each case.

DHS's practice of assigning Trial Attorneys to cases on a hearing-by-hearing basis significantly bogs down the Immigration Court system. Instead, DHS should make a single Trial Attorney primarily responsible for each case, a practice known as vertical prosecution. This will reduce the occurrence of Trial Attorneys showing up to hearings unprepared and unfamiliar with the case, a frequent cause of courtroom inefficiency. In addition, vertical prosecution will provide an immigrant's counsel with a point of contact in the government, thereby encouraging negotiation and the appropriate use of prosecutorial discretion. Trial Attorneys are more likely to negotiate and to exercise discretion on cases with which they are familiar and will have less incentive to delay negotiations for "someone else" to handle.

We recognize that Trial Attorneys are extremely busy so scheduling conflicts are inevitable. Given the high turnover among Trial Attorneys, we also understand that maintaining Trial Attorney assignments will be impossible in some cases. Furthermore, a system of assigning a Trial Attorney to a case from start to finish will not be effective unless Immigration Judges cooperate with Trial Attorneys in setting case schedules. Although DHS will have to accommodate these realities at times, the assignment of Trial Attorneys to cases should be the rule rather than the exception. This new practice may also help reduce Trial Attorney attrition by giving Trial Attorneys ownership over their cases.

Mandate pre-hearing conferences at the request of either party.

Pre-hearing conferences allow the parties to resolve issues, voluntarily exchange information, simplify and organize the courtroom proceedings and dispose of clearly strong or hopeless cases without having to take up the court's time. Although the law encourages pre-hearing conferences in front of an Immigration Judge, they are not mandatory and, our interviews indicate, are rarely held. There is no provision whatsoever regarding pre-hearing meetings solely between the parties, without the judge present. Mandating pre-hearing conferences at the request of either party would shorten hearings and make them more efficient by increasing Trial Attorneys' preparedness and by narrowing the issues before hearings.

> **"[P]re-hearing conferences between the parties to narrow the issues ... foster both more efficient proceedings and more efficient use of limited … resources."**
>
> **David L. Neal, Chief Immigration Judge**

There are certainly cases where pre-hearing conferences are of little use. But because they will be held only upon the request of a party and need not be lengthy, this policy will impose only a slight burden on the government, wholly outweighed by its potential benefits. Pre-hearing conferences will ordinarily take place outside of the courtroom in light of Immigration Judges' already overcrowded dockets, but Immigration Judges will retain their authority to order in-court conferences as well.

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