

Procedural Protections
Termination and Suppression
Strategies for Child Clients

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Materials

- VERA Practice Advisory: *Strategies for Suppressing Evidence and Terminating Removal Proceedings for Child Clients*, March 2015
- Appendices to the VERA Practice Advisory (238-page PDF)
- June 2015 Addendum to the Practice Advisory

Materials

- Report from U.S. Government Accountability Office: Unaccompanied Alien Children: Actions Needed to Ensure Children Receive Required Care in DHS Custody, July 2015
- *ACLU Practice Advisory Representing Immigrant Children Following Release from Border Patrol Custody*, November 2015
- Report from American Immigration Counsel: Hieleras (Iceboxes) in the Rio Grande Valley Sector, Lengthy Detention, Deplorable Conditions, and Abuse in CBP Holding Cells; December 2015

Overview

- I. Context/Basic Concepts
- II. Termination
- III. Suppression
- IV. Practical Tips
- V. Procedural Steps

I. Context

- More than two years after the summer of 2014
- Continuing Violence in Northern Triangle
- Continued Policies of Deterrence/NEW ADMINISTRATION
- New Arrivals
- Procedural Process
 - Motions to Change Venue
 - Motions to Reopen
 - Reprioritization
- Important to understand what procedural process might have occurred at the border

I. Context

- Mistreatment at the border: *hieleras*, *perreras*, *polleras*
- New era – revamped internal enforcement?



I. Basic Concepts

Suppression and Termination Strategies!

- Hold the government to its burden!
- Push back against unlawful government action!
- Critical backstop and brakes for children in an era where an unprecedented number of children are being placed in proceedings and the proceedings are being expedited
- Last line of defense for children without other relief

I. Basic Concepts

Termination vs. Suppression

- Terminate proceedings when the gov't violated certain regulations designed to benefit a child and the child was prejudiced or prejudiced can be presumed, even when the gov't can prove alienage. *Matter of Garcia-Flores*, 17 I&N Dec. 325, 328-29 (BIA 1980).
- Suppress evidence/statements obtained in violation of the Constitution, may lead to termination. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984).

I. Basic Concepts

Termination vs. Suppression

- Termination is more powerful
 - Terminate, not just keep out specific evidence
 - Terminate even if DHS has untainted evidence (e.g. proof of alienage)

II. Motions to Terminate

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- Regardless of proof of alienage, the government violated a regulation intended to benefit the non-citizen + prejudice
 - *Matter of Garcia-Flores*, 17 I&N Dec. 325 (BIA 1980)
- The government violated a policy or promise it has made
- Remedy: Invalidate agency action (i.e., terminate removal proceedings)

Proving Prejudice

- Three ways to prove prejudice:
 - (1) If compliance with regulation is mandated by Constitution or federal law = prejudice presumed;
or
 - (2) Where entire procedural framework, designed to ensure the fair processing of an action affecting an individual is created but then not followed by an agency = prejudice presumed; or
 - (3) Prove actual prejudice to your client.

Violations that Support a Motion to Terminate

- Child-specific regulations
 - 8 CFR Section 236.3(h), Service of Form I-770
 - 8 CFR Section 103.8(c)(2)(ii), Service of NTA
- General regulations that also benefit children
- Protective policies and promises
 - *Flores* Settlement Agreement
 - Hold Rooms Memo
 - TVPRA

Violations Involving Form I-770

- Purpose of I-770 is to inform children of rights before an interview or interrogation
- Must be served on all children under 18 years
- If under 14 years, additional protections
- Typical violations
- Proving prejudice (case example)
- Current trends in motions based on I-770 violations
- Typical DHS arguments in response

Violations Involving NTA Service

- Proper service on children under 14 years
 - Served on person with whom child resides
 - Head of ORR facility
 - ORR sponsor
 - Served on parent if parent is in the United States
 - Ninth Circuit (all released children under 18)
- Typical violations
- Current trends
- DHS arguments in response

Matter of W-A-F-C

- The BIA held that where DHS seeks to re-serve a respondent to effect proper service of an NTA that was defective under the regulatory requirements for serving minors under the age of 14, a continuance should be granted for that purpose.
- Why does EOIR give ICE extra chances but is extremely harsh on respondents?!

Matter of W-A-F-C

- On January 17, 2017, Catholic Legal Immigration Network (CLINIC), Legal Aid Justice Center, Safe Passage Project, VIDA, and 12 other organizations asked the Board of Immigration Appeals (BIA) to reconsider its decision in *Matter of W-A-F-C*, 6 I&N Dec. 880 (BIA 2016).

Matter of W-A-F-C

- CLINIC Motion to Reconsider: <https://www.dropbox.com/s/whzl8rpacw67r05/CLINIC%20redacted%20motion%20to%20reconsider%20WAF-C%20Jan%202017.docx?dl=0>
- Text of the amicus brief (but the pagination is off): <https://www.dropbox.com/s/l0yss3yevjl3aa9/Amicus%20W-A-F-C-%20redacted%20pagination%20imperfect.docx?dl=0>

Other Violations

- Regulations guarding against unlawful searches and seizures
- Regulations mirroring 5th amendment due process rights prohibiting coercion and duress
- Policies and promises around conditions of confinement/detention, transfer to ORR, release, etc.

III. Motions to Suppress

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- “Exclusionary rule” provides that objects or statements obtained in violation of the Constitution generally may not be used in court.
- Typically used to prevent the government from meeting its burden of proving alienage
- Also may be used to keep out evidence introduced for other reasons.

Well-Established Suppression Theories

1. An egregious Fourth Amendment violation
2. A widespread Fourth Amendment violation
3. A Fifth Amendment violation

1. Egregious Fourth Amendment Violation

- Must have a Fourth Amendment violation
- Usually, it focuses on whether a reasonable person would have felt free to leave
- Ex. Two uniformed officers go right up to the only dark-skinned man in a bus waiting area

1. Egregious Fourth Amendment Violation

- Race-based illegal stop,
- Bad faith action (knew or should have known it was illegal), or
- Severe seizure. For example, forced vomiting, improper sexual contact.

2. Widespread Fourth Amendment Violation

- *Oliva-Ramos* (3d Cir. 2012)
- Pattern, many affected, happens often, done routinely, no training, unreliable databases, arrest-quotas
- Collaborate with other lawyers.

3. Fifth Amendment Violation

- Coercion
- Holding children in ice-boxes?
- Interfere with right to counsel?
- Denying food/drink?
- Hours of interrogation?

Beware Untainted DHS Evidence

- The immigrant's lawyer concedes alienage by admitting the NTA's allegations
- The immigrant's lawyer concedes alienage while trying to change venue
- The immigrant's lawyer concedes alienage in a FOIA

Use Suppression to Keep Out Prejudicial Evidence

- Tips for other ways to challenge an I-213
 - Reliability
 - Internal contradictions
 - obviously questionable or inaccurate information
 - source of information unknown or problematic
 - lag between information collection and I-213 creation
 - lack of detail

State Juvenile Confidentiality Laws

- Many states have laws explicitly protecting juvenile records
- If ICE obtained alienage or other prejudicial information from state juvenile records, consider a suppression argument
- Couch violation of state juvenile confidentiality law as violation of Due Process rights
- Exciting developments in CA

IV. Practical Considerations

Working with Kids/Client Interview

- Child is your client!
- Takes time to develop trust, but consider shorter meetings
- Be aware of trauma, developmental issues- stop meetings when necessary, continually check in with the child
- Keep in mind that the child's journey/apprehension was likely very memorable. (Reticence may come from discomfort, so try to avoid re-traumatizing.)

Client Interview

- Explain roles (multiple times)
- Ask neutral, non-judgmental, accessible Qs
- MTTs/MTSs are complex strategies even for adults to understand – consent to proceed with these strategies
- Tell the child you would like to paint a picture of what happened in your mind.
- Use documents you gathered to guide the conversation.

Investigation

- Scour docs: NTA, I-770, I-213
- Document collection: Track III FOIAs, ORR File Request, *Dent* Requests (A-file)
- Subpoenas
- Interview other witnesses
- Interview your client step-by-step from apprehension by immigration to the present

| PROS | CONS |
|--|--|
| Hold the government to its burden | If successful, suppression and termination strategies still leave child without legal status |
| Slow things down! To work with your child client, to pursue predicate SIJS orders, U-visa certs, evidence from abroad, to allow for rehabilitation, etc. | Suppression and termination strategies may slow down child's path to protection against deportation/legal status |
| If child has no strong relief, this may be your only options! | Could annoy the court and government |
| Could result in termination of proceedings or exclude some prejudicial evidence | Lengthy and time consuming |
| Push back against possible unlawful sharing of confidential juvenile information | |
| Deterrence? | |
| Unexpected PD offers? | |

Strategic Decisions: Hypo #1

You represent a child client who was under age 14 at entry, and the NTA certificate of service shows personal service only on her, even though she was in ORR custody, her mother was living in the United States at the time, and she was released to a sponsor in the Ninth Circuit. Was NTA service proper? If not, how do you decide whether to concede proper service?

Strategic Decisions: Hypo #2

You represent a child client with proper NTA service. She was not given an I-770 while in CBP custody, she was questioned by CBP after spending hours in a cold cell, and her I-213 is riddled with errors. She also appears to qualify for SIJS. And she has a legitimate (though legally challenging) asylum claim. How might you analyze this case?

Strategic Decisions: Hypo #3

You represent a child client with serious negative past conduct in his country of origin and here. He has no SIJS options, but he has a possible asylum claim as a former gang member. You have concerns, however, about revealing the conduct because of potential bars and negative discretionary issues. How might you analyze this case?

V. Procedure

At the Initial Master Calendar Hearing

- Contest NTA service if applicable
- Get time to brief service issue
- Deny factual allegations/charge if applicable
- Schedule ICE evidence/motion/hearing
- Assert other grounds for termination even if conceding service/allegations/charges
- Make sure client is prepped, and avoid in absentia order!

Motions

- Assess evidence carefully, interview, research
- Make out a prima facie case for suppression/termination (evidence, not just argument!)
- Write supporting declarations (voice/detail)
- Keep an eye on details (ICPM compliance, service, filing by deadline)
- Note that if ICE blows the deadline to submit evidence of alienage, move to terminate

Hearings!

- Observe similar hearing (or review transcript)
- Understand well how the IJ plans to proceed
- Consider motions in limine
- Complete full practice session (direct/cross/all witnesses)
- Have a plan with your client about invoking the Fifth Amendment if necessary

Hearings!

- Clear up procedural issues up front (Fifth etc.)
- Object to any DHS attempt to submit evidence at the hearing
- Establish prima facie case via testimony
- Keep an eye on cross and object if needed
- Object to DHS continuance request if its witnesses should have been present
- Cross DHS witnesses carefully & get all rulings

Decisions!

- If IJ rules for you:
 - If no DHS appeal, leave client as-is or consider filing for relief affirmatively (alert to NTA re-filing)
 - If DHS appeal, defend at BIA
- If IJ denies your motion:
 - Consider interlocutory appeal, though longshot
 - Decide whether to take removal order or pursue relief
 - Litigate carefully on appeal, and pull in support

Decisions!

- If the IJ denies your motion:
 - Interlocutory appeal unlikely to be accepted by the BIA (though you could try), but you can ask for a stay to try for one
 - Decide whether to take a removal order or pursue relief (note that if the grounds for motion were *not* alienage, then no problem pursuing relief; but if they were, note you might be giving up your alienage claim)
 - Litigate the case carefully on appeal; consult with others and possible amici

Avoiding *in absentia* & Motions to Reopen

- Use same strategies to advocate as pro bono/friend of the court/etc. to avoid *in absentia* order
- Consider the same strategies for clients with removal orders
- Same concepts: improper service, proving alienage, etc.

Thank You's and Stay Involved!

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