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Federal District Court Litigation

Online Course



AILA Federal District Court Litigation Online Course

This course offers intermediate-level instruction for suing the government on immigration issues in federal district court. The course content is intended for immigration practitioners who have some familiarity with federal suits but are new to litigation, with a focus on procedural issues. The program has been designed by a team of experts to provide fundamental litigation strategies for all practitioners, as well as key teachings specific to humanitarian– and employment-based topics.

The first two modules start off the course by addressing steps to take when preparing to file a lawsuit, including litigation logistics, choosing a legal strategy, and pursuing advocacy before filing the suit. Subsequent modules then discuss critical motions, what happens after filing the suit, and litigating disputes related to humanitarian, naturalization, and business immigration issues. Post-filing tactics, including discovery, negotiating a settlement agreement, and challenging denials, also are discussed.

Don't miss this exciting opportunity to learn how to sue the government in federal district court!

Note: *This course is produced by AILA with support by the American Immigration Council.*

Module 1: Preparing to Sue in District Court

This module provides detailed information on pre-litigation essentials, litigation strategies, causes of action and drafting tips for complaints. Faculty and materials in this module discuss causes of action for litigation in federal court, how to draft complaints, and specific ethical considerations. They also provide tips for fee agreements, managing client communications, and other issues to help lawyers navigate cases through the federal courts.

Module Outline

- **Video 101:** Welcome to the AILA Federal District Court Litigation Online Course
- **Reading:** How to Take the AILA Federal District Court Litigation Online Course: Course Logistics and Tech Tips
- **Video 102:** Pre-Litigation Issues: Getting Ready to File Suit
 - Getting admitted to district court
 - Registering on Public Access to Court Electronic Records (PACER) for electronic case files (ECF) filing
 - Review local rules of civil procedure
 - Required documents for filing
 - Issues with civil cover sheet and category form
 - Communicating with local counsel and the court
- **Handout:** Sample Individual Rules of Procedure from a District Court Judge
- **Video 103:** Litigation Strategy: Cause of Action and Legal Issues
 - Mandamus
 - Review the client file: finding issues and reasons for delay
 - Read cases in your district on lengthy delays: knowing local practice



- When and why to sue
 - Venue: where to sue
- Actions under the Administrative Procedure Act (APA)
 - Legal considerations before filing
 - Discretionary decisions and non-reviewable decisions
 - Other remedies vs. litigation
 - Forms of relief available in APA actions
 - Exhaustion of administrative remedies
 - Whether the agency's action is final
 - Venue: where to sue
- **Reading:** B. Green *et al.*, "Putting on the Gloves: Preparing for Federal District Court Litigation," *Immigration Practice Pointers* (AILA 2023–24 Ed.).
- **Video 104:** Drafting the Complaint and Preparing Exhibits
 - Plaintiffs
 - Who has standing?
 - Who should be named as a plaintiff?
 - Defendants
 - Whom to sue: USCIS, DHS, DOS, consulate, FBI, USCIS field office, U.S. Attorney General
 - Who are proper defendants and why are they being sued?
 - Drafting the complaint: key sections
 - Introduction
 - Parties
 - Jurisdiction
 - Venue
 - Exhaustion of Administrative Remedies
 - Facts
 - Cause of Action
 - Requests for Relief
 - Exhibits
 - What and when to include
 - Redacting exhibits
- **Reading:** T. Realmuto and E. Winger, *Whom to Sue and Whom to Serve in Immigration-Related District Court Litigation* (AIC, NILA, NIP Sept. 14, 2022).
- **Exercise:** Drafting Different Sections of a Mandamus Complaint
- **Handout:** Sample Complaint for Mandamus Case
- **Video 105:** Filing the Complaint, Serving Process on Defendants, and Post-Filing Issues
 - Electronic filing of the complaint and exhibits
 - Motion for admission pro hac vice (if needed)
 - Serving the summons and complaint
 - Defendants' response
 - U.S. Attorney or Office of Immigration Litigation (OIL)
 - When the government's response is due
 - Preparing and filing proof of service on defendants



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- Defendant's answer or motion
- Amending the complaint: when and how
- Anticipated actions to manage
 - Motions and responses
 - Scheduling orders from the court
 - Discovery if appropriate
 - Oral argument on motions
- Oral advocacy tips
- Emergency relief (if needed)
- **Video 106:** Important Ethical Issues When Preparing Litigation
 - Pre-litigation issues
 - Determining whether litigation is the best solution
 - Communicating with the client about local counsel
 - Dealing with local counsel: Fee splitting and delegation of tasks
 - Drafting a fee agreement with local counsel included
 - Drafting a fee agreement with assigning potential Equal Access to Justice Act (EAJA) fees
 - Other considerations
 - Protecting confidential client information
 - Redacting documents
 - Communicating with the client after filing the case
 - Managing settlement proposals
- **Handout:** Sample Fee Agreement

Faculty:

Amanda Waterhouse (ML), AILA Amicus Committee Member, Houston, TX

Brian Christopher Schmitt, Westminster, MD

Karen C. Tumlin, Los Angeles, CA

Module 2: Making the Case for Litigation

This module helps litigators consider and make important pre-litigation decisions in their cases. The videos, materials, and exercises help participants decide what their goals are, identify plaintiffs, and navigate important pre-litigation questions like whether administrative remedies have been exhausted, how to find support for your case from national partners, and using non-litigation strategies like media advocacy to bolster your case. Participants also learn important negotiation techniques to maximize your chances of success and hear about common ethical pitfalls in immigration federal court litigation.

Module Outline:

- **Video 201:** Before You Begin Drafting, Part 1: What Are Your Goals?
 - Determining whether the client ultimately wants immigration relief, systemic change, injunctive relief, damages, or a combination of these
 - The role of stays and preliminary injunctions
 - Creating a cost/benefit analysis to compare resource input with likelihood of success



- Is redress available?
 - Does plaintiff have a current priority date, whether underlying case is strong enough to win if mandamus granted, etc.
- Length of litigation: likelihood of appeal(s), procedural or regulatory issues that might delay dispositive outcome
- How to evaluate how far the case can and should go given the Supreme Court's makeup, circuit court precedent
- How to determine which individual cases present good impact issues
- **Video 202:** Before You Begin Drafting, Part 2: Who Is Your Client?
 - Factors to consider about whether a class action is appropriate
 - When is a mass action better?
 - Evaluating whether an organizational plaintiff is better than an individual plaintiff
 - Potential conflicts of interest between clients
 - Lessons learned in representing multiple clients in one action
- **Video 203:** Is Your Case Ready to Litigate?
 - Filing a Notice of Appeal or Motion on Form I-290B or other administrative appeal first
 - Finding support through AILA or other groups
 - The role of amicus briefs
 - Finding strategic partners in the American Immigration Council and AILA
 - For cases which involve issues of great importance to AILA's members
- **Handout:** Litigation Planning Considerations Checklist
- **Video 204:** Preparing Your Case with Litigation in Mind
 - Using Freedom of Information Act (FOIA) and other records requests to get the information necessary to prepare your case
 - How does FOIA work?
 - Entities subject to FOIA
 - How to write your FOIA request
 - Time limits on FOIA responses
 - FOIA administrative appeals
 - Suing over FOIA non-responses
 - FOIA exemptions and exclusions
 - Challenging FOIA exemptions and privilege logs
 - Litigation considerations
 - Attorney fees under FOIA
 - Drafting complaints that include attorney fee requests
 - Including proper attachments to support your complaint
- **Handout:** Sample FOIA Complaint, Redacted
- **Video 205:** Agency Negotiations before and during Litigation
 - Using anti-spoliation notices to preserve evidence and spark early settlement
 - Pre-filing negotiations with the Assistant U.S. Attorney (AUSA)



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- Addressing delay tactics
- Pre-filing notices to relevant administrative agencies
 - USCIS field offices
 - USCIS service centers
- Negotiations after case is filed
 - Strategies with AUSA
 - Strategies with DOJ's Office of Immigration Litigation
- Creative negotiation outcomes
 - DHS U visa certifications
 - Prosecutorial discretion grant
 - Parole, cancelling the notice to appear (NTA), agreement not to reinstate removal
- Communicating negotiations to the court
 - Requesting stays
 - Should you or opposing counsel communicate negotiations to the court?
- **Handout:** Sample Anti-Spoilation Letter
- **Reading:** AILA Administrative Litigation Task Force. *Litigation Briefing: How to Discuss Litigation with a Client* (Jan. 17, 2019); AILA Doc. No. 19011802.
- **Video 206:** Ethical Pitfalls of Using Litigation to Spark Agency Action (Ethics)
 - Communicating timelines, costs, and outcome possibilities effectively to your client
 - Duty to negotiate in good faith
 - Duty to expedite litigation
 - Ethics of prolonging litigation after getting a resolution
 - Ethics of prolonging litigation to negotiate attorney fees
 - Filing an action solely to force an agency to act: When might this be unethical?
 - When is a client's desire for faster adjudication not a real need for faster adjudication?
 - Maintaining your credibility and relationship with the bench
 - Sanctions
- **Video 207:** How to Use Non-Litigation Strategies to Win Your Court Case
 - The basics of movement lawyering
 - Media advocacy as a litigation tool
 - DHS Office for Civil Rights and Civil Liberties (CRCL), the Federal Tort Claims Act (FTCA) Litigation Section, and other administrative complaints as partners in litigation
 - Working with advocacy groups and organizers
- **Hypotheticals**

Faculty:

Kathleen Kersh (ML), AILA Federal Court Litigation Section Steering Committee/Online Course Committee
Member, Dayton, OH

Mark A. Prada, AILA Federal Court Litigation Section Steering Committee Chair, Miami, FL



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Emily Brown, AILA Federal Court Litigation Section Steering Committee, Columbus, OH
Megan Guzman, Orange, CA

Module 3: Dispositive Motions

Federal district court litigation revolves around motions practice, especially in cases where there is no right to a jury trial, and in cases that are decided based on a defined administrative record. The government will usually try to dismiss a case before it can go to judgment, by means of a motion to dismiss; after that, the parties will gear up for cross-motions for summary judgment. This module will help practitioners understand some of the most common motions filed by government defendants in immigration cases, and strategies to keep the case alive and bring it to a final judgment of the court.

Module Outline:

- **Video 301:** Motions Practice Generally
 - Drafting for federal court, and how it differs from others—*e.g.*, immigration court, etc.
 - Federal Rules of Civil Procedure (FRCP) 6, 11, 12, 15, 16, 56
 - Local rules and local practice
 - Pre-filing letters, pre-filing conferences, and meet-and-confer requirements
 - Deadlines and extension of deadlines
 - Submission of proposed orders
 - Chambers copies
 - Consent motions and consent orders
 - Surreplies, notices of supplemental authority, and what to do when relevant facts change in the middle of briefing a motion
 - How to ask for a hearing on a motion
 - Electronic Case File (ECF) basics
 - Confidentiality
 - Semi-confidentiality of certain immigration case types
 - Motions to seal
 - FRCP 5.2 requirement to redact in certain instances
 - Preliminary motions: temporary restraining orders (TRO) and preliminary injunctions (PI), briefly
 - Standard
 - When properly used—*e.g.*, nonimmigrant facing deadline to depart United States
 - Tactical advantage of forcing an immediate response and providing the opportunity to supplement the record to establish irreparable harm
 - Class actions (briefly)
- **Exercise:** Review the Local Rules and Draft Motions
 - Review the rules of the court in which you practice most often or are most likely to practice most often, as well as the chambers' policies of the judges therein; then draft
 - A consent motion to extend briefing deadline, plus proposed order



- An opposition to the government’s second motion to extend answer deadline in an unreasonable delay case
- **Reading:** AILA Administrative Litigation Task Force, “Motions to Dismiss in Federal Court” (Jan. 17, 2019), AILA Doc. No. 19011816.
- **Reading:** American Immigration Council, “Practice Tip: Opposing a Motion to Dismiss Asserting the Consular Nonreviewability Doctrine in Agency Delay Cases” (Dec. 16, 2022).
- **Video 302:** Motions to Dismiss
 - Common jurisdictional arguments
 - Standing, proper party, and zone of interests
 - Redressability
 - Mootness
 - Consular nonreviewability
 - 8 USC §1252(a)(2)(B)(i), (ii) and *Patel v. Garland*, 596 U.S. 328 (2022)
 - 8 USC §1252(a)(2)(A), (a)(5), (g)
 - 8 USC §1182(a)(9)(B)(v)
 - APA-specific jurisdictional arguments
 - Final agency action; exhaustion of administrative remedies
 - Lack of meaningful standards for the court to review
 - Action committed to agency discretion by law
 - Another statute provides review
 - Rules 12(b)(1) versus 12(b)(6); motion to dismiss (MTD) combined with motion for summary judgement (MSJ) as first responsive pleading; when defendant may or may not use materials extraneous to the complaint
 - TRAC factors on a motion to dismiss?—*e.g.*, *Fernandez Gonzalez v. Cuccinelli*, No. 19-1435 (4th Cir. 2021)
 - Amending complaint as a strategy to defeat MTD
 - Especially where agency takes action subsequent to filing complaint, in order to moot lawsuit
- **Reading:** American Immigration Council, National Immigration Litigation Alliance, and Children’s Immigration Law Academy, Practice Advisory: “Immigration Lawsuits and the APA: The Basics of a District Court Action” (Sept. 22, 2021).
- **Video 303:** Motions to Change Venue
 - 28 USC §1391(e)
 - Common government arguments in favor of change of venue
 - Convenience of witnesses
 - Interest of justice
 - Efficient use of judicial resources
 - Moving party has burden of proof but court may also transfer venue *sua sponte*
 - No time limit, but unreasonable delay may be sufficient to defeat motion
 - Knowing the law vs. knowing the judge
 - Perils of filing in the U.S. District Courts of D.C. (D.C.C.) or Maryland (D.Md.) if neither plaintiff resides there nor agency action is pending there
 - Specific venue issues relevant to EB-5 litigation and delay litigation generally



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- **Handout:** Transcript of Motion to Change Venue “Mass Hearing” in D.Md.
- **Reading:** AILA Administrative Litigation Task Force, “Litigation Briefing: Motions for Summary Judgment” (Jan. 17, 2019), AILA Doc. No. 19011812.
- **Video 304:** Motions for Summary Judgment (MSJ)
 - Timing and local rules on number of permissible MSJ’s
 - Substantive standard
 - Statement of undisputed material facts, and response thereto
 - Evidence in support
 - Types of evidence that can be used
 - How to cite to evidence already filed on the docket (*e.g.*, administrative record) and how to attach evidence not yet filed on the docket
 - Judicial notice of government facts
 - Rule 56(c) evidentiary requirements
 - Hearsay
 - Best evidence rule
 - Motions to strike government evidence (*e.g.* affidavits) that violate Rule 56(c)
 - Examples of MSJ wins
 - *Golani v. Allen* (E.D. Mich.), No. 22-10202
 - *Bristow v. Mayorkas* (N.D. Ill.), 22 C 991
- **Video 305:** Defensive Responses to the Government’s Motions for Summary Judgment
 - Rule 56(d) Motions to Defer Summary Judgment
 - Substantive standard
 - Requirement of an affidavit
 - Helpful to explain to the judge specifically what discovery is needed
 - Tailored, laser-focused; not a fishing expedition
 - Rule 56(c) Motions to Strike Hearsay as a means of attacking the admissibility of defendants’ MSJ evidence
- **Handout:** Sample Rule 56(d) Motion and Affidavit
- **Handout:** Sample Rule 56(c) Motion and Affidavit in an I-589 Mandamus

Faculty:

Simon Y. Sandoval-Moshenberg (ML), Online Course Committee Member, Fairfax, VA

Shabnam Lotfi, Madison, WI

Chris Strawn, Seattle, WA

Module 4: What Happens After We File?

The materials and faculty in this module explain how the government will file the certified administrative record and how plaintiff’s counsel must review it and assess the need for a temporary restraining order, discovery, and/or settlement negotiations. Discovery may be limited in scope but still available even in lawsuits where a certified administrative record is produced. Faculty also will examine ethical issues in discovery, settlement, and Equal Access to Justice Act (EAJA) fee recovery considerations.



Module Outline:

- **Video 401:** Discovery
 - Timing and sequence of discovery
 - FRCP 26(d)
 - Rule 26 obligations and duty to supplement
 - FRCP 26(a)(1): Initial disclosure
 - No discovery in APA denial challenges
 - Motion to supplement the certified administrative record
 - Expedited or pre-Rule 26(f) discovery
 - Expert testimony and disclosures
 - FRCP 26(a)(2) and written reports
 - Scope of discovery
 - FRCP 26(b), pattern and practice in APA denial cases, rule of reason in delay cases
 - Interrogatories, document requests, and admissions
 - Bad faith delays, protective orders, and motions to compel
 - Depositions and objections
- **Handout:** Strategy Guide for Discovery in Denial Lawsuits under the APA,
- **Handout:** Plaintiffs Request for Production to Defendants
- **Exercise:** Discovery: Requests for Production in H-1B Petition Denial Case
- **Handout:** Plaintiff Interrogatories to Defendants
- **Video 402:** Settlement
 - What do you do when the government moots your case?
 - Seeking stays until benefit, card, or visa is delivered
 - Move to dismiss but push effective date out for delivery of benefit
 - Notice of voluntary withdrawal or dismissal under FRCP 41
 - When can you unilaterally dismiss vs. when do you need leave?
 - Joint stipulations of dismissal
 - Time for written advocacy: negotiating the terms of the dismissal or deal
 - Writing settlement agreements that work for your client(s)
 - Details matter: If it is not in the written agreement, it is not binding
 - Reopening lawsuits when settlement agreements are broken
 - FRCP 60(b): relief from judgment or order
 - Negotiating to preserve actions for EAJA fees
 - Federal agencies will seek to have each party “bear its own costs and fees”
 - If EAJA fees could have been sought by motion, include an agreement on EAJA fees.
- **Video 403:** Equal Access to Justice Act (EAJA) Fees
 - How does the EAJA statute work?
 - What does USCIS need to pay the client?
 - What requirements exist to qualify for EAJA awards?
 - Unless the government position was substantially justified
 - The need for a written decision in your client’s favor
 - Award of attorney fees to the prevailing party



- The need for contemporaneous, detailed time records
- Negotiating for EAJA fees pre-motion
 - Out-of-pocket legal fees and expenses versus all hourly work
- Motions for EAJA fees
 - What needs to be included?
- Requests for upward deviation from standard hourly fees
 - Circuit set rates vs. industry prevailing rates
- Using declarations and affidavits to prove a higher rate of compensation
- **Reading:** American Immigration Council, National Immigration Litigation Alliance, and National Immigration Project, “Requesting Attorneys’ Fees under the Equal Access to Justice Act (EAJA)” (Aug. 15, 2020).
- **Video 404:** Ethics in Discovery, FOIA, Settlement, and EAJA Fees
 - Ethics in discovery: When is pushing back wrong?
 - Ethics in FOIA: What are you entitled to and what is beyond our reach?
 - Ethics in EAJA:
 - Careful timekeeping is essential
 - Fee agreement should determine who receives EAJA fees and costs
 - What needs to be in your fee agreement?
 - Can you update an existing fee agreement after litigation has commenced?
 - Reimbursing the client for out-of-pocket fees and expenses and the balance of award to attorney: best practices for flat fee cases
 - Ethics in Settlement: timing of withdrawal or dismissal and duty to expedite litigation

Faculty:

Diane M. Butler (ML), Course Committee Member, Seattle, WA

Jesse Matthew Bless, AILA Benefits Litigation Committee Vice Chair / Federal Court Litigation Section Steering Committee, Georgetown, MA

Module 5: Naturalization and Humanitarian-Related Litigation

The faculty and materials in this module discuss why naturalization and denaturalization are two of the most powerful areas of U.S. immigration law and are actively litigated under different administrations. Humanitarian benefits are also extremely valuable and may be litigated in district court. Learn how to litigate delays and denials in these areas, and how to handle de novo hearings in district court.

Module Outline:

Naturalization-Related Litigation

- **Video 501:** Denaturalization
 - False testimony: false identities
 - Materiality of false testimony is not relevant to this issue
 - Every question on the N-400 petition is “vitaly important,” including addresses, etc.



- Material misrepresentation, fraud in gaining lawful permanent residence, statutory ineligibility
- Illegal procurement
- History of U.S. Department of Justice (DOJ) bringing denaturalization actions based on priorities: Clinton, Bush, Obama, Trump, and Biden
- Cases related to the Controlled Application Review and Resolution Program (CARRP)
- **Video 502: Naturalization Delays**
 - Pre-interview delays: Writ of mandamus and APA lawsuits
 - TRAC factors: Argue that disenfranchisement from voting is a huge injury
 - Post-initial interview or testing: INA §336/8 USC §1447 lawsuit after 120 days
 - TRAC factors do not come into play; Congress set a statutory deadline
 - Does jurisdiction over the N-400 transfer to the district court in your circuit?
 - If jurisdiction transferred, agree to a remand for agency adjudication
 - Second N-400 interview? 120-day deadline runs from initial interview or testing
 - Should you ask for a delayed N-400 interview to be videotaped when it is finally held?
 - Can you get EAJA fees or other reimbursement under the APA or INA?
- **Video 503: De Novo N-400 Hearings in U.S. District Court**
 - Best practices to prepare for a de novo N-400 hearing
 - What do you need to prove? Eligibility and good moral character
 - Is your client a good witness at a hearing? Can they hold up under cross-examination?
 - Who has the burden of proof at the de novo hearing?
 - How do the Federal Rules of Civil Procedure and Federal Rules of Evidence come into play?
 - Entering the certified administrative record does not solve hearsay issues, so the U.S. government has to independently qualify each piece of evidence in the certified administrative record
 - What are the strategies for handling de novo hearings? Should you stipulate to issues of facts?
 - Never stipulate to evidence; make the government prove identity, country of origin, etc.
 - What types of legal issues come up in de novo hearings?
 - Procedural issues, evidence, hearsay, privileges, etc.
 - Motions *in limine*, limited motions for summary judgment, motions for protective orders, motions to strike, motion to dismiss under FRCP 12(b)(6)
- **Handout:** Sample De Novo Review Complaint
- **Hypotheticals**

Humanitarian-Related Litigation

- **Reading:** David L. Cleveland, Leslie K. Dellon, Namgiao Do, and Brian S. Green, “Litigating Your Way Out of Delay,” AILA seminar practice advisory (April 16, 2024).
- **Video 504: Lawsuits Challenging Delays in Humanitarian or Other Non-Business Immigration Benefits**
 - Asylum interviews: TRAC factors for seeking asylum interviews and framing the shift from first in, first out (FIFO) to last in, first out (LIFO) as creating an infinite wait for an asylum interview



- Asylum decisions: extensive delays to get an asylum decision after the asylum interview
 - Difficulties arguing that a mandamus/APA suit is not moot after the asylum interview
- Whether bona fide determinations for U nonimmigrant status can be litigated: analyzing whether they are fully within USCIS's discretion or whether some steps in USCIS's analysis are not discretionary; EAD cards
- Special Immigrant Juvenile (SIJS) petitions, Violence Against Women Act (VAWA) petitions, and Temporary Protected Status (TPS)
- Challenging motions to dismiss that are based on USCIS's processing times
- Motion to proceed using a pseudonym (*e.g.*, the plaintiff is an asylum-seeker who would be in danger)
- **Video 505:** Lawsuits Challenging Findings of Inadmissibility and Marriage Fraud Findings per INA §204(c)
 - What is the burden of proof and who has it for marriage fraud findings?
 - How does USCIS and/or ICE investigate marriage fraud?
 - How far back do they go: two or three marriages ago?
 - How does USCIS share its investigatory findings? Do they share recordings of interviews or written statements?
 - Do witnesses and parties have a right to have legal counsel present during USCIS Fraud Detection and National Security (FDNS) or ICE interviews?
 - How do you challenge the marriage fraud finding in the complaint and through a motion for summary judgment?
 - The decision in *Bristow v. Mayorkas* (N.D. Ill. 2024) 22 C 991, as a teaching tool for standards and evidence
- **Video 506:** Lawsuits Challenging USCIS Policies Affecting Humanitarian or Other Non-Business Immigration Benefits
 - Analyzing whether a nonprofit organization can be a plaintiff when challenging a government policy
 - *Patel*: Jurisdictional issues with these types of lawsuits
 - Work authorization issues related to humanitarian benefits
 - Incident to status
 - Ukrainian parolee example
 - Overview of challenging federal agency recalcitrance in granting benefits that Congress intended or explicitly granted
 - Overview of injunctive relief when executive orders cut benefits (*e.g.*, TPS, DACA, parole through CBP)
 - Brief discussion of *Mansor v. USCIS* (W.D. Wash 2023), lawsuit by the Northwest Immigrant Rights Project (NWIRP) and the National Immigration Litigation Alliance (NILA) to force USCIS to issue work permits to eligible TPS applicants
- **Reading:** American Immigration Council and AILA, Practice Advisory: "Delay Actions in the Asylum Context: Avoiding Dismissal and Proving the Case" (Nov. 24, 2022).
- **Video 507:** Ethics: Bringing Valid Arguments and Avoiding Baseless or Fraudulent Arguments
 - Need to investigate your client/plaintiff via FOIA, fingerprinting, etc.



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- What to do when you find ethical or substantive problems in the underlying benefit case that is being litigated through mandamus
 - Do you drop the lawsuit? Advise to refile the benefit case?
- Issues around delay litigation and affirmative asylum applicants who may be eligible for non-LPR cancellation of removal
- Confront the client with any factual concerns, such as if the client does not disclose information or gives information that appears questionable

Faculty:

Michael R. Jarecki (ML), USCIS Field Operations Committee Member, Chicago, IL

Kate Goettel, AILA Federal Court Litigation Section Steering Committee Vice Chair, Iowa City, IA

Patricia Corrales, Course Committee Member, Pasadena, CA

Amber Qureshi, Columbia, MD

Module 6: Business Immigration Litigation

In this module, participants will learn about litigating delays and denials of immigration petitions, including E, H-1B, L and O-1 nonimmigrant visa petitions, as well as EB-1, NIW and PERM-based immigrant visa petitions. Information about litigating against DOL and CBP also will be presented, as well as lawsuits challenging DOL and DOJ investigations. The faculty and materials in this module discuss litigation strategy, recent trends, and the government's position in immigration lawsuits, as well as best practices in client expectation management.

Module Outline:

- **Reading:** American Immigration Council, Practice Advisory: “Litigation for Business Immigration Practitioners” (Jan. 8, 2024).
- **Video 601:** Writs of Mandamus and APA Delay Lawsuits for USCIS, DOL and State Department Delays of Business Immigration Cases
 - USCIS delays in adjudication of applications not eligible for premium processing (Forms I-485, I-765, I-131, etc.)
 - *Patel* decision: Can you challenge delays of applications on Form I-485?
 - Ways to manage the litigation and how to get around the *Patel* decision
 - Mandamus vs. APA delay action: circuit courts-specific decision
 - EB-5 adjudication delays (Forms I-526 and I-829): How long is long enough?
 - DOL prevailing wage determination and PERM delays
 - DOS nonimmigrant and immigrant visa administrative processing delays
 - DOS immigrant visa interview scheduling delays
- **Video 602:** Types of USCIS Employment- or Investment-Based Denials That Can Be Challenged in Federal Court (and Types Which Cannot)
 - What decision is being challenged? Is the decision discretionary and not subject to judicial review?
 - What types of decisions cannot be challenged—i.e., denials of national interest waiver (NIW), others(?)



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- *Patel* decision: Can you challenge denials of I-140-based I-485 applications?
 - Denials of applications on Form I-129 for E, H-1B, L, O-1 and P visa cases
 - EB-2 NIW denials: discretionary and immune from judicial review
 - EB-2 and EB-3 denials (PERM-based cases)
 - EB-5 Form I-526 denials: Appeal to the Administrative Appeals Office (AAO) is required before challenging denials in U.S. district court under the EB-5 Reform and Integrity Act (RIA)
 - DOL PERM certification denials: Appeal to the Board of Alien Labor Certification Appeals (BALCA) is required before challenging denials in U.S. district court
- **Video 603:** How to Challenge *Kazarian* Step 2 Denials in EB-1A Cases
 - USCIS adoption of *Kazarian v. USCIS*, No. 07-56774 (9th Cir. 2010) as policy without notice and comment
 - Congress has not set out the *Kazarian* test
 - APA violation because USCIS policy of adoption of *Kazarian* restricts a benefit that Congress had intended
- **Video 604:** Lawsuits Challenging DOJ and DOL Investigations
 - DOJ's Immigrants and Employee Rights Section (IER): investigations of immigration-related hiring practices and of I-9 compliance
 - Challenging DOJ and DOL administrative law subpoenas
 - Wage & Hour Division investigations of H-1B and H-2A and H-2B worker employment conditions, unpaid wages, etc.
- **Exercise:** Motion to Quash an Administrative Law Subpoena (fill-in-the-blank)
- **Video 605:** Lawsuits Challenging USCIS, DOL, and DOS Policies Affecting Employment-Based Cases
 - CBP denials of TN visa engineer admissions
 - CBP policy on employment or investment in marijuana industry in states where this industry has been legalized
 - CBP revocations of TN visa approvals after USCIS's adjudication of petitions on Form I-129
 - DOS's refusal to approve immigrant visas for nurses and doctors without licenses vs. USCIS's policy of approving NIW for these petitioners
 - DOL delays and DOL policies on foreign workers
- **Hypotheticals**

Faculty:

Leslie K. Dellon (ML), Online Course Committee / American Immigration Council Senior Attorney (Business Immigration), Washington, DC

Zachary Ryan New, Benefits Litigation Committee / Federal Court Litigation Section Steering Committee Member, Aurora, CO

Matt Galati, Elkins Park, PA

Amy L. Peck, Omaha, NE

Online Course Committee

All speaker affiliations are listed for the 2024-2025 AILA committee year.



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