

COVID-RELATED OBJECTIONS IN IMMIGRATION COURT

Authority to make objections in Immigration Court

- The Court’s refusal to allow Respondent to make objections on the record is in violation of 8 CFR 1240.1(c) (“Conduct of Hearing. The immigration judge shall receive and consider material and relevant evidence, rule upon objections, and otherwise regulate the course of the hearing.”)
- The rules of evidence are relaxed in immigration hearings. *Matter of Wadud*, 19 I&N 182 (BIA 1984). Evidence should be allowed if it is material and relevant. 8 CFR § 1240.1(c). Under the Due Process Clause, a noncitizen is entitled to “a full and fair opportunity to present her claims[.]” *Burger v. Gonzales*, 498 F.3d 131, 134 (2d Cir. 2007).
- The following objections relate to the issue of the propriety of proceeding with this hearing under the circumstances.
- We respectfully insist on making all objections on the record, for preservation on appeal.

Objections to the Court’s refusal to grant a continuance

- **Need for Continuance:** Objection - the Court’s refusal to grant a continuance and order that Respondent proceed at this time creates a substantial risk that Respondent’s right to due process will be compromised because ordering Respondent to proceed at this time creates a substantial risk that errors will occur in the removal proceedings. [Specify why additional time is needed. This might include some of the same COVID-19 related points raised in other objections listed here, such as the inability to prepare the client adequately or obtain an expert because of COVID, and/or non-COVID-related reasons for needing a continuance.]
- **Unable to Prepare Detained Client:** Objection - counsel for Respondent has not had a full and fair opportunity to prepare Respondent for this hearing, given that Respondent is detained and conducting in-person visits at the detention center entails significant health risks, due to the COVID-19 pandemic. [State any specific reasons why you would face enhanced COVID-related risks at the detention center. For example, the rooms are small and inadequately ventilated; social distancing is not possible; etc.]
- **Inability of Counsel to Appear in Person:** [in a motion, or by telephone] Objection - the Court’s refusal to grant a continuance and order that Respondent proceed at this time will be prejudicial to Respondent.
 - **Counsel’s health concerns:** I am unable to safely appear in court in person, due to my particular COVID risk factors. As Respondent’s counsel, I am familiar with the facts and legal theories of the case and have established a relationship with my client. It is unreasonable to expect another attorney in my firm to appear in person

in my stead. The proceeding should be continued until it is safe for me to appear in person.

- **Telephonic Appearance Insufficient:** My telephonic -- rather than in-person -- appearance may be prejudicial to Respondent, since I am unable to observe Respondent's body language, hand gestures, and other movements that people use to convey what they are saying; my inability to see my client's non-verbal forms of communication may prejudice my representation, and result in a denial of due process. Also, I am unable to gauge whether Respondent may appear confused or in distress. Respondent also cannot see me, and may be confused as to who is speaking. The proceeding should be continued until it is safe for me to appear in person.
- **Witness:** Objection - Respondent has been unable to find an expert witness able/willing to conduct an evaluation of respondent [in jail] [remotely, even for non-detained clients]. The proceeding should be continued until it is reasonably safe for expert witnesses to meet with Respondent.
- **Document Collection:** Objection - Respondent has been unable to obtain necessary documents, due to the COVID-related closure of [agencies]. The lack of these necessary documents is materially prejudicial to Respondent's case. The proceeding should be continued for a reasonable time after the [agencies] reopen, so that Respondent may seek the necessary documents.
- **Remote Appearance by Client:** Objection - Respondent will not have a fair opportunity to be heard if s/he must go forward without a continuance and prepare the case even though it is impossible to speak freely because [he/she] is not in a location that allows [him/her] to speak confidentially, and our office is closed to clients. [Explain here if our client has a shared space with a stranger, is with people our client doesn't trust, is uncomfortable revealing sensitive information or traumatic memories while relatives or children are around, etc.] The proceeding should be continued until it is reasonably safe for Respondent to appear in person.
- **Preparation of Witnesses:** Objection - this case will require testimony from numerous individuals. In order to properly assess credibility, it is imperative to meet each individual personally, which has not been possible due to COVID concerns. The proceeding should be continued until it is reasonably safe to meet with and prepare the witnesses in person.
- **Attendance by Witnesses:** Objection - Respondent's relatives/friends/other witnesses are unable to appear in court in person due to COVID-related concerns. Their inability to participate is prejudicial to Respondent, and deprives him/her of a full and fair hearing, which undermines his/her right to due process. The proceeding should be continued until it is reasonably safe for the witnesses to appear in court in person.
- **Social Workers:** [If social worker involved] Objection - Respondent's counsel uses interdisciplinary work between social workers and lawyers to address the holistic needs of clients in removal proceedings. Interdisciplinary work usually requires building the trust needed for clients to disclose traumatic experiences. Having to abide by social

distancing guidelines makes it impossible for our team to collaborate with social workers and lawyers to let clients and witnesses disclose extremely traumatic experiences in the way they could when we have in-person meetings. The proceeding should be continued until it is reasonably safe for our social workers to meet with the Respondent in person.

Counsel's Ethical Obligations

Litigating cases during the COVID-19 pandemic raises particular challenges regarding our ethical obligations toward our clients. The following are some considerations to keep in mind, in order to avoid running afoul of the New York Rules of Professional Conduct.

- Rule 1.6 imposes a **Duty of Confidentiality** on lawyers. A client who lacks the means to communicate confidentially with a lawyer may be faced with the Hobson's choice of either waiving confidentiality and privilege in order to timely prepare; or insisting on maintaining confidentiality and privilege and thus not being able to adequately prepare. Forcing this Hobson's choice upon the client arguably violates the client's due process rights, or the right to counsel, or other procedural rights under the applicable rules, and objections should be made on these grounds. If the client and lawyer do not have access to a confidential means of communicating, then the lawyer should advise the client of the potential risks and benefits of a waiver of privilege and confidentiality; should explain that the client is not required to waive privilege and confidentiality, but not waiving would impair the lawyer's ability to prepare the client's case; and should discuss whether the client wishes to give informed consent to a potential waiver of privilege and confidentiality. The lawyer should abide by the client's instructions in this regard.
- Rule 1.1 imposes a **Duty of Competence** on lawyers. A lawyer who labors under technology or other difficulties created by the court, or COVID, or both, is required to perform competently. So long as these conditions do not prevent the lawyer from performing competently, the lawyer may proceed with the representation. The conditions themselves may create a due process or other legal violations. The lawyer should make all appropriate objections to proceeding under conditions that interfere with the quality of representation, many of which are discussed above.
- Rule 1.3 imposes a **Duty of Diligence** on lawyers. A lawyer may not unreasonably delay a client's case. If conditions created by COVID – such as a health risk to the lawyer associated with conducting a mandatory in-person court appearance – would prompt the lawyer to request an adjournment, the lawyer should consider the probable length of the adjournment, the impact on the client's case, and whether another lawyer is available who could make the appearance while providing competent and effective representation. The lawyer should exercise all reasonable measures to avoid delays to the client's case without compromising the quality of the client's representation.
- Rule 1.4 imposes a **Duty of Communication** on a lawyer. A lawyer is obligated to inform a client promptly about material developments in the case and anything requiring the client's informed consent. And a lawyer must reasonably inform the

client about the status of the matter and timely respond to the client's requests for information. Conditions created by the COVID pandemic may increase the difficulty of engaging in such communications. A lawyer should strive to engage in these communications in as timely a way as possible in light of the circumstances.

Helpful Resources

- Hon. Dorothy Harbeck, *Objections in Immigration Court: Dost Thou Protest Too Much or Too Little?* 5 Stetson J. Advoc. & L. 1 (2018) https://www2.stetson.edu/advocacy-journal/wp-content/uploads/2018/05/Harbeck_2018.pdf
- CLINIC practice advisory regarding rules of evidence in Immigration Court, in including making objections <https://cliniclegal.org/file-download/download/public/2309>