PRACTICE ADVISORY

STRATEGIES FOR SUPPRESSING EVIDENCE AND TERMINATING REMOVAL PROCEEDINGS FOR CHILD CLIENTS

Produced for the Vera Institute of Justice's Unaccompanied Children Program

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INTRODUCTION[1]

This practice advisory provides a framework and guide to practitioners on termination and suppression motions to help children in removal proceedings. Termination and suppression motions are interrelated yet analytically distinct defense strategies to push back against unlawful government action. In their most basic form, they aim to end proceedings either because the government violated its own rules or because the government does not have lawfully-obtained evidence of alienage. In a time when the government is placing an unprecedented number of children in removal proceedings and expediting their proceedings, termination and suppression are vital safeguards to protect children's rights.

Part I of this practice advisory discusses general concepts relevant to the more detailed discussion to follow. Part II examines the regulations, policies, and procedures applicable to termination motions. It reviews child-specific regulations (such as providing a Form I-770), general regulations (such as protection from illegal searches and coercion), and protective policies (such as the *Flores* Settlement Agreement and the *Orantes-Hernandez* injunction). Part III dives into suppression motions, including for Fourth and Fifth Amendment violations, international treaty violations, and state-law violations. Part IV addresses practical considerations—working with children; determining whether the government broke the law; and making tactical decisions about going forward with termination, suppression, or both. Part V covers procedural steps to prepare and litigate termination and suppression motions from beginning to end, including obtaining evidence, filing motions, preparing for hearings and testimony, and handling appeals. It also includes strategies for *in absentia* proceedings. Part VI concludes the advisory.

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I. BASIC CONCEPTS

A. Termination and Suppression[2]

When the government violates certain regulations, policies, or procedures, removal proceedings may be terminated—even if the government can prove alienage. Specifically, in *Matter of Garcia-Flores*, the Board of Immigration Appeals (BIA) recognized that when a federal regulation is "intended to serve a purpose of benefit" to a noncitizen and the government violation of that regulation "prejudiced her interests protected by the regulation and such prejudice affected the outcome of the deportation proceedings," it is appropriate to invalidate proceedings.[3] In addition, prejudice is presumed in several situations, including where the regulation violated protects constitutional rights and where it creates an entire procedural framework designed to ensure the fair processing of the case.[4]

The related concept of suppressing evidence is based on the "exclusionary rule," which provides that objects or statements obtained in violation of the Constitution generally may not be used in court.[5] The primary goal in immigration proceedings is to prevent the government from meeting its burden of proving alienage (thus resulting in dismissal of proceedings for lack of jurisdiction).[6] It also may be used to keep out evidence introduced for other reasons. In *INS v. Lopez-Mendoza*,[7] a plurality of the Supreme Court recognized that egregious or widespread violations of the Fourth Amendment could serve as bases to exclude evidence in civil removal proceedings.[8] The case left open the possibility of applying the exclusionary rule to violations of "other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained."[9] The BIA and other courts have excluded evidence in immigration proceedings based on Fourth and Fifth Amendment violations.[10] There is no requirement to choose between filing a termination motion and a suppression motion—it is common to file both, where appropriate.

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[2] *See* Appendices 1.A, 1.B, 1.C and 1.D (sample motions to suppress and terminate).
[3] *Matter of Garcia-Flores*, 17 I&N Dec. 325, 328-29 (BIA 1980) (*citing United States v. Calderon-Medina*, 591 F.2d 529, 531 (9th Cir. 1979)).
[4] *Garcia-Flores*, 17 I&N Dec. at 329.
[5] *See Wong Sun v. United States*, 371 U.S. 471, 485 (1963).
[6] Where a child is charged as being present in the United States without being admitted or paroled, DHS must prove only the child's alienage; if DHS succeeds, the burden then shifts to the child to establish the time, place, and manner of entry. *See* 8 CFR § 1240.8(c); *Matter of Cervantes-Torres*, 21 I&N Dec. 351, 354 (BIA 1996).
[7] The Immigration and Naturalization Service (INS) was abolished in 2003 and its functions were primarily placed under three agencies—U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP)—within the U.S. Department of Homeland Security (DHS). *See Our History*, http://www.uscis.gov/about-us/our-history (last updated May 25, 2011).
[8] *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984); *see also Puc-Ruiz v. Holder*, 629 F.3d 771, 778 (8th Cir. 2010); *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1016 (9th Cir. 2008); *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 234 (2d Cir. 2006).
[9] *Lopez-Mendoza*, 468 U.S. at 1050-51.
[10] *See, e.g.*, *Singh v. Mukasey*, 553 F.3d 207, 216 (2d Cir. 2009) (excluding evidence based on due process violation); *Matter of Garcia*, 17 I&N Dec. 319, 321 (BIA 1980) (suppressing evidence based on due process violation).

B. Contexts: Border Enforcement and Interior Enforcement

Three major areas of potential unlawful government conduct are children's treatment at the border, in the juvenile justice system, and in searches within the United States. Distressing border conditions for children have been reported.[11] They include children being physically and sexually abused, being forced to sleep on floors without a mattress, being held in painfully freezing rooms (referred to as *hieleras* or "iceboxes"), not being properly served legal papers, not being read their rights, being questioned by the same officers who arrested them, and being questioned in a language they do not understand. In the juvenile justice system, states are unlawfully sharing confidential information with U.S. Immigration and Customs Enforcement (ICE) and ICE is coercively interrogating children.[12] Turning children with strong ties to the United States over to ICE can strike fear in communities that look to the system to provide rehabilitation, not deportation, for children. Illegal searches and seizures in the United States interior, like workplace raids, traffic stops, and home raids, can also include children as victims.

C. Why Termination and Suppression Strategies Are Important to Children's Cases in the Current Immigration Landscape

Termination and suppression motions are effective ways to protect immigrants whose rights are violated. Responding to illegal conduct through legal challenges pushes back against unlawful action, holds the government accountable, and aims to protect everyone's rights. For some children, these legal strategies are their only viable arguments against deportation. Practitioners should analyze termination and suppression grounds for all of the children they represent as part of an effort to provide zealous advocacy and to ensure a deliberate, fair process for child clients.

[11] *See, e.g.*, National Immigrant Justice Center et al., *Complaint to Department of Homeland Security, Office of Civil Rights and Civil Liberties and Office of Inspector General, Regarding Systemic Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection* (June 11, 2014) (presenting individual complaints and discussing numerous reports), *available at* http://www.acluaz.org/sites/default/files/documents/DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs.pdf.
[12] *See, e.g.*, U.C. Irvine School of Law Immigrant Rights Clinic, *Second Chances for All: Why Orange County Probation Should Stop Choosing Deportation Over Rehabilitation for Immigrant Youth* (Dec. 2013), *available at* http://www.law.uci.edu/academics/real-life-learning/clinics/UCILaw_SecondChances_dec2013.pdf.

II. TERMINATION FOR REGULATORY AND POLICY VIOLATIONS

A termination motion should be considered when the government violates a regulation or policy that: (a) is mandated by the Constitution or federal law so prejudice is presumed; or (b) creates an entire procedural framework to ensure the fair processing of the case so prejudice is presumed; or (c) is intended to benefit the noncitizen child plus the violation results in actual prejudice.[13] The regulations in Title 8 of the Code of Federal Regulations (CFR) describe some procedures the government must follow.[14] The CFR contains regulations that apply to everyone and some that apply to children only. The child-specific regulations are addressed in Section II.A below. Section II.B then covers the generally-applicable regulations. Finally, Section II.C addresses protective policies, as opposed to regulations, that may support a termination motion.

A. Child-Specific Regulations

The following regulations are specific to children. Unless otherwise stated, these regulations apply to *all* children under the age of 18, including children apprehended with a parent, rather than only to those deemed "unaccompanied alien children" (UAC).[15]

1. 8 CFR § 236.3(h): Service of Form I-770, Notice of Rights and Disposition

The Form I-770 informs the child of his or her rights during the initial processing interview, typically conducted by a subsidiary agency of the U.S. Department of Homeland Security (DHS), such as U.S. Customs and Border Protection (CBP) or, for youth in the juvenile justice system, ICE.[16] The I-770 must be provided to the child when the child is apprehended. Under the regulation, DHS must provide the I-770 to all children, including children apprehended with their parents. The government must read and explain the I-770 in a language the child can understand if the child is under 14 years old or does not understand the written notice. If the child accepts voluntary departure after asking for a hearing or if the child is allowed to withdraw his or her application for admission, the government must give the child

[13] *See generally Garcia-Flores*, 17 I&N Dec. at 328-29. For an example of a motion arguing actual prejudice as a result of a regulatory violation, see Appendices 1.A, 1.B, 1.C and 1.D (sample motions to suppress and terminate).

[14] *See, e.g.*, 8 CFR § 287. In some districts, ICE is making the dubious argument that by inserting a disclaimer in 8 CFR § 287.12 (which states that the regulations do not create any rights enforceable by law) in 2003, the agency unilaterally overrode decades of established Supreme Court precedent about regulatory violations arising out of *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265-67 (1954). However, ICE's argument is not supported by statements issued when the regulation was first authorized. The commentary on the final rule explained that this regulation would not prevent anyone from pursuing remedies existing under law. *See* Enhancing the Enforcement Authority of Immigration Officers, 59 Fed. Reg. 42406, 42414 (Aug. 17, 1994). Logically speaking, Section 287.12 should not prevent anyone from seeking termination under *Garcia-Flores*, a remedy that had been established 14 years before the 1994 commentary.

[15] An "unaccompanied alien child" is defined as a child who is under 18 years old, has no lawful immigration status in the United States, and has either no parent or legal guardian in the United States or no parent or legal guardian in the United States "available to provide care and physical custody." 6 U.S.C. § 279(g)(2).

[16] *See* Appendices 2.A and 2.B (redacted I-770s).

a new I-770. The requirement to provide an I-770 is also found in the *Flores* Settlement Agreement, discussed in Section II.C below.[17] Consider filing a termination motion[18] in these situations:

- DHS did not give the child an I-770 (even if it served a similar form)
- DHS did not give the I-770 to the child timely (*e.g.*, provided it after interviewing the child)
- DHS did not read aloud the I-770 or explain it and the child was either: (1) under 14; or (2) the child was at least 14 and it was clear the child did not understand (*e.g.*, the child obviously could not read what was written, the child had obvious developmental disabilities, the child had obvious psychological issues, or the child obviously was unable to concentrate)
- DHS gave the child an I-770 written in a language the child did not understand and DHS refused to translate it (*e.g.*, giving something in Spanish to a child who understood only an indigenous language)
- DHS completed the I-770 in a way that failed to reflect that it followed proper procedures
- DHS forced the child to sign the I-770 without offering the child any opportunity to read it
- DHS did not give a copy of the I-770 to the child immediately after the child signed it
- DHS did not give the I-770 to the child and instead gave it only to the child's guardian or the conservator of the Office of Refugee Resettlement (ORR)-funded shelter where the child was held[19]

2. 8 CFR § 103.8(c)(2)(ii): Service of Form I-862, Notice to Appear

The Notice to Appear (NTA) is the charging document alleging the factual and legal bases for the initiation of removal proceedings.[20] The NTA is created by DHS officials, often after interviewing and obtaining admissions from the child; served upon the child as required by statute, regulation, and case law; and finally, filed with the immigration court. DHS must comply with the NTA service requirements applicable to children.

Under 8 CFR § 103.8(c)(2)(ii), in cases of children under 14 years of age, the NTA shall be served upon the person with whom the child resides; whenever possible, DHS shall also serve the "near relative, guardian, committee, or friend." If DHS serves the NTA while the child is in federal custody, service

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[17] *See* Stipulated Settlement Agreement ¶ 12.A, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997), *available at* https://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf.

[18] *See* Appendices 3.A and 3.B (sample termination motions based on I-770 and order granting motion).

[19] ORR is an office within the Administration for Children and Families of the U.S. Department of Health and Human Services (HHS). HHS is the federal entity responsible for the care and custody of UAC. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457, 122 Stat. 5044, § 235(b)(1)-(3) (codified at 8 U.S.C. § 1232(b)(1)-(3)). Once a child is in ORR custody, ORR employees attempt to locate relatives or other responsible adults within the United States with whom they may place the child. This process is called "reunification." Once reunified, the child continues in removal proceedings in the venue of placement. Those children for whom a relative or other caregiver cannot be identified and approved will remain in ORR custody and in removal proceedings. Detained children who are identified as victims of human trafficking or have an approved Special Immigrant Juvenile Status (SIJS) petition or an approved asylum application may be placed in foster care through the Unaccompanied Refugee Minors Program. For more information on ORR and the services it provides to unaccompanied immigrant children, see *Unaccompanied Children's Services*, http://www.acf.hhs.gov/programs/orr/programs/ucs (last visited Jan. 18, 2015).

[20] *See* Appendices 4.A and 4.B (redacted NTAs).

should be on the head of the ORR-funded facility where the child "resides."[21] Upon release from ORR custody, the child's ORR sponsor should be served.[22] The BIA has held that if the child's parent is present in the United States, the regulation requires service on the parent, in addition to any prior service upon, for example, a "near relative" or ORR. [23] In the Ninth Circuit, the service requirement for ORR sponsors applies to children up to the age of 18 years.[24]

Look to BIA precedent for further clarification on how the government's failure to comply with its regulatory requirements for NTA service on children can serve as a basis for a termination motion.[25] Also examine 8 U.S.C. § 1229 [INA § 239] and accompanying regulations for other potential violations related to the NTA warranting a termination motion. For example, in addition to improper service, additional bases for a termination motion might include the insufficiency of the NTA (for example, no original signature of the officer on the NTA filed with the court or the issuance of the NTA by an individual not authorized to do so), the inaccuracy of the NTA, or that the NTA was improvidently issued.[26] Consider filing a termination motion[27] in these situations:

- The child, the ORR sponsor, and/or the parent did not receive a copy of the NTA
- The NTA's certificate of service does not show service on all parties as required by regulations and case law (for example, the ORR sponsor of a 17-year-old child in the Ninth Circuit was not served under *Flores-Chavez* or no adult was served with the NTA for a child under 14)
- DHS's only purported service of the ORR sponsor was to tell the child to give a copy of the NTA to the sponsor
- DHS attempts to perfect service in court, in violation of 8 CFR § 1003.14(a) (NTA service must be properly executed prior to filing the NTA with the court)
- The NTA contains the wrong name or other basic identifying, biographical information describing the child
- The NTA fails to allege sufficient facts to establish the child's alienage or removability

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[21] *See Matter of Amaya*, 21 I&N Dec. 583, 584-85 (BIA 1996).

[22] *See Matter of Mejia-Andino,* 23 I&N Dec. 533, 536 (BIA 2002) (en banc) (holding that "the purpose of requiring service of a notice to appear on the person with whom a minor respondent resides [is] to direct service of the charging document 'upon the person or persons who are most likely to be responsible for ensuring that an alien appears before the Immigration Court at the scheduled time.'" (quoting *Amaya,* 21 I&N Dec. at 585)).

[23] *Mejia-Andino*, 23 I&N Dec. at 536.

[24] *See Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1163 (9th Cir. 2004) (holding that"[i]n light of the constitutional concerns, the only reasonable construction of the statute and implementing regulations requires notice to the adult to whom the juvenile is released from custody. Thus, when the INS releases a minor alien to an adult's custody pursuant to 8 CFR § 242.24, thereby making that adult responsible for the minor's future appearance at immigration proceedings, the agency must serve notice of the minor's rights and responsibilities upon that adult if the minor is under eighteen."). For those outside the Ninth Circuit, consider arguing that the NTA service regulation applies to children 14 and over if there are indicia of trauma or incompetence that DHS should have recognized. The regulation's rationale should apply to such vulnerable children despite their age.

[25] *See, e.g.*, *Matter of Cubor-Cruz*, 25 I&N Dec. 470, 473 (BIA 2011) (holding that personal service of the NTA on a child who is 14 years of age or older at the time of service is effective and notice need not be served on an adult with responsibility for the child); *Mejia-Andino*, 23 I&N at 536-37 (concluding that proceedings against a seven-year-old child were correctly terminated due to failure to properly serve the NTA).

[26] *See* American Immigration Council et al., *Notice to Appear: Legal Challenges and Strategies* (June 2014), *available at* http://www.legalactioncenter.org/sites/default/files/notices_to_appear_fin_6-30-14.pdf.

[27] *See* Appendices 5.A and 5.B (sample termination motions based on NTA).

- The NTA filed with the court does not bear the original signature of an officer with the authority to issue the NTA under 8 CFR § 239.1(a)
- The NTA was issued without a date or time for removal proceedings and was not followed up by a hearing notice as required under 8 CFR § 1003.18(b)

3. 8 CFR § 1240.10(c): Admissions of Removability

CFR § 1240.10(c) specifies that the immigration judge (IJ) "shall not accept an admission of removability from an unrepresented respondent who is incompetent or under the age of 18 and is not accompanied by an attorney or legal representative, a near relative, legal guardian, or friend; nor from an officer of an institution in which a respondent is an inmate or patient." When, under this regulation, the IJ does not accept an admission of removability, the regulation directs the IJ to hold a hearing on the issues.[28]

In *Matter of Amaya*, the BIA held that although an IJ may not accept the literal admission to a charge of deportability by an unrepresented child without a "relative, legal guardian, or friend" in court, the IJ can accept such a child's admissions to factual allegations, which then may form the sole basis of a finding that such a child is deportable.[29] But if so, the IJ must take special care in determining whether deportability is established by clear and convincing evidence.[30] The IJ must consider the child's age and *pro se* and unaccompanied status and determine, after a "comprehensive and independent inquiry," whether the child "is both capable of understanding, and in fact understands, any facts that are admitted, and that those facts establish deportability."[31] Consider filing a termination motion in these situations:

- The IJ improperly accepted admissions related to removability before an attorney represented the child (whether the child was in court totally alone or was in court with an adult who does not fall into one of the categories specifically listed at 8 CFR § 1240.10(c))
- The IJ did not enlist procedural safeguards, such as the "comprehensive, independent inquiry" required by *Matter of Amaya*, before finding the child removable
- DHS wants to use factual admissions the child made that are inherently unreliable in light of the child's unaccompanied or unrepresented status, how the child was coerced, or other regulatory violations (*e.g.*, not serving an I-770)

B. General Regulations (Those Benefiting Not Just Children)

The regulations discussed in this Section derive from the Fourth and Fifth Amendments of the United States Constitution.[32] Where compliance with the regulation is mandated by the Constitution, prejudice

[28] *See* 8 CFR § 1240.10(c).
[29] *Amaya*, 21 I&N Dec. at 586-87.
[30] *Id*. at 586 (citing 8 CFR § 242.14(a) (1996) regarding "clear, unequivocal, and convincing evidence").
[31] *Id*. at 587.
[32] Fourth and Fifth Amendment violations themselves are explored in greater depth in Part III below. If the regulatory violation is also a constitutional violation, consider filing both a termination motion and a suppression motion based on the same improper conduct.

may be presumed. [33] Keep in mind that even though these regulations are not child-specific, children have unique vulnerabilities that can provide a basis for distinguishing unhelpful case law developed in the adult context and may assist in demonstrating prejudice resulting from violation of the regulations. Some of these vulnerabilities are explored in Section III.A below.

1. Fourth Amendment-Based Regulations—8 CFR §§ 287.8(b) and (c)(2), and 8 CFR § 287.3(a): Detention, Arrests, and Questioning

Several regulations reinforce the protections against unlawful search and seizure of the Fourth Amendment. A person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.[34] A child's perception of when he or she is not free to leave an encounter with an official is often very different from an adult's sense of when he or she can walk away.[35]

8 CFR § 287.8(b) prohibits unauthorized interrogation and detention by immigration agents outside the parameters of the Fourth Amendment. Specifically, it restricts immigration officers' authority to detain people for additional questioning to cases where the agents have "reasonable suspicion, based on specific articulable facts, that the person being questioned is, or is attempting to be, engaged in an offense against the United States or is an alien illegally in the United States." If there is no reasonable suspicion, they may not "restrain the freedom of an individual, not under arrest, to walk away." In addition, 8 CFR § 287.8(c)(2)(i)-(ii) requires an arrest warrant except when the officer has both "reason to believe" that an immigration arrest is warranted *and* "reason to believe" that the person is likely to escape before a warrant can be obtained. It is important to examine carefully each step leading up to law enforcement's encounter with a child. Were there specific articulable facts amounting to reasonable suspicion to justify detention? Was the child free to walk away from the encounter? Did the child feel free to leave? While the case law is not favorable regarding Fourth Amendment-like standards along the border,[36] consider violations of these regulations when a child did not present himself or herself to CBP.

8 CFR § 287.3(a) requires that the officer who determines if a person should be placed in removal proceedings (the "examining officer") be someone other than the "arresting officer," subject to the exception of when another qualifying officer is not available and taking the person before another officer will cause unnecessary delay. Consider arguing that the need for a separate officer is analogous

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[33] *See Garcia-Flores*, 17 I&N at 329; *see also United States v. Caceres*, 440 U.S. 741, 749 (1979) ("[a] court's duty to enforce an agency regulation is most evident when compliance with the regulation is mandated by the Constitution or federal law"); *Bridges v. Wixon*, 326 U.S. 135, 152-53 (1945) (invalidating a deportation order based on statements which did not comply with INS regulations aimed at providing the noncitizen with due process); *Leslie v. Holder*, 611 F.3d 171, 180 (3d Cir. 2010) ("For the sake of emphasis we repeat: we hold that when an agency promulgates a regulation protecting fundamental statutory or constitutional rights of parties appearing before it, the agency must comply with that regulation. Failure to comply will merit invalidation of the challenged agency action without regard to whether the alleged violation has substantially prejudiced the complaining party.").

[34] *See United States v. Mendenhall,* 446 U.S. 544, 554-55 (1980).

[35] *See, e.g.*, *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011) ("a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go").

[36] *See United States v. Ramsey*, 431 U.S. 606, 616 (1977); *United States v. Brignoni-Ponce*, 422 U.S. 873, 877-81 (1975).

to the need for a neutral magistrate in the Fourth Amendment's warrant requirement.[37] In *Martinez-Camargo v. INS*, the Seventh Circuit rejected this argument and held there was no proof of actual prejudice in the adult's case.[38] However, consider portraying this requirement as analogous to the warrant requirement, developing the factual record about whether the child suffered actual prejudice, and distinguishing *Martinez-Camargo* on the basis that it involved an adult respondent.

2. Fifth Amendment-Based Regulations—8 CFR § 287.8(c)(2)(vii), 8 CFR §§ 287.3(c) and 292.5(b), and 8 CFR § 1240.10(a): Interrogations and Advisals

Other regulations mirror Fifth Amendment due process rights including the protection against coerced interrogations and the guarantee of fundamentally-fair proceedings. Some apply before the child is placed into removal proceedings, while others govern the proceedings themselves.

8 CFR § 287.8(c)(2)(vii) generally prohibits the government from using coerced statements. Just as a child's perception of when he or she is free to leave is different from that of an adult, so too is a child's sense of voluntariness in answering questions posed by officials. Traditional factors to consider when determining voluntariness include: physical abuse, length of interrogation, denial of food or drink, threats or promises, or interference with a respondent's attempts to exercise rights.[39] Age is also a critical factor in assessing voluntariness.[40] If DHS is attempting to use a child's statements, look for evidence of coercion through a child-focused lens. Consider a termination motion when the circumstances of obtaining the child's statements rise to coercion or duress for the child, even if they would not be considered coercive for an adult. Where was the child questioned? Was the door in the room where he or she was questioned open or closed? Was the child deprived of food or drink? Who was present when the child was questioned? What did the child understand to be the purpose of the questioning? How old was the child when questioned? Did a developmental disability, past experience of trauma, or any other factor influence his or her perception of the questioning? How long did questioning take place? Did questioning take place in an *inherently* coercive environment?

8 CFR §§ 287.3(c) and 292.5(b) contain important required advisals of rights. With the exception of expedited removal,[41] the government must advise people of the reasons for their arrest and of the right to be represented at no expense to the government. The examining officer must advise that any statement may be used against the person in a later proceeding. The examining officer must also provide a list of the available free legal services organizations and attorneys located in the district where the removal hearing will be held. These warnings must be given in a language the person understands

[37] *See Gerstein v. Pugh*, 420 U.S. 103, 112 (1975) (explaining that the Fourth Amendment requires that whenever possible, a neutral and detached magistrate should evaluate whether probable cause exists).
[38] *Martinez-Camargo v. INS*, 282 F.3d 487, 492 (7th Cir. 2002).
[39] *See Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).
[40] *See J.D.B.*, 131 S. Ct. at 2403 ("[N]o matter how sophisticated, a juvenile subject of police interrogation cannot be compared to an adult subject.") (internal quotations and citation omitted).
[41] Expedited removal is a procedure (generally applicable only to adults) that allows DHS to issue a removal order against a noncitizen with no hearing or review by an IJ when the noncitizen is encountered at a port of entry or within 100 miles of the border: (1) without a valid entry document; or (2) having lied or misrepresented a material fact, including falsely claiming U.S. citizenship, in obtaining U.S. entry documents or admission. *See* 8 U.S.C. § 1225(b)(1) [INA § 235(b)(1)].

and the person must acknowledge understanding them. Litigation has focused on *when* these advisals must be given. In *Matter of Gregorio Cruz Perez*, the government's failure to comply with 8 CFR §§ 287.3(c) and 292.5(b) prior to interrogation resulted in termination of removal proceedings.[42] However, in *Samayoa-Martinez v. Holder*, the Ninth Circuit held the advisals are not required until the NTA is filed with the court.[43] Similarly, in *Matter of E-R-M-F- & A-S-M-*, the BIA held that the advisals are not needed until an NTA has been filed with the court.[44] However, for these advisals to have any meaning, they must be given before interrogation, particularly to vulnerable individuals such as children.[45] Even if the IJ determines that delayed advisals do not violate the regulation, argue that the statements obtained during the interrogation without advisals were not voluntary under the Fifth Amendment as described in Section III.B. Consider a termination motion in the following situations, similar to those noted in the context of the I-770:

- DHS failed to give the 8 CFR § 287.3(c) advisals
- DHS did not give the 8 CFR § 287.3(c) advisals before interrogation (pushing back against bad case law developed in the adult context and focusing on the particular vulnerability of children)
- DHS did not give the 8 CFR § 287.3(c) advisals in a language the child could understand

After the commencement of proceedings against the child, 8 CFR § 1240.10(a) requires that the IJ tell him or her about free legal services and provide a list of these services. This regulation is a due-process-derived regulation ensuring fundamental fairness in proceedings. In *Leslie v. Holder*, the Third Circuit overturned a removal order when the unrepresented respondent was not given these advisals.[46] Consider pursuing a termination motion where the IJ failed to give a child a list of free legal services when unrepresented.

C. Protective Policies Applicable to Children

Below are several examples of agreements and policies that may serve as additional potential bases for termination. New policies are emerging all the time and the specific facts of your case may implicate a policy not covered here. Think creatively about additional settlements, injunctions, or policies that may apply. To obtain relevant memoranda, consider using Freedom of Information Act (FOIA) requests and requests to ICE counsel—and then demand that the IJ compel the documents through a court order or

[42] *Matter of Gregorio Cruz Perez*, A 095-748-837, at 16-18 (Imm. Ct. Los Angeles Feb. 12, 2009) (unpublished).
[43] *Samayoa-Martinez v. Holder*, 588 F.3d 897, 901-02 (9th Cir. 2009).
[44] *Matter of E-R-M-F- & A-S-M-*, 25 I&N Dec. 580, 585 (BIA 2011).
[45] *See* Legal Action Center, *Challenging* Matter of E-R-M-F- and A-S-M-*: Warrantless Arrests and the Timing of Right to Counsel Advisals* (Nov. 2, 2012), *available at* http://www.legalactioncenter.org/sites/default/files/challenging_matter_of_e-r-m-f-__a-s-m-_0.pdf; *see also* American Immigration Council, *Motions to Suppress in Removal Proceedings: A General Overview* 27-28 (last updated Jan. 26, 2015) [*Motions to Suppress: A General Overview*], *available at* http://www.legalactioncenter.org/sites/default/files/motions_to_suppress_in_removal_proceedings-_a_general_overview_1-26-15_fin.pdf
[46] *Leslie*, 611 F.3d at 183.

by signing subpoenas. Make sure the IJ's ruling covers any non-public memoranda and policies that might exist.[47]

1. *Flores* Settlement Agreement[48]

The *Flores* Settlement Agreement establishes nationwide standards and policies for the detention, treatment, and release of all children in DHS and ORR custody.[49] The *Flores* Settlement requires, among other conditions: that a child be placed in the least restrictive detention setting appropriate to that child's age and special needs; that facilities detaining children are safe and sanitary and reflect concern for the particular vulnerabilities of children; that unaccompanied children are segregated from unrelated adults (and, if not possible, that the detention of the unaccompanied children will not last more than 24 hours); that a general policy of favoring release be implemented; and that attorney-client visits and facility visits be permitted.[50] In the event of an emergency or influx that prevents prompt placement of children in licensed programs, the *Flores* Settlement states that government policy is to make all reasonable efforts to place children in programs licensed by an appropriate state agency expeditiously.[51] Though many of the standards and policies of the *Flores* Settlement have been incorporated into current statutes and regulations, others have not. For example, the requirement under *Flores* to place children in state-licensed facilities, which is not in the regulations, is routinely violated.[52] This and other violations of the *Flores* Settlement may form an independent basis for termination.

2. *Orantes-Hernandez* Permanent Injunction

The *Orantes-Hernandez* permanent injunction orders the government to protect the due process rights of detained citizens of El Salvador of all ages held in the United States. The permanent injunction was

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[47] IJs often resist granting discovery in removal proceedings, but efforts similar to those in Appendices 6.A, 6.B and 6.C (sample discovery motions and requests) are appropriate. There is a strong legal basis for why the material is essential to the case and impossible for respondents to obtain through diligent efforts.

[48] For background on the Flores Settlement Agreement, see Lutheran Immigration and Refugee Service et al., Flores Settlement Agreement & DHS Custody (Dec. 18, 2014), available at http://www.womensrefugeecommission.org/resources/document/1097-flores-settlement-agreement-dhs-custody.)

[49] *See Flores* Settlement Agreement ¶ 12.A. Note that on February 2, 2015, a motion to enforce the Flores Settlement Agreement was filed in the Central District of California. It argues that DHS is violating the agreement by: maintaining a no-release policy for children apprehended with their mothers at the border; holding children in secure (lock-down) facilities that are not licensed to take care of dependent children; and subjecting children to unduly harsh conditions in CBP short-term detention facilities near the border. For additional information and the Memorandum in Support of Motion to Enforce Settlement of Class Action, see http://www.ylc.org/2015/02/petition-filed-to-halt-en-masse-detention-of-refugee-children/.

[50] *See Flores* Settlement Agreement ¶¶ 11-12.A, 14, 32-33.

[51] *See id*. ¶¶ 12.B-12.C. In a case pending in the New York City Immigration Court, ICE counsel has argued that exceptional circumstances excused DHS from promptly placing a child within 72 hours. As of January 2015, the IJ had not yet ruled on this issue.

[52] *See* Manny Fernandez, *Base Serves as Home for Children Caught at Border*, N.Y. Times, April 28, 2012, *available at* http://www.nytimes.com/2012/04/29/us/some-question-use-of-temporary-shelter-for-children-in-country-illegally.html?_r=0; Rebeca M. López, *Codifying the* Flores *Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 Marq. L. Rev. 1635, 1658, 1671 (2012). For an overview of DHS compliance with the *Flores* Settlement Agreement, see generally DHS Office of Inspector General, *A Review of DHS' Responsibilities for Juvenile Aliens* (2005), *available at* http://www.oig.dhs.gov/assets/Mgmt/OIG_05-45_Sep05.pdf. *See also* DHS Office of Inspector General, *CBP's Handling of Unaccompanied Alien Children* (2010), *available at* http://www.oig.dhs.gov/assets/Mgmt/OIG_10-117_Sep10.pdf.

issued in 1988.[53] The injunction was reaffirmed in 2007, in 2009,[54] and most recently in July 2014.[55] Among other remedies, the initial injunction ordered the government, at the time of arrest and processing, to: advise Salvadorans about the right to a hearing, to consult with counsel, and to apply for asylum; make telephones available to class members at the time they are interviewed and charged with immigration violations; and provide class members with legal service lists. The federal court also imposed requirements about detention conditions for class members. The injunction requires that detention facilities provide class members with reasonable visitation, access to counsel, access to telephones (at least one telephone per every 25 detainees), access to confidential phone calls, the ability to receive and possess legal materials, access to writing materials, and access to detention center law libraries. Failure to comply with the *Orantes-Hernandez* injunction should be raised in a termination motion to assert a child's class membership and its benefits, and to further establish the government's disregard for other special protections in place for children (*e.g.*, I-770 advisals for children, detention conditions specified in the *Flores* Settlement Agreement).

3. Hold Rooms Memorandum

In 2008, CBP established a national policy on how it treats people held in short-term custody in its "hold rooms" memorandum. Advocates have not obtained a completely unredacted copy of the 2008 policy, but two organizations have stitched together a revealing compilation based on different partially-redacted copies of the same document.[56] It is logical for you to ask—through FOIA and through discovery requests—for the policy (the 2008 version, or a later version if one exists) that applied on the date your client was held by CBP and to incorporate it into your termination motion. Highlights of the compiled 2008 memorandum are:[57]

- **Feeding**. Snacks and juice must be provided every four hours. A meal must be provided if the child is or is expected to be detained eight hours. Meal service is required at least every six hours after the first meal (and two out of three meals must be hot). A child must be given the next meal served, regardless of the amount of time in custody. CBP must record the times of all meals.
- **Bedding**. Clean bedding must be provided to every child who requires bedding. A blanket and mattress must be provided to any child held 24 hours. Every hold room must offer access to clean blankets and mattresses.
- **I-770s**. These must be provided to all children and explained in the child's language if the child is under 14 years old or does not understand the form.

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[53] *See Orantes-Hernandez v. Meese*, 685 F. Supp. 1488 (C.D.Cal. 1988), *aff'd sub nom*. *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990).

[54] *See Orantes-Hernandez v. Gonzales*, 504 F. Supp. 2d 825 (C.D. Cal. 2007), *aff'd sub nom*. *Orantes-Hernandez v. Holder*, 321 Fed. Appx. 625 (9th Cir. 2009).

[55] The July 2014 order facilitates class counsel's access to detained Salvadoran children housed at a facility in Nogales, Arizona. *See* Order Denying Plaintiffs' Application for Temporary Restraining Order; Construing Plaintiffs' Application as a Motion to Compel Discovery; Granting Plaintiffs' Motion to Compel Discovery, *Orantes-Hernandez v. Holder*, No. CV 82-01107 (C.D. Cal. July 17, 2014), *available at* http://www.nilc.org/orantes.html.

[56] *See* Appendix 7 (National Immigration Forum and Catholic Charities of Newark's compilation of redacted versions of Hold Rooms Memorandum).

[57] These provisions are found in Sections 6.8 and 6.24 of the Hold Rooms Memorandum.

- **Temperature**. Every hold room must offer access to adequate temperature control and ventilation.

4. Trafficking Victims Protection and Reauthorization Act of 2008

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)[58] provides numerous protections to UAC, including: the immediate transfer into the care and custody of the U.S. Department of Health and Human Services (HHS), specifically ORR;[59] ORR placement in the least restrictive setting;[60] access to legal counsel "to the greatest extent practicable" for all UAC who are or have been in ORR custody;[61] and the promulgation of regulations which take into account the specialized needs of UAC and address both procedural and substantive aspects of handling children's cases.[62] The government's failure to follow these statutory provisions may strengthen your termination motion.

[58] Pub. L. No. 110-457, 122 Stat. 5044, § 235 (codified at 8 U.S.C. § 1232).
[59] 8 U.S.C. § 1232(b)(2)-(3) (stating that each department or agency of the federal government shall notify HHS within 48 hours upon the apprehension or discovery of a UAC; and further, that the child shall be transferred to the custody of HHS not later than 72 hours after determining that the child is a UAC).
[60] *Id*. § 1232(c)(2)(A) (stating that "[a] child shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense.").
[61] *Id*. § 1232(c)(5).
[62] *Id*. § 1232(d)(8).

III. SUPPRESSION OF EVIDENCE, PARTICULARLY EVIDENCE OF ALIENAGE

In addition to analyzing potential grounds for termination, you must also independently analyze potential grounds for suppression. They are analytically distinct, but they are not mutually exclusive, and you need not have both to win your case. When considering a suppression motion, key questions include whether the evidence—typically, the I-213[63] ICE will attempt to use to establish your client's alienage—was obtained in a fundamentally fair manner and whether the manner in which it was obtained undermines its probative value. Be aware that as a general matter, the CFR allows an IJ to "receive in evidence any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial."[64] Although the Federal Rules of Evidence do not apply in immigration court, you can and should argue that deviating from them would be fundamentally unfair in your case. As discussed in Part V, pursuing a suppression strategy means avoiding admissions of alienage at any point, including when denying the NTA's allegations, moving to change venue, and filing a FOIA request.

Fourth Amendment violations are addressed in Section III.A below and Section III.B then covers Fifth Amendment violations. Section III.C addresses other possible suppression grounds, and Section III.D ends with other strategies that may complement termination and suppression motions. It is common to raise several of these arguments in the same case, such as seeking suppression because the violation was egregious, it was widespread, or in the alternative because its use would violate the Fifth Amendment.

A. Fourth Amendment Violations

Suppression motions grounded in the Fourth Amendment typically rely on the violations being egregious, widespread, or both. Although prevailing on Fourth Amendment challenges arising out of conduct at the border may prove difficult, as discussed below, it is important nonetheless to assess their viability in your client's particular case—wherever the apprehension occurred.

1. Egregious Fourth Amendment Violations

A well-established method for suppressing evidence in immigration court is to prove that there was an egregious violation of your client's Fourth Amendment rights.[65] There are two independent requirements to satisfy: you must show that there was a Fourth Amendment violation and that the violation was egregious in nature.

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[63] *See* Appendices 8.A and 8.B (redacted I-213s).
[64] 8 CFR §§ 1240.7(a), 1240.46(b).
[65] Although in *Lopez-Mendoza* the Supreme Court merely left open the question of whether suppression would be appropriate for an egregious Fourth Amendment violation, circuit courts considering the question since have concluded that it is. *See, e.g.*, *Oliva-Ramos v. Holder*, 694 F.3d 259, 272 (3d Cir. 2012); *Almeida-Amaral*, 461 F.3d at 235.

First, the issue of whether a Fourth Amendment violation happened frequently boils down to whether a seizure took place, which would require the government to demonstrate at least a reasonable suspicion of criminal activity (or probable cause, in the event of an arrest).[66] The test for whether a "seizure" occurred is whether a reasonable person would have felt free to leave.[67] In one unpublished decision, an IJ thoughtfully concluded that someone did not feel free to leave when two uniformed officers with holstered guns went directly up to him in a Greyhound bus station.[68] Similarly, a woman's Fourth Amendment rights were determined to have been violated when she was told to stop working, was not free to move around, had to ask for permission to go to the bathroom, could not use her cell phone, and some fellow workers were handcuffed during a workplace raid.[69] Even when you can show that a reasonable person would not feel free to leave, ICE may argue that your client consented to the stop. In that case, the IJ must analyze the totality of the circumstances, including the age, education, and intelligence of the person who purportedly gave consent. One difficulty in litigating these cases is the risk that an IJ or the BIA will make improper rulings to avoid suppression, such as where the IJ and BIA improperly held that an officer's scribble that consent was supposedly given was irrebuttable proof that consent was given. There, it took a Third Circuit appeal to overturn the IJ and BIA.[70]

Second, assuming you can show that a seizure took place, you must show that the Fourth Amendment violation was egregious in nature. The "egregious" qualifier is nearly impossibly vague, and the definition of "egregious" varies among the circuits. Some classic arguments for why a violation was egregious include: it was racial profiling,[71] it was a sufficiently severe search or seizure,[72] or that it was conducted in bad faith (where the officer knew or should have known it was illegal).[73] This list is not exhaustive, and you should forge new ground to expand the list. Note that ICE has frequently failed when it has argued that an IJ should not suppress evidence where the egregious search was conducted by state police rather than DHS. The BIA rejected this argument in unpublished decisions in May 2009[74] and in July 2014.[75] ICE also often fails when it argues that egregiousness cannot be found unless there are beatings or physical threats.[76]

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[66] For an in-depth discussion of searches and seizures in the immigration context, see *Motions to Suppress: A General Overview*, *supra*, 15-25, 35.
[67] *See Florida v. Royer*, 460 U.S. 491, 501, 514 (1983) (test endorsed by the plurality and a dissenter).
[68] *In re [Redacted]*, A *[Redacted]* (Imm. Ct. New York NY Oct. 3, 2007) (unpublished).
[69] *In re [Redacted]*, A *[Redacted]* (Imm. Ct. New Orleans LA May 24, 2012) (unpublished).
[70] *See Oliva-Ramos*, 694 F.3d at 283.
[71] *See Orhorhaghe v. INS*, 38 F.3d 488, 497 (9th Cir. 1994); *Gonzales-Rivera v. INS*, 22 F.3d 1441, 1447-48 (9th Cir. 1994).
[72] *Almeida-Amaral*, 461 F.3d at 235, laid out the standard for this. Examples satisfying this standard include cases won by attorneys Manuel Rios in Seattle and Maureen Sweeney in Baltimore, in which DHS physically abused a client and an ICE officer engaged in sexually offensive touching of a client, respectively. For more information about these cases please contact Rex Chen at rexnyc@gmail.com.
[73] *See Lopez-Rodriguez*, 536 F.3d at 1019. It is not yet clear whether every circuit court will agree that bad faith violations are egregious in nature, but it is worth arguing. For example, the Eighth Circuit does not believe bad faith acts are always egregious. *See Garcia-Torres v. Holder*, 660 F.3d 333, 337 n.4 (8th Cir. 2011).
[74] *See In re [Redacted],* A [Redacted] (BIA May 7, 2009) (unpublished).
[75] *See In re Jairo Ferino Sanchez*, A 094-216-521 (BIA July 11, 2014) (unpublished).
[76] *See, e.g., Oliva-Ramos,* 694 F.3d at 276 (refusing to limit suppression to activity that shocks the conscience); *but see Escobar v. Holder*, 398 Fed. Appx. 50, 54 (5th Cir. 2010) (unpublished) (limiting egregiousness to conduct similar to forced vomiting). The

For children apprehended at or near the border, a fact-intensive analysis often reveals that there was no Fourth Amendment violation because of the broad latitude officials have to conduct border searches.[77] Still, an outrageously intrusive search at the border requires reasonable suspicion.[78] If a child is caught at an inland checkpoint, engage in a fact-intensive analysis about whether the checkpoint is unreasonable, because the public interest in making the stops must outweigh the individual's constitutionally-protected interests.[79] And be sure to perform the Fourth Amendment analysis if ICE apprehended your client in an interior raid or random arrest.

2. Widespread Fourth Amendment Violations

Suppression is appropriate for widespread Fourth Amendment violations.[80] As with egregious Fourth Amendment violations, *supra*, the first step is to prove that a Fourth Amendment violation of any kind took place.

The second step is to prove that the violation is widespread in nature. In the first federal circuit court decision to discuss this issue, the Third Circuit articulated important factors to consider in deciding whether a violation is widespread: whether there is a consistent pattern; the number of people affected; how frequently violations happen; and if there is a routine nature to the violations. [81] Helpful evidence can include: proof that officers are not trained adequately; proof that the government relies on outdated, inaccurate databases when planning raids; proof that officials are motivated by inflated arrest quotas; and displays of excessive force. Gathering evidence that a particular practice is widespread frequently involves collaboration with other lawyers, since there is a good chance that anything a child experiences is also being done to other children. Another method for gathering evidence is to file FOIA requests about the operation under which the illegal search was conducted. For example, FOIA requests and cross-examination of officers revealed arrest quotas for ICE's Fugitive Operations Teams (officers assigned to search for immigrants who have been ordered removed but who have not left the country), which gave credit for collateral arrests during home raids. In addition, reports and amicus filings that discuss the widespread nature of many illegal searches are excellent resources.[82]

Eighth Circuit does not believe that the sanctity of the home automatically makes every illegal home raid egregious in nature. *See Carcamo v. Holder*, 713 F.3d 916, 922-23 (8th Cir. 2013).

[77] In *Ramsey*, 431 U.S. at 619, the Supreme Court held that reasonable border searches can be conducted without probable cause. Recent decisions reinforce the lower standard for border searches by focusing on whether reasonable suspicion is even required to conduct forensic analysis of laptops at the border. *See, e.g.*, *United States v. Cotterman*, 709 F.3d 952 (9th Cir. 2013). Cursory inspections at the border probably do not require reasonable suspicion. For an in-depth discussion of Fourth Amendment-based claims arising out of CBP misconduct, see Legal Action Center, *Motions to Suppress in Removal Proceedings: Fighting Back Against Unlawful Conduct by U.S. Customs and Border Protection* 3-14 (Nov. 13, 2013), *available at* http://www.legalactioncenter.org/practice-advisories/motions-suppress-removal-proceedings-fighting-back-against-unlawful-conduct-cbp.

[78] *See United States v. Montoya de Hernandez*, 473 U.S. 531, 541-42 (1985) (alimentary canal search at the border).

[79] *See United States v. Martinez-Fuerte*, 428 U.S. 543, 560-62 (1976).

[80] *See Lopez-Mendoza*, 468 U.S. at 1050.

[81] *See Oliva-Ramos*, 694 F.3d at 279-81.

[82] For example, Stella Jane Burch, *"Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting* Lopez-Mendoza, 2008 Wis. L. Rev. 1109 (2008) and Cardozo Immigration Justice Clinic, *Constitution on ICE: A Report on Immigration Home Raid Operations* (2009), *available at*

B. Fifth Amendment Violations

Evidence also may be suppressed for violations of the Due Process Clause of the Fifth Amendment.[83] Claims under the Fifth Amendment do not depend on the illegality of an arrest, and they can cover misconduct that happened before or after an arrest. Therefore, this avenue of suppression may be more viable than the Fourth Amendment route for most children, particularly those who turned themselves in to CBP at the border. The Fifth Amendment mandates that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."[84] Individuals are entitled to procedural due process in removal proceedings under the Fifth Amendment.[85] In *Matter of Toro*, the BIA held that "[t]o be admissible in deportation proceedings, evidence must be probative and its use fundamentally fair so as not to deprive respondents of due process of law as mandated by the [F]ifth [A]mendment."[86] Thus the key argument is that the use of the evidence obtained in violation of the Fifth Amendment is fundamentally unfair and that the evidence's probative value is undermined by the violation.[87]

The procedural due process protections under the Fifth Amendment prohibit the government from using statements that are made involuntarily to support removal.[88] "The use of admissions obtained from a respondent involuntarily to establish [removability] is fundamentally unfair."[89] To determine the voluntariness of a statement, courts consider the totality of the circumstances.[90] Note that in immigration proceedings, a statement is not involuntary under the Fifth Amendment unless the record demonstrates that the statement was "induced by coercion, duress, or improper action" by the immigration officer.[91] If the circumstances viewed in the aggregate reflect an atmosphere of coercion and intimidation, the evidence is considered to be provided involuntarily and cannot be used against the respondent in removal proceedings.[92]

Examine BIA and your circuit court case law carefully to determine factors relevant to analyzing voluntariness. Be aware that in *Matter of Garcia*, the BIA held that the respondent's admissions regarding his alienage were made involuntarily because he "was led to believe that his return to Mexico was inevitable, that he had no rights whatsoever, that he could not communicate with his attorney (his

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http://cw.routledge.com/textbooks/9780415996945/human-rights/cardozo.pdf. In addition, amicus briefs addressed the widespread nature of violations in *Argueta v. ICE*, 643 F.3d 60 (3d Cir. 2011) and *Oliva-Ramo*s.

[83] *See Lopez-Mendoza*, 468 U.S. at 1050-51.

[84] U.S. Const. amend. V.

[85] *Reno v. Flores*, 507 U.S. 292, 306 (1993); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *Bridges*, 326 U.S. at 154; *The Japanese Immigrant Case*, 189 U.S. 86, 100-01 (1903).

[86] *Matter of Toro*, 17 I&N Dec. 340, 343 (BIA 1980).

[87] *See Sanchez-Llamas v. Oregon*, 548 U.S. 331, 349 (2006) ("The Supreme Court requires 'exclusion of coerced confessions both because we disapprove of such coercion and because such confessions tend to be unreliable.'").

[88] *See Navia-Duran v. INS*, 568 F.2d 803, 808-11 (1st Cir. 1977) (holding that the rule against involuntary confessions is an essential element of due process); *see also Bong Youn Choy v. Barber*, 279 F.2d 642, 646 (9th Cir. 1960) (stating that "[e]xpulsion cannot turn upon utterances cudgeled from the alien by governmental authorities; statements made by the alien and used to achieve his deportation must be voluntarily given.").

[89] *Ramirez-Sanchez*, 17 I&N Dec. at 505; *see Garcia*, 17 I&N at 321.

[90] *See, e.g.*, *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).

[91] *Cuevas-Ortega v. INS*, 588 F.2d 1274, 1278 (9th Cir. 1979).

[92] *See Navia-Duran*, 568 F.2d at 811; *Garcia*, 17 I&N Dec. at 321.

attempts to do so being actively interfered with), and that he could be detained without explanation of why he was in custody."[93] The BIA has also suggested that coercion or duress may inhere in circumstances where there is "physical abuse, hours of interrogation, denial or food or drink, threats or promises, or interference with any attempt by the respondent to exercise his rights."[94] And the BIA has asserted that the government's failure to comply with regulatory requirements is relevant to analyzing voluntariness.[95] In a series of unpublished decisions, the BIA found that children's statements were properly suppressed under the Fifth Amendment where CBP interrogated them for nine hours, threatened to deport them to Mexico, and refused their requests to call a parent or lawyer.[96]

Your child client's age and other vulnerabilities make it much more likely that an interaction with DHS will be experienced as coercive, and therefore render any admission made involuntary.[97] Do not be discouraged by case law developed in the adult context; here, as in many realms, children should not be held to the same standards as adults. Look to the *Flores* Settlement Agreement, the child-specific regulations listed above, the Hold Rooms Memorandum, and other reports documenting conditions of confinement to construct your Fifth Amendment suppression motion based on coercion. Consider reaching into other realms, like the case law governing coerced confessions of children in the criminal or juvenile delinquency contexts.[98]

Practice Tip: Unreliability of I-213s in Children's Cases

When you hold ICE to its burden of establishing alienage in removal proceedings, ICE typically produces your client's I-213, which generally is deemed "inherently trustworthy" unless it contains information that is "inaccurate or obtained by coercion or duress."[99] As outlined in Part IV below, you must object to the I-213's admission into evidence. Even if your suppression motion is not successful, you may nonetheless gain termination if you can convince the IJ that your client's I-213 is inherently unreliable

[93] 17 I&N Dec. at 321.
[94] *See Ramirez-Sanchez,* 17 I&N Dec. at 506.
[95] *See Garcia-Flores*, 17 I&N Dec. at 327.
[96] *See In re Luis Miguel Nava*, A 095-422-302, 2006 Immig. Rptr. LEXIS 8918, *3-*5 (BIA Nov. 29, 2006) (unpublished); *In re Yuliana Huicochea*, A 095-422-308, 2006 Immig. Rptr. LEXIS 8420, *3-*5 (BIA Nov. 29, 2006) (unpublished); *In re Jaime H. Damian*, A 095-422-307, 2006 Immig. Rptr. LEXIS 7890, *3-*5 (BIA Nov. 29, 2006) (unpublished); *In re Oscar J. Corona*, A 095-422-301, 2006 Immig. Rptr. LEXIS 7854, *3-*5 (BIA Nov. 29, 2006) (unpublished). In addition to finding these statements coerced, the BIA affirmed the IJ's independent finding that the children "were detained solely on account of their Hispanic appearance" and thus that "the stop was illegal and suppression of the evidence obtained as a result of the illegal stop is required." *In re Oscar J. Corona*, 2006 Immig. Rptr. LEXIS, *3. Though it cited to a Ninth Circuit case addressing the Fourth Amendment, the BIA grounded this "illegal stop" suppression in the Fifth Amendment. *See id*. at *2-*3.
[97] *See* Section II.B.2, *supra*. For example, a child may experience duress if interviewed in a small room inside a locked facility, failed to understand the interview's purpose or significance of his answers, and feared the DHS officer. Coercion also can arise from DHS's failure to comply with its own regulations. For example, failure to provide the I-770 before the child's interrogation may create or contribute to a coercive environment that renders admissions involuntary.
[98] *See, e.g.*, *J.D.B.*, 131 S. Ct at 2403 (events "which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens") (quoting *Haley v. Ohio*, 332 U.S. 596, 599 (1948)); *see also Graham v. Florida*, 560 U.S. 48, 68 (2010) ("developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds").
[99] *Matter of Gomez-Gomez*, 23 I&N Dec. 522, 524 (BIA 2002).

(thus rebutting the presumption of reliability, such as where it contains inaccurate information), and thus fails to satisfy ICE's burden.[100] When challenging the reliability of a child's I-213, pay special attention to issues of source, lack of detail, and inaccurate information—in addition to issues of involuntariness that formed part of your suppression motion. Challenge the use of the I-213 as unreliable when a source other than your client contributed to its creation. Particularly during the recent influx of children, some with adult companions, DHS may have completed the I-213 in whole or part through conversations with adults—related or unrelated to your client.[101] Attack skeletal I-213s as unreliable, since detailed information specific to the child in question bears upon an I-213's reliability.[102] Be aware that DHS requires its officers to include in-depth information on a child's I-213, including answers to questions on 12 topics not covered by the I-213 itself.[103] Last, consider whether the I-213 contains inaccurate information. Challenge its use if it does, since an I-213 is deemed inherently trustworthy and admissible to prove alienage only "absent any evidence that [it] contains information that is inaccurate."[104]

C. Other Novel Suppression Theories

There are several ambitious theories for suppressing evidence currently being litigated. Even though they may be uphill battles in immigration court, they could potentially succeed in a circuit court appeal. Consider presenting them in your client's case even if there is no governing case law because a circuit court might rule favorably in someone else's case while yours is pending.

1. Suppression for Violating the Right to Consular Notification

The Vienna Convention for Consular Relations and 8 CFR § 236.1(e) require DHS to inform individuals of their right to call their consulate. In *Sanchez-Llamas v. Oregon*, the Supreme Court refused to suppress evidence in a state criminal proceeding based on a Vienna Convention violation.[105] However, the Supreme Court left open the possibility of suppression in removal proceedings because it arguably has supervisory authority over federal immigration proceedings, unlike state criminal proceedings.[106]

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[100] For more detailed information on this approach, see Kristen Jackson, "What to Do When DHS Alleges Your Client Is a Bad Actor: Challenging I-213s Created When Your Client Was a Minor," *Immigration Practice Pointers: Tips for Handling Complex Cases* 550 (2013-14 ed.). *See also* Appendix 9 (sample BIA brief regarding alienage). Also consult *Matter of Mejia-Andino*, where five members of the BIA would have found a seven year old's I-213 insufficiently reliable to establish removability. *See Mejia-Andino*, 23 I&N Dec. at 537-39 (concurrence).

[101] The BIA has held that DHS "would be well advised to include as many indicia of trustworthiness regarding the information in [the I-213] as are practicable, such as the source of the information and the circumstances of the alien's apprehension." *Gomez-Gomez*, 23 I&N Dec. at 526. And the Ninth Circuit has recognized that I-213s are presumed inherently trustworthy and capable of establishing alienage in significant part because they are "essentially a recorded recollection of a [DHS agent's] conversation with the alien." *Espinoza v. INS*, 45 F.3d 308, 308 n. 1 (9th Cir. 1995) (citation omitted). Indeed, I-213s are typically regarded as records of the subject's own statements—that is, created from "information out of the alien's mouth." *Id*. at 310.

[102] *See Matter of Ponce-Hernandez*, 22 I&N Dec. 784, 786-87 (BIA 1999); *see also Mejia-Andino*, 23 I&N Dec. at 538.

[103] ICE, *Detention and Removal Operations Policy and Procedures Manual*, at Appendix 11-4 ¶ 2.1.3 (2006), *available at*. http://shusterman.com/pdf/deportationofficersfieldmanual.pdf.

[104] *Gomez-Gomez*, 23 I&N Dec. at 524; *Ponce-Hernandez*, 22 I&N Dec. at 785.

[105] *Sanchez-Llamas*, 548 U.S. at 337.

[106] *See id*. at 345.

2. Suppression for *Any* Fourth Amendment Violation

You also should consider three arguments for expanding the rule for suppressing evidence to cover *any* Fourth Amendment violation (even violations that are not egregious). The first approach asks the court to apply the factors in *Lopez-Mendoza*, where the Supreme Court assessed then-contemporary conditions when deciding whether evidence should be suppressed in immigration court for any Fourth Amendment violation.[107] Today, over 30 years later, contemporary conditions of widespread DHS misconduct are very different from the limited INS wrongdoing in 1984 so that the likely social benefits of deterring unlawful government conduct outweigh the potential costs analyzed in *Lopez Mendoza*.[108] In addition, *Lopez-Mendoza* focused on how suppression was not appropriate for chaotic mass arrests.[109] If your client was not encountered during such an arrest, argue that the Supreme Court's concern that INS officers would have difficulty proving that they followed protocols during a mass arrest does not apply in your case. A second approach to expanding the suppression rule is the argument that removal proceedings today are quasi-criminal in nature, as the Supreme Court recognized in *Padilla v. Kentucky*,[110] such that the court should adopt the rule in criminal proceedings to suppress evidence for any Fourth Amendment violation, rather than the egregiousness standard. A third approach focuses on why the deterrent effect of the exclusionary rule is particularly appropriate where local police were the ones who acted illegally. Deterrence here can be strong because local police conduct a more manageable number of immigration arrests and no comprehensive regulatory scheme exists to otherwise discourage unlawful conduct.[111] Be creative in thinking through possible Fourth Amendment theories.

3. Suppression for Violating State Constitutional Protections

State constitutions can provide more expansive protection from searches and seizures than does the United States Constitution.[112] An unresolved issue is the degree to which suppression is appropriate for violating state constitutional protections. In 2011, an unpublished BIA case rejected this theory without offering any analysis.[113]

4. Suppression for Violating State Juvenile Confidentiality Laws

Many states have laws strictly protecting the confidentiality of juvenile records and setting out careful procedures for outside parties to obtain copies of these documents and the information they contain. If ICE violates state juvenile confidentiality laws when obtaining evidence of alienage, file a suppression motion. This can happen when a child is in the juvenile justice system within the United States and someone within that system contacts ICE. Couch the state law violation in terms of a Fifth Amendment

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[107] *See Lopez-Mendoza*, 468 U.S. at 1042-45.
[108] *See id*. at 1041-42.
[109] *See id*. at 1049-50.
[110] *Padilla v. Kentucky*, 559 U.S. 356, 360-64 (2010).
[111] This issue is not well-developed in case law. The only circuit court to rule on the theory so far has rejected it. *See Maldonado v. Holder*, 763 F.3d 155, 163 (2d Cir. 2014) (rejecting argument that suppression is required for any Fourth Amendment violation where local police conducted the arrest). But the argument has merit and may win in other circuit courts.
[112] *See, e.g., State v. Hunt*, 450 A.2d 952, 955 (N.J. 1982).
[113] *See In re [Redacted]*, A *[Redacted]* (BIA Feb. 18, 2011) (unpublished).

due process violation. Proceedings are fundamentally unfair when ICE uses evidence that it obtained by skirting state laws expressly designed to protect vulnerable youth. This argument has gained traction in at least one case arising out of the San Francisco Immigration Court.[114] You should research what the process is to obtain juvenile records in the relevant state and develop the factual record about how ICE obtained the evidence in your specific case.[115] This is also a strong strategy for keeping juvenile records out of immigration court when you are pursuing relief from removal.

D. Civil Rights Strategies in Addition to Termination and Suppression

Along with a motion to terminate or suppress, there may be tactical value in a civil lawsuit for money damages (including attorney's fees[116]) or injunctive relief as well as in a civil rights complaint. Although an in-depth discussion of all potential causes of action is beyond the scope of this practice advisory, consider the following options when interviewing a child and preparing a case. These approaches can bolster your motions in immigration court and might strengthen your case for a favorable exercise of prosecutorial discretion (PD).[117]

- **42 U.S.C. § 1983.** The Civil Rights Act holds individuals personally liable for offending conduct made "under the color of State law." The United States, its agencies, and federal officials are not subject to Section 1983 liability. The violation of a federal right must be pleaded and proven. Section 1983 suits are typically one of two types: a suit against a local government entity (when the illegal conduct was pursuant to a policy, practice, or custom)[118] or a suit against the individual violator. Potential relief includes monetary damages and injunctive relief. Fees are available pursuant to 42 U.S.C. § 1988. One example of a claim brought under Section 1983 in the immigration context is *Lyttle v. United States, et al*., a case involving a U.S. citizen with mental disabilities who was unlawfully detained and deported to Mexico in 2008.[119]

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[114] *See* Appendices 1.A, 1.B, 1.C and 1.D for a sample motion presenting this argument.

[115] *See* Vera Institute of Justice, "Obtaining Juvenile Records: A Guide for Sixteen States and Washington, DC" (February 2015), *available at* http://my.hdle.it/38966623. For readers who are not registered users of Vera Institute's "Extra Legal" online resource database, please email the Vera Institute of Justice's Unaccompanied Children Program at CIJcoordinator@Vera.org to request a copy of this resource.

[116] *See* Trina Realmuto and Stacy Tolchin, *Requesting Attorneys' Fees Under the Equal Access to Justice Act* (June 17, 2014), *available at* http://www.legalactioncenter.org/sites/default/files/requesting_attorneys_fees_under_the_equal_access_to_justice_act_6-7-14_fin.pdf.

[117] PD in this context refers to DHS's ability to make decisions—given limited resources—about who will be subject to immigration enforcement, and how. According to the head of DHS, "prosecutorial discretion should apply not only to the decision to issue, serve, file, or cancel a Notice to Appear, but also to a broad range of other discretionary enforcement decisions" including "whether to settle, dismiss, appeal, or join in a motion on a case; and whether to grant deferred action, parole, or a stay of removal instead of pursuing removal in a case." Jeh Charles Johnson, Secretary, DHS, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, at 2 (Nov. 20, 2014). ICE is supposed to consider PD, in particular, for plaintiffs in non-frivolous lawsuits regarding civil rights or liberties violations. *See* John Morton, Director, ICE, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs*, at 2 (June 17, 2011).

[118] *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978).

[119] *Lyttle v. United States, et al*., No. 4:11-152 (M.D. Ga., *filed* Oct. 13, 2010); No. 10-142 (E.D.N.C. *filed* Oct. 13, 2010). *See Noncitizens with Mental Competency Issues in Removal Proceedings*,

- **The Federal Tort Claims Act (FTCA).** The FTCA waives the United States' sovereign immunity and authorizes suits for money damages based on federal employees' negligent acts or omissions and, in some instances, their intentional misconduct.[120] FTCA claims may be appropriate to address reported mistreatment and abuses suffered by children at the border.[121]
- ***Bivens* Actions.** *Bivens* actions are damage suits against federal agents, in their individual capacity, for violations of constitutional rights.[122] Note that federal agencies are not subject to *Bivens* actions.[123]
- **State Law.** Consider a claim against state or local officials under state tort law or civil rights law. For example, county officials may be liable for unauthorized disclosure of confidential juvenile records to federal officials and others.
- **DHS Office of Civil Rights and Civil Liberties (CRCL).** The CRCL Office investigates civil rights and civil liberties complaints filed by the public regarding DHS (including its officers and facilities). Complaints can address detention conditions, DHS abuse/misconduct, use of force, denial of due process, discrimination, and more.[124]

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http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/immigrants-mental-disabilities-removal-proceedings (last updated Aug. 2012).

[120] 28 U.S.C. §§ 1346(b), 2671-2680.

[121] For a primer on FTCA claims, see Priya Patel, *Federal Tort Claims Act: Frequently Asked Questions for Immigration Attorneys* (Jan. 24, 2013), *available at* http://www.nationalimmigrationproject.org/legalresources/practice_advisories/pa_FTCA_FAQ.pdf.

[122] *See Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

[123] For information on *Bivens* actions and other claims against the government, see Trina A. Realmuto, *Whom to Sue and Whom to Serve in Immigration-Related District Court Litigation* (May 13, 2010), *available at* http://www.legalactioncenter.org/sites/default/files/lac_pa_040706.pdf.

[124] The CRCL complaint form can be found online. *See File a Civil Rights Complaint*, http://www.dhs.gov/file-civil-rights-complaint#1 (last updated Sept. 23, 2013). You can also send a complaint documenting the issue, along with the child's name and A-number (the eight- or nine-digit unique personal identifier that DHS assigned to him or her), to CRCL at CRCLCompliance@hq.dhs.gov.

IV. PRACTICAL CONSIDERATIONS: INTERVIEWING CHILDREN, INFORMATION GATHERING, AND DECISION MAKING

This Part covers interviewing strategies and techniques, working with your child client to determine if the government violated the law, and case strategy and decision-making with the child.[125] As a zealous advocate, you must develop at least a basic understanding of childhood cognitive development and abilities. You must take the time to build trust and rapport with your client in order to represent his or her stated interests. You must remind the government that children are different, and should be treated differently according to their age, development, ability, and experience.[126]

A. Working with Children: Interview Strategies

Consider the following when preparing to meet with and interview your client regarding a possible termination and suppression strategy.[127]

1. Groundwork

Consider setting a series of shorter meetings with your client in order to build trust and rapport. Children often are not prepared to explain the details of past trauma and abuse to a stranger at the first meeting. Shorter meetings correspond with children's attention spans and ability to concentrate. Be prepared to communicate in the child's best language or dialect. Bring in interpreters as needed; do not use the child's family or friends as interpreters. Remember that your duty of communication to your client includes addressing language issues. Do not interview the client in his or her best language without an interpreter unless you are fully fluent in the child's best language.[128] Be thoughtful about the interview setting.[129] Consider arranging your meeting space so that a desk is not between you and the child. Have child-friendly items, like crayons or stuffed animals, within the child's reach. Plan to meet with the child individually at first. Call in relatives or friends later and with the child's permission if the

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[125] *See generally* Lutheran Immigration & Refugee Services, *Working with Refugee and Immigrant Children: Issues of Culture, Law & Development* (1998) (Table of Contents and Introduction *available at* www.brycs.org/documents/upload/WORKINGW.PDF).

[126] In limited ways, the Executive Office for Immigration Review (EOIR) has acknowledged that children are different. The BIA has noted that "considerations and principles of special care" should be accorded to children in removal proceedings. *See Gomez-Gomez*, 23 I&N at 524; *see also Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042, 1045-46 (9th Cir. 2007) (requiring EOIR to evaluate harm through the eyes of seven and nine year olds, the ages of the adult respondents when the key events occurred). EOIR has also noted that "[i]ssues of age, development, experience and self-determination" impact how child respondents navigate removal proceedings. *See* Michael J. Creppy, Chief Immigration Judge, U.S. Dep't of Justice, EOIR, *Interim Operating Policies and Procedures Memorandum 04-07: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children*, at 2 (Sept. 16, 2004).

[127] *See generally* ABA Comm'n on Immigration*, ABA Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States* §§ IV.C (child-sensitive interviewing techniques), V.A (attorney role), V.C (establishing the attorney-client relationship) (Aug. 2004) [ABA Standards], *available at* http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/Immigrant_Standards.authcheckdam.pdf.

[128] *See* Lisa Aronson Fontes, *Interviewing Clients Across Cultures: A Practitioner's Guide* 142-43 (2008).

[129] *Id*. at 19-22.

relatives and friends are needed to develop the legal strategy or claim—but always remember that the child, not his or her family or caregiver, is your client.

2. The Interview

Begin the interview with the child by clarifying roles and what the meeting is about. For example, explain the role of an attorney, the attorney-client relationship and privilege, and confidentiality. Explain that an attorney does not work for the government and cannot share information with the government. You may need to explain the removal process along with the roles of the IJ and the ICE counsel. Use language that meets the age or developmental needs of the specific child.[130] For example, you may need to explain what an international border is, that each government has rules about who can cross its border, and who can stay within its border. Consider using a map or drawing a picture.[131] Talk with your child client about how to answer questions. Children often say what they think adults want to hear, believing there is a "right" answer. Explain to your client that there is no "right" answer. Encourage him or her to use his or her own words instead of repeating what someone may have told him or her. Encourage him or her to express his or her own feelings, not those of others. Explain that it is okay to say "I don't know" or "I don't understand" instead of guessing or making up an answer. Be sure to assure your client that he or she can correct you because you may get something wrong or misunderstand an answer.

Delve into the substance of the interview with a neutral topic, such as the child's biographical information. Try not to stick too rigidly to an intake sheet or scripted questions; instead, be present and responsive to the child, allowing the child to take an active rather than passive role in your conversation. This should facilitate a more open exchange of information. As you ask questions, explain why you need the information. For example, explain you are keeping notes so that you can remember the conversation and that the notes will not be shared with outsiders. Remain neutral and non-judgmental. Ask open-ended questions. For example, "you said he . . ., can you tell me more about that?" and ". . . and then what happened?" Encourage the child to tell you a narrative, rather than to provide short answers to pointed questions.[132] Avoid leading questions, as your client may be eager to please you and will try to guess the answer you want and give it. Use active and reflective listening, repeating back parts of the child's story. For example, "It sounds like . . ." Reflect back not only content, but the emotions your client seems to be experiencing. For example, "You were really sad when your grandmother died, leaving you alone with your sister." Be creative with questioning. You may need to rephrase questions or ask the same question in a few different ways. Avoid compound questions. Continually check in with the child to confirm that he or she understands what you are saying. Do this by asking that the child repeat back what you said about the law or the next steps in the process.[133] Validate what the child is saying;

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[130] *See* Anne Graffam Walker, *Handbook on Questioning Children: A Linguistic Perspective* 1-7 (3d ed. 2013).
[131] *See* ABA, *Child Clients Are Different: Best Practices for Representing Unaccompanied Minors*, Chapter 4 (2007), *available at* http://www.americanbar.org/content/dam/aba/migrated/child/PublicDocuments/legalrep_10.authcheckdam.pdf.
[132] *See* Walker, *supra*, at 121-23.
[133] *See id*. at 70-71.

assure him or her that it is okay to feel scared, betrayed, isolated, and the like. Repeat back what you heard to verify that what you heard is correct. If the interview stalls, take a break and change topics.

Stop the interview if the child becomes very upset or appears to be re-traumatized. At this point, the conversation should shift to reviewing the child's support system, talking about self-care, and safety planning if necessary. Have resources on hand to share with the child, if possible (for example, the names of therapists, support groups, and community centers). The child's school may have a counselor on staff. Ask the child if you can help him or her call one of the resources, especially if the child has no support system in place. If the child is suicidal, immediate action may be necessary. Familiarize yourself with the American Bar Association Model Rules of Professional Conduct and your own state bar's rules on when confidentiality can be breached in order to help the client.[134]

3. After the Interview

As the interview winds down, summarize what you have heard. Ask the child to repeat what he or she has learned. Discuss next steps and make a concrete action place. Be sure to leave time for questions. Especially for children who are recent arrivals to the United States, clarify the best method of communication: phone, cell phone, email, or letters? Also explain the best way to reach you: call and leave a voice message, email, or come during drop-in hours. Check in to see how the child is feeling emotionally and whether he or she has support at home. Call the day after the interview to see how the child is feeling. Remember that in most cases, connecting children with mental health services providers is advisable, both to help them process the emotions that arise in the interview process (especially if they have experienced serious trauma) and to help them handle the stress of being in removal proceedings.

4. Other Considerations

Remember that a child's ability to participate in an interview depends on his or her age, health, development, cognitive processes, education, language ability, and background. Trauma dramatically affects the development of a child's brain and may account for inconsistencies in a child's stories or narrative.[135] Trauma can arise from chaotic social conditions, violence, lack of protection and caring by adults, nutritional deficits, and treatment related to physical or mental disabilities. In turn, remember that the child, particularly an older youth, is often capable of understanding the processes and legal strategies you present. Explain the options, advantages, and disadvantages in a few different ways. For example, use diagrams or charts to walk through what happens when.

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[134] *See* Model Rules of Prof'l Conduct r. 1.6(b)(1), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.html; *see also* ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 83-1500 (1983) (discussing disclosure of client's intent to commit suicide).

[135] *See* National Child Traumatic Stress Network, *Complex Trauma in Children and Adolescents* 7 (2003) (outlining biological and cognitive effects of childhood trauma), *available at* http://www.nctsnet.org/nctsn_assets/pdfs/edu_materials/ComplexTrauma_All.pdf.

B. Determining Whether DHS Violated the Law: Gathering Information

1. Interview the Client

Although some children can tell you how they were mistreated, others may not know what their rights are and therefore cannot identify how they were wronged. Ask specific, detailed questions, using the interview techniques outlined above. Be sure to cover all relevant topics, including the child's apprehension and interrogation (at the border or via internal enforcement), the child's treatment while in DHS and ORR custody (including documents the child may have signed or been given), and what has transpired to date in immigration court (presuming the child has gone to master calendar hearings unrepresented). Develop intake materials that cover not only eligibility for immigration relief, but also the important topics relevant to suppression and termination.[136]

2. Interview Witnesses

Sometimes, the improper conduct took place in front of other people whom you can interview. For example, CBP might have failed to give warnings to an entire family so other family members can explain what they saw, or ICE might have raided a home when others living in the apartment were there. Parents and ORR sponsors can be important witnesses on NTA service issues (including whether ICE served the NTA at a prior hearing, where the child appeared *pro se*). Consider getting signed declarations in case witnesses become unavailable later, and object if ICE tries to deport a key witness.

3. Examine the I-213 and Other Key Documents

DHS often mistakenly completes the I-213 such that it contains information not related to the client. Check your child client's I-213 for such errors (for example, whether it refers to a girl as "he"). See if it describes information about someone else as if DHS copied details from someone else's I-213. Review the I-213 to see if it illogically says the child refused to answer any questions but includes personal information presumably from the child. Check the various dates on the I-213 to see if DHS pre-completed portions before the interview. Do the same careful analysis of the child's I-770 and NTA. You may need to obtain the I-213 from ICE via a FOIA or other means (discussed below), or obtain it in immigration court once you hold ICE to its burden of establishing alienage.

4. Check for Forged Documents

In 2014, the Northwest Immigrant Rights Project filed a lawsuit against ICE counsel Jonathan Love for allegedly forging a document that stated it was signed in 2000, but that appeared on a DHS form that did not exist until after 2001.[137] This example serves as a reminder to be diligent in your document review. Try to obtain metadata, which includes computer data that would show when a file was last edited and which user created it, using document production strategies outlined below.

[136] *See* Appendix 10 (suppression/termination intake questions).
[137] *Lanuza v. Love*, Case No. 2:14-cv-01641 (W.D. Wash. *filed* Oct. 23, 2014).

5. Pursue Document Production

A comprehensive plan to seek document discovery can be very productive. Possible steps include asking the IJ to compel ICE to produce the A-file[138] and relevant documents, asking ICE counsel to produce documents as a matter of fairness, making a limited track 3 FOIA request,[139] making broad FOIA requests (CBP, ICE, ORR, U.S. Citizenship and Immigration Services (USCIS)), and asking the IJ for subpoenas, if you need a certain witness for your case.[140] Be very careful in your requests for evidence through FOIAs and other methods to not inadvertently concede alienage or provide information on your client's place of birth, because ICE may argue that the information could be used as independent evidence of alienage. If the child was in ORR custody, request the child's ORR file.[141] In the Ninth Circuit, a specific statute has been held to require the government to produce a copy of the respondent's A-file because it contains evidence of the respondent's entry and presence.[142]

C. Pros, Cons, and Case Strength: Advising Your Client and Reaching a Decision

It is critical to explore with the child the advantages and disadvantages of pursuing a suppression or termination motion, and to make the decision about strategy in concert with the child.

1. Advantages

One key advantage of pursuing termination is if the motion succeeds, the IJ will dismiss proceedings and not enter a removal order. In the case of successful suppression motions, some or all evidence of alienage may be excluded or given less weight for the duration of the removal proceedings. Some suppression motions do lead to termination; for example, where ICE's only evidence of alienage is successfully suppressed. For a child with no easy path to qualify for legal protection (for example, if the child is about to age out of eligibility for relief), this strategy may be his or her only defense against

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[138] Your client's A-file is DHS's official file for all of your client's immigration records. It is identified by your client's A-number. *See A-Files Numbered Below 8 Million*, http://www.uscis.gov/history-and-genealogy/genealogy/files-numbered-below-8-million (last updated July 7, 2014).

[139] USCIS uses a three-track system to process FOIA requests. "Track 3 is an accelerated track for cases involving individuals who are to appear before an immigration judge" and want to obtain a copy of their A-file. *See FOIA/Privacy Act Overview*, http://www.uscis.gov/about-us/freedom-information-and-privacy-act-foia/foia-privacy-act-overview/foiaprivacy-act-overview (last updated Aug. 25, 2014).

[140] *See* Appendices 6.A, 6.B and 6.C (sample discovery motions and requests). Additional resources include Geoffrey Heeren, *Shattering the One-Way Mirror*, 79 Brook. L. Rev. 1569 (2014); Rex Chen and Wayne Sachs, "Document Production: Getting What's Rightfully Ours," *Immigration Practice Pointers: Tips for Handling Complex Cases* 616 (2014-15 ed.); New York University Immigrant Rights Clinic, *Understanding* Oliva-Ramos v. Attorney General *and the Applicability of the Exclusionary Rule in Immigration Proceedings* (Nov. 30, 2012), *available at* http://www.law.nyu.edu/sites/default/files/ECM_PRO_074309.pdf; American Immigration Council, Dent v. Holder *and Strategies for Obtaining Documents from the Government During Removal Proceedings* (June 12, 2012), *available at* http://www.legalactioncenter.org/sites/default/files/dent_practice_advisory_6-8-12.pdf.

[141] Note that ORR has a new non-FOIA method for getting children's case file information. *See Requests for UAC Case File Information*, http://www.acf.hhs.gov/programs/orr/resource/requests-for-uac-case-file-information (last updated April 14, 2014). One practitioner received case file information through this ORR non-FOIA avenue in about 20 days.

[142] The statute is 8 USC § 1229a(c)(2)(B) [INA § 240(c)(2)(B)] and it is discussed in *Dent v. Holder*, 627 F.3d 365, 374-75 (9th Cir. 2010). Attorneys in Los Angeles have received copies of children's A-files after submitting simple *Dent* requests prior to entering pleadings.

deportation. Even a strong and deserving asylum claim might unfairly lose if the case is randomly assigned to an unfavorable IJ.[143] Another advantage is termination and suppression motions generally slow down the processing of a case due to the extra steps of producing alienage evidence, briefing of the argument by both sides, IJ consideration of the argument, and possible hearings on the evidence. Given the serious concerns that children on expedited dockets are not being given enough time to prepare their cases,[144] termination and suppression strategies are a legitimate method to slow down the proceedings to a fairer pace. Slowing down the proceedings can also provide critical time that children may not otherwise have to obtain predicate orders, certifications, and other documents needed for relief, such as for Special Immigrant Juvenile status (SIJS) or U nonimmigrant status (U visa). Pursuing suppression or termination motions before seeking relief from removal also forces the government to do its job and satisfy its burden of proof. This is a perfectly valid way to help protect the child's due process rights, and preserve important issues for appeal. It holds the government accountable for its actions, which hopefully has some deterrent effect on future improper government conduct. In addition, a strong termination or suppression motion may result in ICE offering a child PD. Finally, an IJ may exclude certain evidence but still find the government met its burden of proof based on other admissible evidence, such as through the independent source rule (see page 32 "Practice Tip: Independent Evidence vs. Fruit of the Poisonous Tree"). It can be helpful that certain questionable excluded evidence cannot be used when the child seeks relief from removal later in the hearing.

2. Disadvantages

The main disadvantage to pursuing these motions is that a successful termination or suppression motion alone does not confer legal status at the end, as opposed to winning an asylum case or any other form of legal status. It can also be lengthy and time-consuming for the child, particularly if the IJ denies your motion and you appeal, or the IJ grants your motion and ICE appeals as described in Section V.D below. The time spent litigating these motions may weaken or foreclose forms of relief. For example, a child may age out of eligibility for SIJS or the ability for file for asylum with USCIS. You might also be concerned that a particular IJ or ICE counsel will be upset and improperly vindictive later in the case when the child might ask for relief from removal, including PD. It is hard to foresee whether your zealous advocacy will improperly frustrate the IJ or ICE counsel or have the result of earning their respect to the benefit of your client on other fronts. Attorneys have obtained dismissal of proceedings to allow for relief before USCIS after filing a termination motion based on NTA service, and, as mentioned previously, have secured a grant of PD after filing a strong termination motion. Regardless, do not let concerns about your reputation with ICE counsel or the IJ deter you; you owe duties to your client that rise above your personal preferences.

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[143] *See generally* Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (2009).

[144] Various media outlets have reported on the fast-tracking of children's removal cases. *See, e.g.*, Lomi Kriel, *Expediting Child Immigrant Cases Disrupts Docket, Due Process, Judge Says*, Houston Chronicle, Aug. 6, 2014, *available at* http://www.houstonchronicle.com/news/article/Expediting-child-immigrant-cases-disrupts-docket-5673373.php; Odette Yousef, *Lawyers Fear Speedy Deportations Harm Minors* (WBEZ radio broadcast Aug. 27, 2014), *available at* http://www.wbez.org/news/lawyers-fear-speedy-deportations-harm-minors-110715.

3. Analyzing Case Strength and Determining the Best Course of Action

Review all the documentation, records, reports, and interview notes with the child to assess the strength of making a motion. What evidence do you have? What is lacking? Can you get it? Analyze your client's case in light of the BIA and applicable circuit court case law and the client's facts, but remember that negative case law can be distinguished if it was developed in the context of adult cases. Familiarize yourself with the positions of your immigration court, the assigned IJ, and ICE counsel. For example, what is the likelihood of success on the merits of a gang-based asylum claim in your jurisdiction? If your client appears eligible for SIJS, what is the likelihood of success in your state juvenile court and at your local USCIS office? Given that litigating a termination and suppression strategy may prolong the course of removal proceedings, it is important to reassess your strategy from time to time.

4. Decision-Making and Forming a Plan with Your Client

Communicate clearly with the child about the advantages and disadvantages of pursuing a suppression or termination motion. Discuss the strengths and weaknesses of the motion, as well as the strengths and weaknesses of potential claims for relief from removal. Discuss practical timelines. Provide a road map for your client of all possible options so that he or she can make the best decision possible with your assistance.[145] Remember that the stated or expressed wishes (not "best interests") of your client direct the case.[146] It is your duty to represent your client's expressed wishes, even if they conflict with those of the parent or ORR sponsor.[147] Once a strategy is determined, continue to check in with the child to see if the strategy continues to make sense. If your client is too young or unable to state her wishes for representation and case strategy, you must advocate for all legal interests preserving any and all immigration remedies available.[148]

[145] See ABA Standards, *supra*, § III.F ("Children have the right to participate in all decision-making processes that affect their lives. Specifically, allowing a Child meaningfully to participate in decision-making means ensuring that this process must (i) be free from pressure on and manipulation of the Child either to reach a certain decision or to make a decision at all; (ii) account for the Child's evolving ability to understand situations and respond to advice and guidance; and (iii) provide the Child with sufficient and understandable information to allow the Child to make an informed decision in a form that the Child can understand.").
[146] *See* ABA Standards, *supra*, § V.A.1; *see also* Kristen Jackson, Meredith Linsky & Elissa Steglich, "Representing Children in Removal Proceedings: Ethical and Practical Issues," *Immigration Practice Pointers: Tips for Handling Complex Cases* 559 (2014-15 ed.).
[147] ABA Standards, *supra*, § V.A.1.
[148] *Id*.

V. PROCEDURAL STEPS FOR TERMINATION AND SUPPRESSION STRATEGIES

This Part provides a step-by-step action guide. It covers: setting the case up for termination and suppression (including at the initial master calendar hearing and motion filing); making out a *prima facie* case; handling evidentiary hearings and the IJ's decision; pursuing relief while pursuing dismissal; dealing with appeals; and tips for what to do if your client fails to appear for an immigration court hearing. With this Part—and in consultation with local experts who can discuss specific details about how your IJ and ICE counsel behave—you will be prepared to pursue these important strategies for your client.

A. Setting Up the Case for Termination and Suppression

Your overall termination and suppression strategy must inform everything you do, from your client's initial master calendar hearing forward. Missteps early on, such as conceding proper NTA service or the factual allegations and charges on your client's NTA, might derail even a strong motion. Below, both the client's initial master calendar hearing and the preparation and filing of your motions is discussed.

1. The Initial Master Calendar Hearing

Your client's first master calendar hearing is a crucial point in the case.[149] Your positioning the case for suppression or termination begins with a thorough client interview and review of the immigration court's file for materials that the government might try to use to prove alienage. If the court held a hearing before you represented the child—for example, a hearing at another immigration court that resulted in a change of venue to your court[150]—it is essential to find out what happened, which often includes listening to the recording of what was said on the record in court. Ideally, you would have taken steps to get a copy of the client's A-file to estimate what materials ICE counsel might offer to prove alienage. Consider whether and how to ask the IJ to compel ICE counsel to produce documents, including whether to commit to making a FOIA request.[151]

During a client meeting before the initial master calendar hearing, present the child with the game plan for the hearing, discussed below, in a way that the child can understand. Ideally, create a cheat sheet for

[149] If your client's master calendar hearing is fast approaching and you do not have time to fully analyze the case, consider filing a motion to continue, or attending the hearing and asking for attorney preparation time. Just be certain not to address NTA service or alienage in the motion or during that hearing.

[150] Note that unlike an adult, a child is not required to address NTA service or plead to the NTA's factual allegations and charges in her motion to change venue. *Compare* David L. Neal, Chief Immigration Judge, U.S. Dep't of Justice, EOIR, *Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children*, at 8 (May 22, 2007), *with* Immigration Court Practice Manual, Chapter 5.10(c) (June 10, 2013). But if your client already conceded proper NTA service or entered pleadings, despite valid termination or suppression grounds, you should file a motion to set aside the pleadings.

[151] If you plan to hold ICE to its burden of establishing alienage, do not include information on alienage in your client's FOIA request. If you cannot get FOIA results without providing information related to alienage, get creative. *See, e.g.*, *Motions to Suppress: A General Overview*, *supra*, 2 ("If the agency requires your client's country of origin to process the application, note that the country provided is that alleged in the NTA.").

yourself and run through a mock master calendar hearing with your client.[152] If you are challenging the adequacy of the NTA, first advise the child that he or she should not bring a caretaker or ORR sponsor to the hearing.[153] You might need to explain this to the adult also. This might be critical if you will challenge service of the NTA and worry that the IJ will allow ICE counsel to cure service in court that day by serving the adult. It can also help if ICE must prove alienage and you anticipate that the IJ will attempt to ask the adult about the child's alienage. Second, if you are holding ICE to its burden of establishing alienage, advise the child not to answer any questions about where he or she was born, his or her citizenship or nationality, or what country he or she left to travel to the United States. Third, alert him or her that your termination and suppression strategy may surprise and perhaps even upset the IJ, ICE counsel, or both. Let him or her know that if this happens, it does not mean that he or she has done anything wrong.

At the hearing, you will enter your appearance, your client will confirm his or her address, and the IJ will confirm that each party has a copy of the NTA. The IJ will then ask if you concede proper NTA service. Do not concede proper NTA service unless you know that service was perfected exactly according to the governing statute, regulations, and case law (discussed in Section II.A.2 above).[154] If you do not concede service, the IJ should ask ICE to prove proper service. Be sure to resist any ICE attempt to "cure" improper service by trying to serve it belatedly in court. Receive ICE's evidence of service (typically in the form of the NTA's certificate of service) and request time to brief the issue of defective NTA service and its impact on the proceedings. At this point, the IJ may give you a briefing schedule and a new hearing date. Alternatively, the IJ may choose to consolidate all preliminary issues and move forward with NTA pleadings. If so, and you are holding ICE to its burden of establishing alienage, state this and deny the NTA's factual allegations and charge of removability.[155] Refrain from identifying or addressing relief from removal, as relief becomes legally relevant only upon a finding of removability. The IJ should then require ICE to provide evidence of alienage—which, most likely, will be a Form I-213.[156] Object to the admission of this evidence and alert the IJ that you plan to file a termination motion or a suppression motion, or both, identifying all known grounds for the motion.[157] Ask the IJ to set a deadline for ICE

[152] *See* Appendix 11 (sample master calendar hearing cheat sheet).
[153] This may anger the IJ. But be aware that there is no legal obligation that the sponsor attend. The ORR sponsor agreement addresses the sponsor's duty to ensure the child's presence—not the adult's own—at the child's removal proceedings. *See* ORR, Division of Unaccompanied Children's Services, *Sponsor Care Agreement* (Sept. 9, 2014), *available at* http://www.acf.hhs.gov/programs/orr/resource/unaccompanied-childrens-services. And indeed, IJs are forbidden from assuring a sponsor that DHS will not take enforcement action against him or her if he or she attends a hearing. *See* Brian M. O'Leary, Chief Immigration Judge, U.S. Dep't of Justice, EOIR, *Docketing Practices Relating to Unaccompanied Children Cases in Light of the New Priorities*, at 2-3 (Sept. 10, 2014) [O'Leary Memorandum].
[154] You might also consider, as a general practice, requiring DHS to prove up proper NTA service in every case—regardless of whether service was proper in any particular case.
[155] Note that some ICE counsel may respond that you are behaving "unethically" by contesting alienage if you know your client was born outside the United States. This is a frivolous argument, and misunderstands ICE's burden of proof. ICE, not your client, is required to prove alienage. And you are ethically required to zealously advocate for your client, which in many instances includes holding ICE to its burden. Similarly, resist any ICE attempts to recuse you from a case for pursuing an "agenda."
[156] Given the large number of juvenile cases and the requirement that many of them (the "priority" cases EOIR outlined in the O'Leary Memorandum, *supra*) must be scheduled for a first master calendar hearing within 21 days of NTA filing, it is very possible ICE will not have the A-file in time for the first hearing. If ICE has no evidence of alienage to substantiate the NTA, ICE cannot meet its burden of proof. You can ask that proceedings be terminated on the spot.
[157] *See* Appendix 12 (evidentiary objections cheat sheet).

counsel to submit all evidence of alienage. Ask for a briefing schedule and an evidentiary hearing.[158] Consider moving for an order from the IJ to compel ICE's production of a copy of the A-file, or be sure that the briefing schedule accommodates any pending FOIA requests.

Practice Tip: Independent Evidence vs. Fruit of the Poisonous Tree

ICE may try to meet its burden of establishing alienage by submitting other documents such as material from your client's ORR reunification packet or your client's juvenile delinquency records or background check results, in addition to the I-213. Argue to the IJ that this additional evidence is "fruit of the poisonous tree" of the original violation, so it is similarly tainted and is inadmissible.[159] If ICE obtains evidence of alienage from sources *independent* of the violation at issue in the suppression motion, that evidence may be admissible.[160] However, ICE has the burden of showing that such evidence was "gathered independently of, or sufficiently attenuated from," the alleged violation.[161] Hold ICE counsel to this burden if he or she asserts the independent evidence exception. Argue that there is no indication that the information in the juvenile delinquency records, background check results, or ORR documents, for example, was obtained independent of the original violation.

2. Motion Preparation and Filing

With your client's initial master calendar hearing behind you, you can now turn to preparing a strong motion for termination and/or suppression. Evidence review, legal research, and motion and declaration drafting and review can take substantial amounts of time—at least the first time around. In advance of writing your motion, examine all of ICE's evidence on your own, especially evidence of NTA service and any deficiencies or errors in the I-213. Spend sufficient time with your client, using child-sensitive interviewing techniques to learn his or her full story related to the evidence. Be sure to interview other people with relevant knowledge as needed (for example, interview ORR sponsors on NTA service or siblings or others present at the border when DHS apprehended your client). Reserve time to perform additional research in light of ICE's evidence. Using this practice advisory as a jumping-off point, ensure you have researched all issues that might lead to termination of your client's removal case and/or suppression of government evidence. Become familiar with all relevant BIA case law and governing cases from your circuit.[162]

When sitting down to write the motion, keep at the forefront of your mind that you are creating your administrative record for appeal with each document you file in court, and be cautious when using sample motions. Specifically, always confirm that your motion has the most up-to-date and relevant

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[158] Although the BIA has held that a separate hearing on a motion to suppress is not required, *see Matter of Benitez*, 19 I&N Dec. 173, 175 (BIA 1984), make this request nonetheless, as post-*Benitez* case law has required testimony to establish a *prima facie* case. *See Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988).

[159] *See Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

[160] *See Segura v. United States*, 468 U.S. 796, 805 (1984); *United States v. Guzman-Bruno*, 27 F.3d 420, 422 (9th Cir. 1994).

[161] *Lopez-Mendoza*, 468 U.S. at 1043.

[162] For some relevant law, see *In re Oscar J. Corona*, A 095-422-301, 2006 Immig. Rptr. LEXIS 7854, *3-*5 (BIA Nov. 29, 2006) (unpublished) and Appendices 13.A, 13.B and 13.C (additional BIA and IJ decisions on termination and suppression issues for children).

case law, and that the facts are true to your client. Note that BIA case law requires your client to make out a *prima facie* case for suppression before ICE is required to come forward with evidence to justify the manner in which it obtained evidence—that is, you must provide evidence which, if ultimately true, would form the basis for excluding the evidence.[163] Though you might choose to challenge this legal requirement, nonetheless construct your motion so that you can make out this *prima facie* case in the event the IJ rules against your challenge. Draft the motion's supporting affidavits in your client's (or other witness's) voice, keeping the information simple and easy to testify to, yet sufficient to establish a *prima facie* violation. Be sure the final versions include certificates of translation if needed and are verified by the declarant. Finalize your motion and supporting materials—including a witness list, if the *prima facie* stage and merits stage are consolidated—according to the requirements of the Immigration Court Practice Manual (ICPM), serve copies on ICE, and file the originals with the court by the deadline the IJ or ICPM set.[164]

B. Your Motion Playing Out in Court: Evidentiary Hearing and IJ Decision

Now that your motion is on file, and presuming ICE has filed its opposition to your motion, you need to prepare yourself, your client, and other witnesses carefully for your upcoming evidentiary hearing, should you be granted one. You should be ready to establish your client's *prima facie* case, handle whatever evidence or witnesses ICE presents, and work with whatever decision the IJ issues on your motion. Keep in mind that some IJs might bifurcate the proceedings into an initial hearing on your *prima facie* case, and a subsequent hearing requiring ICE to produce its witnesses only if you have made out your *prima facie* case. Be certain you understand how the IJ intends to proceed so you can prepare accordingly.

1. *Prima Facie* Case

Prepare carefully for the upcoming hearing on your motion. Review ICE's opposition to your motion in detail, anticipating what arguments might appeal most to the IJ. Consider replying to ICE's opposition. Though the ICPM does not specifically contemplate replies, it does not forbid them.[165] Just be certain to meet the pre-hearing filing deadlines, or file a motion to allow late filing to accompany your reply if you cannot. If ICE did not file an opposition, be prepared to argue that the IJ should grant the motion due to non-opposition.[166] Also be prepared to argue against ICE's filing its opposition or any evidence (aside from evidence on cross-examination used solely to impeach your client) on the day of the hearing.[167] Also consider filing motions *in limine* to address preliminary evidentiary issues to protect your client, including motions asking that the hearing and materials not be allowed to establish alienage, that alienage issues are not relevant to the termination or suppression issues, and that ICE cannot question

[163] *See Barcenas*, 19 I&N Dec. at 611.
[164] *See* ICPM 3.1(b) (deadlines); 3.2 (service); 3.3(a) (certificates of interpretation); 3.3(c) (formatting, including witness lists and motions).
[165] *See* ICPM 5.5 (motion briefs).
[166] *See* ICPM 5.12 ("A motion is deemed unopposed unless timely response is made.").
[167] *See* Appendix 14 (sample brief regarding objections to evidence not submitted by the court's filing deadline).

your client on alienage and then use the responses to establish alienage.[168] It is essential that you meet with your client and any witnesses who will testify at the hearing to do a full practice session—most effectively, with colleagues playing the IJ and ICE counsel.[169] In particular, practice your client's avoiding answering incriminating questions (especially questions related to alienage) since these admissions might derail your motion.

At the beginning of the hearing, consider asking the IJ if you can invoke on your client's behalf the Fifth Amendment right to remain silent in the face of questions whose answers may incriminate him or her—though your client should be prepared to do this on his or her own if need be.[170] Put your client on the stand for your brief direct examination as practiced, and then make him or her available for cross-examination. Object to improper questioning or use of evidence by ICE, keeping in mind again that you are creating a record for appeal should the IJ deny your motion. Be very familiar with the case law on what is needed to make out a *prima facie* case on your motion, and invoke it as needed. At the conclusion of the *prima facie* portion of the hearing, the IJ may make a decision or he may take this first step of the motion under submission. Presuming the IJ finds that your client has established her *prima facie* case, the burden then shifts to ICE "to justify the manner in which it obtained the evidence."[171] If, however, the IJ denies your motion for failure to establish a *prima facie* case, please consult the discussion below on appeals (Section V.D) and on pursuing relief while pursuing termination (Section V.C).

2. ICE's Attempt to Meet Its Burden

If the IJ shifts the burden to ICE, ICE may attempt to meet its burden by providing testimony of the agent who took significant actions on your client's case (for example, apprehended your client, interrogated your client, created and served your client's I-213, or the like).[172] You should expect ICE to make the agent available the day of the evidentiary hearing, as evidenced by a witness list ICE should file in advance of the hearing. You should object on the record to any ICE efforts to obtain a continuance to make the agent available in light of the *prima facie* finding, or to attempts to make the agent available telephonically. Note, however, that after the *prima facie* finding the IJ is likely to give ICE a continuance

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[168] If ICE counsel argues that he or she can question your client at the hearing and use your client's responses to establish alienage, be sure to rely upon case law that requires ICE to come forward with initial admissible evidence of alienage before testimony can be used. *See Matter of Tang*, 13 I&N Dec. 691, 692 (BIA 1971) ("Upon presenting evidence that the respondent is an alien, the Service may call upon him to testify and may use his testimony to find that deportability is established." (citation omitted)).

[169] *See* Appendix 15 (sample direct and cross examinations).

[170] For arguments related to your client's Fifth Amendment right to refuse to answer certain questions in immigration court proceedings, including resisting an adverse inference from such a refusal, see Appendix 9 (sample BIA brief regarding alienage).

[171] *See Barcenas*, 19 I&N Dec. at 611.

[172] Note that ICE might see the writing on the wall—the defects in its own initial evidence—and attempt to introduce *new* evidence of alienage on the day of the evidentiary hearing. Object vigorously to this tactic, as ICE, just like your client, is required to follow the ICPM's rules on submission of evidence in advance of a hearing date. *See* ICPM 3.1(b)(ii)(A); 8 CFR § 1003.31(c) ("If an application or document is not filed within the time set by the Immigration Judge, the opportunity to file that application or document shall be deemed waived."). The exception for "impeachment" evidence does not cover additional evidence of alienage, since impeachment evidence is offered to dispel your client's credibility, not to establish the underlying truth of any particular fact. *See, e.g.*, *Limbeya v. Holder*, 764 F.3d 894, 898 (8th Cir. 2014) ("impeachment evidence is not offered for the truth of the matter asserted"). If the IJ resists, argue the "fruit of the poisonous tree" as outlined above.

to make the agent available to testify. In advance of agent testimony, be sure to review all documents relevant to your motion, including any statements or documents prepared by the testifying agent. During the hearing, if ICE attempts to rely on additional documents to meet its burden, assert that your client has a due process right to cross-examine the author of the document and sources of information in the document itself, as well as have a reasonable opportunity to review the documentary evidence. At the close of ICE's presentation of its case, be prepared to make a short closing argument on your motion.

3. The IJ's Decision on the Motion

The IJ may issue a decision on the day of the evidentiary hearing, or he may take the motion under submission. In the former scenario, the decision is likely to be oral. If so, be certain to ask for clear findings on your clients' *prima facie* case. Also ask for clear findings on the ultimate decision to grant or deny the motion and to terminate the proceedings. Take very detailed notes of the decision and ideally request from the court clerk a copy of the oral decision on CD. If the IJ decides to take the matter under submission, it is important to pay close attention to the mail or to a forthcoming decision date. Because appeal deadlines are very tight (30 days from the decision, as outlined in Section V.D below), you must learn of the IJ's decision very soon after he or she issues it and you must be ready to take action immediately—whether filing an appeal, preparing to fend off an appeal, or choosing to pursue immigration relief before the IJ, all discussed below.

C. Pursuing Relief While Pursuing Suppression and Termination

Whether and when to pursue immigration relief while also pursuing a termination and suppression strategy is a complex matter. As noted in Section IV.C above, it is something you must discuss in detail with the child at the outset of the case, as well as while the case develops. In many instances, you will be pursuing termination or suppression because your client is not eligible for immigration relief or has a weak claim to relief. But be mindful that even if your client does not initially appear to qualify for relief, you must reassess this throughout your representation.

As a general rule, you should be safe taking steps to pursue immigration relief outside of USCIS and immigration court contexts. For example, you might file a state court dependency action and obtain findings for SIJS (as there is little risk ICE would examine that court file for evidence of alienage, for example), obtain a U visa certification for your client, or work with experts to develop country conditions materials or create a psychological evaluation in support of an asylum claim—all while pursuing termination or evidence suppression. Even filing applications for relief with USCIS may be appropriate provided that your strategy does not depend upon challenging ICE's evidence of alienage (for example, if your motion relied upon defective NTA service or a regulatory violation regarding your client's I-770). However if you are challenging ICE's evidence of alienage, then it is safest to refrain from submitting evidence of your client's alienage to USCIS (in the context of SIJS, U visa, asylum, or other

relief) until your termination or suppression motion is granted (and any appeal resolved, as noted below). Otherwise, ICE may attempt to use your submitted evidence to establish alienage.[173] This is also true if you are considering PD with ICE. Evidence and information that may be relevant to a request for PD—such as length of time in the United States, identity documentation, acknowledging manner of entry—may be damaging to your termination or suppression strategy.[174]

If you have pursued your motion to its end before the IJ and the IJ denies the motion, you can consider an interlocutory appeal.[175] Barring an interlocutory appeal and a corresponding stay of removal proceedings, you must make a strategic decision regarding relief, that is, whether: (1) to go on to pursue relief in ongoing removal proceedings (with the risk this may moot out your appeal of the IJ's denial of the motion[176]); or (2) appeal the IJ's decision on your motion without additional testimony, evidence, or applications for relief. These decisions are not ones to make lightly, and must be made in close consultation with the child.

Practice Tip: Evidentiary Objections Short of Suppression and Termination

If you move forward with your client's claims for relief before the IJ—for example, pursuing SIJS-based adjustment of status—you should think broadly and carefully about objections to ICE evidence. In the relief stage, with well-crafted objections you may succeed in keeping damaging evidence out of the record that could otherwise render your client ineligible for relief, undermine her credibility, or weigh against the IJ's favorable exercise of discretion. Even if you cannot keep the evidence out of the record, you may attack it effectively enough that the IJ chooses to give the evidence little weight. Some of the common documents you may want to challenge at the relief stage, arguing they are immaterial or that their admission is fundamentally unfair are: (1) I-213s; (2) confidential juvenile court documents and police reports (especially ICE's submission of the documents to the IJ in violation of state confidentiality law; see Section III.C.4 above); and ORR documents, particularly medical or psychological records.

[173] Note that information in applications for relief made "during the [removal] hearing" cannot "constitute a concession of alienage or deportability in any case in which the respondent does not admit his or her alienage or deportability." 8 CFR § 1240.11(e). But since many applications for children are made to USCIS—not "during the hearing" before the IJ—this regulation would appear to provide little protection.

[174] If you decide to pursue PD for your client, you should ask ICE to agree in writing that PD discussions will be inadmissible in removal proceedings just as settlement discussions are inadmissible in civil litigation. In many parts of the country, however, ICE generally refuses to agree to this, thus making it difficult to gauge how risky it is to disclose information in a PD request that ICE may then try to use to establish alienage. It also may be possible to request that ICE guarantee that a different ICE counsel than the one assigned to your case will review the PD request. Consider making ICE put this promise in writing. Even then, however, you may decide that it is too risky that ICE would internally share damaging evidence.

[175] *See* Section V.D below and Appendix 16 (sample motion for a stay of proceedings to allow for an interlocutory appeal regarding alienage).

[176] *See* Immigrant Legal Resource Center & Ozment Law, *Motions to Suppress: Protecting the Constitutional Rights of Immigrants in Removal Proceedings* 4-11 to 4-12 (2d. ed. 2013) ("There is a split in thinking among practitioners and available BIA decisions as to whether concessions of alienage made after a motion to suppress is denied, *e.g.*, to demonstrate eligibility for voluntary departure, would moot any appeal of an IJ's denial of the motion to suppress. . . . Counsel must review decisions in the relevant circuit and make a strategic decision whether to pursue relief or appeal the decision without further testimony.").

D. Dealing with Appeals—Yours and ICE's—of Suppression and Termination Decisions

As noted above, as you litigate the motion it is important to keep in mind that you are creating a record for appeal. When you receive an IJ decision, you need to assess the appellate options before you.

1. If the IJ Denies Your Motion

If the IJ denies your motion, do not make statements on the record that would make it appear that you are abandoning the legal positions set forth in your motion. Consider telling the IJ that you plan to file an interlocutory appeal of the denial, and ask for a continuance to file that appeal timely with the BIA.[177] Although the BIA is unlikely to grant an interlocutory appeal, pursuing it may be one way to resolve termination and suppression issues *before* moving to the relief stage. Before this, however, consult with others given that any appeal you file has the possibility of creating a precedential opinion.

If you choose to forgo filing an interlocutory appeal, then your next step depends upon whether you will be pursuing immigration relief for your client. If you are not, then after the IJ finds your client removable as charged and issues a removal order, you must reserve appeal and then be certain to file your BIA appeal within 30 days, preserving all issues on appeal. If you decide to pursue immigration relief for your client in immigration court—and thus not accept a removal order straight away—note that your appeal of the IJ's denial of your motion related to alienage may be mooted out by any subsequent concessions of alienage. Of course if you do pursue immigration relief and it is granted, you will have no need to appeal the denial of your motion.

If the IJ does ultimately issue a removal order (whether that order was issued after denial of your suppression and/or termination motion or after denial of your client's applications for relief) and you appeal, utilize the assistance of appellate experts and amici as needed. Strategize with experts on how to present the strongest claim related to your motion in both the notice of appeal and your brief. Ultimately, if the BIA dismisses your appeal of your client's removal order you should consider filing a petition for review with the court of appeals governing the immigration court—again on a tight 30-day deadline—as well as a motion for a stay of removal.[178] If the BIA sustains your appeal, however, you should expect that it will remand the case to the IJ.

2. If the IJ Grants Your Motion

If the IJ grants your motion and terminates your client's removal proceedings—or if the IJ suppresses some evidence short of that needed to terminate proceedings but goes on to grant your client immigration relief[179]—your best hope is for ICE to waive appeal and thus make the IJ's order final. In either case, ICE's failure to perfect an appeal within 30 days will result in a final order in your client's

[177] *See* BIA Practice Manual, Chapter 4.14 (Aug. 8, 2014).
[178] *See* 8 U.S.C. § 1252(b)(1) [INA § 242(b)(1)] ("The petition for review must be filed not later than 30 days after the date of the final order of removal.") Note that ICE may enforce the removal order very soon after the BIA dismisses the appeal, so it is essential to file the petition for review and the motion for a stay of removal with the court of appeals immediately.
[179] Note that if the IJ suppresses some evidence but does not terminate proceedings and then goes on to *deny* your client immigration relief, it is possible ICE will try to challenge the IJ's grant of your motion during the course of your appeal.

proceedings. If ICE does file a BIA appeal, be certain to enter your appearance with the BIA so that you can defend the IJ's order on your client's behalf. If you choose to pursue immigration relief for your client during the pendency of a BIA appeal on alienage, ICE might move the BIA to remand the case to the IJ for further proceedings if you submit evidence of your client's alienage in the process. Note that if the BIA sustains ICE's appeal and sends the case back to the IJ because it finds the IJ improperly dismissed proceedings or granted relief, you should be prepared to litigate the case again before the IJ. If, however, the BIA dismisses ICE's appeal then you have a final victory, as the federal courts of appeals lack jurisdiction over final grants of relief and over final dismissal, as opposed to removal, orders.[180]

E. Strategies When Your Client Does Not Show Up to Court

The strategies outlined in this practice advisory are particularly important in the *in absentia* context—that is, when your client fails to appear in court and ICE moves the IJ to issue a removal order in his or her absence. In the process of representing children, you will sensitize IJs to important legal issues that they must analyze when ICE pushes for *in absentia* orders against other children, particularly unrepresented children.

1. What to Do at the Hearing to Avoid an *In Absentia* Order

Avoiding an *in absentia* order begins long before your client's hearing. To ensure your client's attendance, make sure he or she and his or her adult caretaker know all of the hearing information and consequences of failure to appear. Instruct him or her to arrive early, to call you if there are any problems, and to meet you in or near the courtroom (so that you can go inside and ask for extra time if he or she does not appear as scheduled, since you certainly do not want an *in absentia* order issued in *your* absence). But if despite your efforts your client fails to appear, you must act swiftly to avoid harm to your client. First, start off by asking for a continuance to locate your client. Argue good cause for the continuance, and point out the lack of prejudice to ICE.[181] Frame your arguments to qualify as "exceptional circumstances" in case you need to reopen on that basis; focus on the child's age and inability to come to court on her own.[182] If this does not work, try the strategies outlined below and make sure your objections to the *in absentia* order are clear on the record.

To enter an *in absentia* order, the IJ must find that ICE "establishes by clear, unequivocal, and convincing evidence that the written notice was . . . provided and that the alien is removable."[183] If you have not yet conceded proper NTA service, do not do so now. Request termination if ICE fails to prove definitively that service was proper under governing regulations and case law on children. If the IJ hesitates, request time to file a motion on the service issue (and find your client!). Additionally, if you have not done so

[180] *See* 8 U.S.C. § 1252 [INA § 242].
[181] *See* 8 CFR § 1003.29 ("The Immigration Judge may grant a motion for continuance for good cause shown.").
[182] If your client is unable to attend his or her hearing because he or she is in state or federal custody, be sure to get this on the record. This custody is a basis to rescind an *in absentia* order—although hopefully if you alert the IJ to this situation he or she will not issue an *in absentia* order to begin with. *See* 8 U.S.C. § 1229a(b)(5)(C)(ii) [INA § 240(b)(5)(C)(ii)].
[183] 8 U.S.C. § 1229a(b)(5)(A) [INA § 240(b)(5)(A)]; *see* 8 CFR § 1003.26(c).

already, do not concede the NTA's factual allegations or charge of removability. Object to any evidence that ICE offers to establish removability, with a child-centered focus. Even if the IJ admits the evidence, argue that it is not "clear, unequivocal, and convincing" evidence of alienage. Request dismissal on this ground. Again, if the IJ hesitates, request time to file a motion (and find your client!). The situation is more perilous if the IJ, at a previous hearing, already found NTA service proper and found your client removable as charged. If that is the case, do not concede proper hearing notice service (in contrast to NTA service). Request termination if ICE fails to prove that service was proper; also request time to brief the issue if the IJ seems disinclined to find improper service on the present record.

2. What to Do after the Hearing if the IJ Issues an *In Absentia* Order

If the IJ issues an *in absentia* order, act immediately to protect your client's interests—particularly because you cannot appeal an *in absentia* order to the BIA, and the order is final and enforceable upon issuance.[184] Find your client, and file a motion to rescind the *in absentia* order as soon as possible.[185] The motion can be based on lack of notice or your client's being in state or federal custody,[186] or based on "exceptional circumstances" justifying your client's failure to appear. Do not delay. Even though you have no deadline if the motion is based on lack of notice or client custody, and a 180-day deadline if based on exceptional circumstances, a filed motion automatically stays the *in absentia* order's enforcement. Consider asking ICE to join the motion, depending on the circumstances, but do not let that cause delay in filing. Argue through a child-centered lens about the improper notice, custody, and exceptional circumstances, as they are not mutually exclusive. And although ICE's failure to establish alienage properly is not a ground for rescinding the order, you should consider arguing it in your motion to alert the IJ to an underlying flaw in the order and to preserve this issue for circuit court review.[187] Be careful not to concede alienage or provide evidence of alienage if you plan to hold ICE to its burden later. If the IJ grants your motion, then continue with the case as originally planned—challenging NTA service, filing your motions, and the like. The rescission undoes the notice and alienage determinations made at the *in absentia* hearing, returning your client to the legal position she held prior to the hearing.[188] If the IJ denies your motion, you can then appeal the motion's denial (but not the underlying *in absentia* order directly) to the BIA within 30 days.[189] If you are unsuccessful there, you can consider

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[184] *See* 8 CFR § 1240.15. If your client shows up to the hearing late, but after the IJ issues the *in absentia* order, ask the IJ to hear the case and reopen the removal order *sua sponte*. Arriving slightly late, but while the IJ is nearby, does not count as missing the hearing. *See, e.g.*, *Alarcon-Chavez v. Gonzales*, 403 F.3d 343, 346 (5th Cir. 2005). Ask court staff to ask the IJ to return to the bench if he or she is in chambers.

[185] *See* 8 U.S.C. § 1229a(b)(5)(C) [INA § 240(b)(5)(C)] and Appendix 17 (sample motion to reopen to rescind *in absentia* order of removal).

[186] Note that there is no fee for the motion if it is based on lack of notice or state/federal custody, so include those arguments whenever possible. *See* 8 CFR § 1003.24(b)(2)(v).

[187] *See* 8 U.S.C. § 1229a(b)(5)(D) [INA § 240(b)(5)(D)] (judicial review shall "be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) *whether or not the alien is removable*" (emphasis added)); *see also Torres-Ramos v. Mukasey*, 258 Fed. Appx. 991, 992 (9th Cir. 2007) (ordering the BIA to reverse and vacate the IJ's removal order because DHS failed to establish removability).

[188] *See Matter of M-S-*, 22 I&N Dec. 349, 353 (BIA 1998) ("to 'rescind' an in absentia deportation order is to annul from the beginning all of the determinations reached in the in absentia hearing" and "[o]nce an in absentia order is rescinded, the alien is then given a new opportunity to litigate the issues previously resolved against her at the in absentia hearing.").

[189] *See* BIA Practice Manual, Chapter 5.6(e)(ii).

filing a petition for review with the proper circuit court.[190] As noted in Section V.D above, be sure to consult with experts handling appeals as you move forward.

VI. CONCLUSION

As the government has chosen to funnel children through fast-tracked proceedings in an unprecedented fashion, it is critical that attorneys consider and think creatively about termination and suppression strategies. These strategies ensure children's rights are protected and they hold the government accountable for abiding by the Constitution and by regulations, policies, and procedures that the government itself created. This practice advisory aims to serve as a jumping-off point for further brainstorming around termination and suppression motions for children. Collaboration, sharing, and support of strategies, tips, and materials are critical to further positive development of this area of law.

[190] *See* 8 U.S.C. § 1229a(b)(5)(D) [INA § 240(b)(5)(D)].