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PROSECUTORIAL DISCRETION: HOW TO ADVOCATE FOR YOUR CLIENT

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Highlights of the June 17, 2011 Morton Memoranda on Prosecutorial Discretion

On June 17, 2011, John Morton, Director of Immigration and Customs Enforcement (ICE), issued two new memoranda encouraging the expanded use of prosecutorial discretion by ICE officers, agents, and attorneys in all phases of civil immigration enforcement. The first outlines in detail how ICE employees should approach a wide range of opportunities to apply prosecutorial discretion in line with ICE enforcement priorities; the second describes specific protections for certain crime victims, witnesses, and plaintiffs.

These recent memoranda are significant: if followed in the field, more intelligent exercises of prosecutorial discretion should be forthcoming. Building on decades of agency guidance, the first memorandum sets forth a broad range of alternatives for ICE personnel and encourages targeted enforcement on a case-by-case basis. This new guidance provides the broadest and most explicit instruction, setting the agency's enforcement priorities as the standard for the exercise of prosecutorial discretion. The memorandum outlines who within ICE is authorized to make discretionary enforcement decisions and what factors they should consider. Furthermore, ICE personnel are encouraged to consider proactively the appropriate exercise of discretion as early in a case or proceeding as possible. John Morton, Director, ICE, "[Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens](#)" (June 17, 2011) (hereinafter "Exercising Prosecutorial Discretion").

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The second memorandum highlights ICE’s recognition that cases involving crime victims, witnesses and plaintiffs require a heightened standard of prosecutorial discretion. This guidance makes clear that it is generally *against ICE policy* to initiate removal proceedings against victims or witnesses to a crime, or to “remove individuals in the midst of a legitimate effort to protect their civil rights or civil liberties.” John Morton, [“Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs”](#) (June 17, 2011) at 1-2 (emphasis added) (hereinafter “Victims, Witnesses, and Plaintiffs”). This is the first time that the Department of Homeland Security (DHS) has formally recognized that private civil rights and labor litigants are deserving of protection. Moreover, the language of the memo is expansive and will protect those involved in labor, housing or similar disputes being waged outside of a courtroom. These protections could go far towards removing the fear of retaliation and removal that noncitizens face when contemplating whether to defend their rights.

The following are the *highlights* of each of the two memoranda (more detail about these and the earlier memoranda is provided throughout the practice advisory):

1. **“Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens.”** This memorandum:

- Emphasizes that prosecutorial discretion decisions should be consistent with ICE enforcement priorities and reframes the standard for prosecutorial discretion decisions to whether the case meets the agency’s civil immigration enforcement priorities,² which are national security, border security, public safety, and the integrity of the immigration system;
- Clarifies the broad scope of options to exercise prosecutorial discretion by supplying a list of examples of the types of decisions that can be made; notable among these are the decisions on whether to:
 - Issue or cancel a notice of detainer;
 - “Reissue” or “serve” Notices to Appear (NTA); arguably, this gives an ICE officer the flexibility to allow a respondent to accrue the necessary continuous residence or continuous physical presence time for LPR and non-LPR cancellation, respectively;
 - Settle or dismiss a proceeding; this appears to apply at all stages of a removal proceeding, including federal court appeals;
- Expands the list of favorable factors to be considered, to include:
 - Whether the case falls within agency priorities;
 - Graduation from a U.S. high school and/or pursuit of higher education in the U.S.; inclusion of this factor will benefit “DREAM” students;
 - A much greater emphasis on family relationships; thus, for example, consideration is now to be given to the military service

² Previously, the Meissner memo had articulated the standard as whether a “substantial federal interest” was present.

of a noncitizen or an *immediate relative*; whether a noncitizen or *spouse* is pregnant, nursing, or has a severe mental or physical condition; and whether the noncitizen is the primary caretaker of an ill *relative* (emphasis added); family relationships also now are recognized explicitly as part of a noncitizen's ties to the community.

- Identifies the ICE personnel who can exercise prosecutorial discretion; significantly, ICE attorneys can exercise such discretion at any stage of a case, including at the federal courts; moreover, ICE attorneys can do so even in cases initiated by United States Citizenship and Immigration Services (USCIS) or Customs and Border Patrol (CBP);
- Identifies classes of individuals warranting "particular care": veterans and members of the U.S. armed forces; long-time permanent residents; elderly; minors; seriously ill or disabled; victims of abuse, trafficking or other crimes; pregnant or nursing women; those in the U.S. since childhood;
- Identifies only a few negative factors warranting "particular" consideration: national security risks; serious felons, repeat offenders, or those with lengthy criminal records; known gang members; and "egregious" immigration violators;
- Encourages personnel to proactively consider prosecutorial discretion even absent a request from the noncitizen or representative; and
- Requires that ethics rules be followed regarding contact with represented individuals.

2. **"Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs."** This memorandum:

- States that, absent special circumstances, it is against ICE policy to initiate removal proceedings against crime victims and witnesses, or to remove those in the midst of legitimate efforts to protect their civil rights;
- Seeks to minimize the deterrent effect that immigration enforcement may have on victims, witnesses, and plaintiffs calling police and pursuing justice;
- Identifies classes of individuals warranting "particular care": victims of domestic violence, trafficking, or other serious crimes; witnesses in pending criminal investigations or prosecutions; plaintiffs in non-frivolous civil rights lawsuits; and individuals involved in protected activity related to civil or other rights (such as union organizing or complaining about discrimination in employment or housing); and
- States that, in the absence of serious adverse factors (such as national security concerns; serious criminal history; significant immigration fraud; human rights violations), exercising prosecutorial discretion "*will be appropriate.*" (Emphasis added).

Introduction

Like all other enforcement agencies, ICE has prosecutorial discretion. When ICE favorably exercises prosecutorial discretion, it essentially decides not to assert the full scope of the enforcement authority available to the agency in a given case. Morton, “Exercising Prosecutorial Discretion” at 2. In immigration cases, this discretion can be exercised with respect to investigations, arrests, detention, parole, the initiation of removal proceedings, and even the execution of final removal orders. In some cases, a favorable grant of prosecutorial discretion may be the only relief available to a client.

This practice advisory explains what prosecutorial discretion is, who has authority to exercise it, and how it is exercised most often in immigration cases. It also suggests ways that attorneys can advocate for the favorable exercise of prosecutorial discretion by DHS officers, whether from ICE, USCIS or CBP.³

This practice advisory also discusses all currently applicable agency guidance on prosecutorial discretion in immigration cases – including memoranda from the legacy Immigration and Naturalization Services (INS), ICE and USCIS – and summarizes this guidance in an attachment at the end of the advisory. In general, this guidance encourages officers to consider the exercise of prosecutorial discretion in a variety of settings and sets forth guidelines for doing so. In particular, Director Morton clearly explains that, because of limited resources, ICE officers should focus enforcement efforts on cases that fall within the agency’s four enforcement priorities: national security, border security, public safety, and the integrity of the immigration system. *See* Morton, “Exercising Prosecutorial Discretion.”

Unfortunately, in the past, officers in the field too often failed to follow the guidance on prosecutorial discretion and, as a result, infrequently exercised such discretion favorably. For that reason, it is essential that attorneys advocate for expanded use of prosecutorial discretion, consistent with the 2011 Morton memoranda, by specifically requesting favorable prosecutorial discretion in meritorious cases, and building a case for this relief on behalf of clients, just as you would any other type of relief.

What is prosecutorial discretion?

“Prosecutorial discretion” is the authority of a law enforcement agency or officer charged with enforcing a law to decide whether – and to what degree – to enforce the law in a particular case. *See* Morton, “Exercising Prosecutorial Discretion.” A law enforcement officer who decides *not* to enforce the law against a person has *favorably* exercised prosecutorial discretion. Examples of the favorable exercise of prosecutorial discretion in the immigration context include a grant of deferred action; a stay of removal; or a decision not to issue a Notice to Appear (NTA).

³ For a more in-depth discussion of prosecutorial discretion, *see* Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 Conn. Pub. Int. L.J., No. 2, 2010.

Prosecutorial discretion applies in the law enforcement context only; that is, only in situations in which a person is suspected of having violated the law (whether civil or criminal). Both ICE and USCIS officers have the authority to exercise prosecutorial discretion. In immigration cases, prosecutorial discretion primarily is exercised with respect to removal proceedings (including the decision whether to place a person in proceedings); detention; parole; and the execution of removal orders. Prosecutorial discretion is not the same as the discretion that a USCIS officer exercises when deciding an affirmative application for an immigration benefit, such as adjustment of status, since such a decision is not about whether to *enforce* a law against a person. However, if after the officer denies an adjustment application, he agrees not to issue an NTA against an applicant who might be subject to removal, he has favorably exercised prosecutorial discretion.

Prosecutorial discretion can be exercised on either an agency-wide basis or by an individual officer or employee. When ICE adopts priorities streamlining its enforcement efforts, for example, it is exercising prosecutorial discretion as an agency with respect to how to spend its resources. Administrative advocacy and liaison efforts often seek to influence the agency-wide exercise of prosecutorial discretion by advocating for adoption of more favorable enforcement practices and policies. For example, in response to coordinated advocacy efforts, USCIS adopted a new policy establishing a procedure for surviving spouses and children of deceased U.S. citizens to apply for deferred action. *See* Donald Neufeld, “[Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and their Children](#)” (June 15, 2009). In contrast, a DHS officer who decides to cancel an NTA as improvidently issued, *see* 8 C.F.R. § 239.2(a)(6), is exercising favorable prosecutorial discretion on an individual basis.

Prosecutorial discretion is not addressed in either the immigration statute or regulations (although there may be statutory or regulatory authority for some of the decisions made). Rather, prosecutorial discretion is the inherent discretionary authority that the agency has with respect to how it enforces the law. *See* Bo Cooper, General Counsel, INS, “[INS Exercise of Prosecutorial Discretion](#)” (undated) (discussing the origins of prosecutorial discretion and its application in immigration proceedings). Both courts and the Board of Immigration Appeals (BIA) have long recognized the agency’s authority to exercise prosecutorial discretion. *See, e.g., Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-92 (1999) (finding that the INS retains inherent prosecutorial discretion as to whether to bring removal proceedings); *Matter of Yauri*, 25 I&N Dec. 103, 110 (BIA 2009) (noting that DHS has prosecutorial discretion over deferred action and citing cases); *Matter of Bahta*, 22 I&N Dec. 1381 (BIA 2000) (finding that the former INS had prosecutorial discretion to decide whether to commence removal proceedings against a person subsequent to IIRIRA).

However, prosecutorial discretion only can be exercised within the bounds of the agency’s – or an officer’s – legal authority to act. Where the Immigration and Nationality Act (INA) makes a determination/action mandatory, the agency or officer generally does not have discretion to act in ways contrary to that mandate. For example, DHS has stated that the mandatory detention statute, INA § 236(c), eliminates an

officer's prosecutorial discretion to release a person subject to such detention. *See* Doris Meissner, Commissioner, "[Exercising Prosecutorial Discretion](#)" (Nov. 17, 2000) ("Meissner memo"). Note, however, that this would not prevent an officer from exercising prosecutorial discretion and *not* issuing an NTA against a person who – if and when the NTA were issued – would be subject to mandatory detention. *Id.* at 6. Arguably, and for the same reasons, an officer also might be able to cancel an NTA in a compelling case before it is filed with the court and thus eliminate the basis for mandatory detention. Thus, while it is always important to keep in mind the limits of an officer's statutory authority when seeking prosecutorial discretion, it is also important to think creatively about potential solutions not prohibited by law – especially in particularly compelling cases.

Finally, prosecutorial discretion is not only a humanitarian tool of the agency. It also serves other agency purposes. As a practical matter, understanding these purposes will assist you in arguing that your client is a good candidate for favorable prosecutorial discretion. Important among these purposes is that the agency's ability to exercise prosecutorial discretion – by declining to prosecute certain cases or types of cases – assists it in focusing its limited resources on higher priorities. DHS estimates that ICE only has resources to remove, annually, less than 4% of noncitizens who are in the U.S. without authorization. John Morton, Director, ICE, "[Civil Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens](#)" (March 2, 2011).⁴ Consequently, ICE has set as its highest enforcement and removal priorities national security, public safety and border security. *Id.*; *see also* Morton, "Exercising Prosecutorial Discretion."⁵ In accord, the agency has explained that the first question behind all prosecutorial discretion decisions should be whether the enforcement action advances the agency's goals. Meissner memo, at 4-6. Consistent with this, the standard for prosecutorial discretion in a given case now is whether pursuing it meets the agency's priorities for federal immigration enforcement. Morton "Exercising Prosecutorial Discretion," at 2 n.1.

Over what types of immigration decisions can an immigration officer exercise prosecutorial discretion?

In the immigration context, DHS officers have the authority to favorably exercise prosecutorial discretion at all stages of any enforcement process. This discretion can be

⁴ This memorandum is a reissuance of a memorandum first issued on June 30, 2011. The only difference between the two is that the current version, cited above, contains a final paragraph stating that it does not create any right or benefit enforceable by law.

⁵ Unfortunately, ICE's conduct in the field often is not consistent with the agency's national priorities. *See, e.g.,* Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 Conn. Pub. Int. L.J., No. 2, 2010; Michele Waslin, "[ICE's Enforcement Priorities and the Forces that Undermine Them](#)" (November 2010); Shoba Sivaprasad Wadhia, "[Reading the Morton Memo: Federal Priorities and Prosecutorial Discretion](#)" (November 2010).

exercised with respect to detainers, investigations, arrests, detention, parole, the initiation of removal proceedings, appeals, motions to reopen, and even the execution of final removal orders. *See* Morton, “Exercising Prosecutorial Discretion,” at 2-3 (listing examples of when an officer can exercise prosecutorial discretion).

The following provides examples of the types of prosecutorial discretion decisions that an immigration officer can make at three discrete stages of a case: (1) prior to filing an NTA with the immigration court; (2) while the noncitizen is in removal proceedings; and (3) after a removal order has been issued. Note that this list is not exhaustive but intended to illustrate the range of decisions subject to discretionary action by agency personnel.

1. Prior to filing an NTA. An officer can exercise prosecutorial discretion over:

- Whether to focus enforcement resources on particular administrative violations or conduct;
- Whether to stop, question, or arrest an individual for an administrative violation;
- Whether to issue or cancel a notice of detainer;
- Whether to place a person in expedited or other summary removal proceedings;
- Whether to issue, serve, file, or cancel an NTA or refrain from doing so;⁶
- What charges to include in an NTA;
- Whether to agree to cancel an NTA before it is filed with the court;⁷
- Whether to agree to pre-hearing voluntary departure;
- Whether to parole under § 212(d)(5) a person in the U.S. who was never admitted or paroled (i.e., a grant of “parole-in-place”) but who otherwise is eligible to adjust so that she can pursue that relief;
- Whether to parole an arriving alien into the United States, rather than detain the alien under § 235(b);
- Whether to detain a person or release him or her on bond, supervision, personal recognizance, or other condition;
- Whether to grant a noncitizen deferred action;

⁶ *See* 8 C.F.R. §§ 239.1(a) and 1239.1(a) for a listing of officers who can issue an NTA.

⁷ Before an NTA is filed with the court, any officer with authority to issue an NTA also has the authority to cancel the NTA as “improvidently issued,” due to changed circumstances, or for other reasons. 8 C.F.R. § 239.2(a). Note that ICE attorneys (known as Assistant Chief Counsels or trial attorneys) do not have authority to issue an NTA and thus do not have authority to cancel one. However, an ICE attorney can advise her client to cancel the NTA. *See* William Howard, Principal Legal Advisor, ICE, “[Prosecutorial Discretion](#)” (Oct. 24, 2005), at 4-5. Additionally, once the NTA is filed with the immigration court, the trial attorney can move to dismiss proceedings. *Id.* at 5; *see also* 8 C.F.R. § 1239.2(c); Morton, “Exercising Prosecutorial Discretion,” at 3.

2. **While the noncitizen is in removal proceedings.** An officer can exercise prosecutorial discretion over:
 - Whether to agree to join a motion to administratively close or terminate a removal case;
 - Whether to agree to a continuance for the person to become eligible for relief at a later date (i.e., while waiting for a family member to naturalize);
 - Whether to amend the NTA to change or remove certain charges;
 - Whether to agree not to oppose a grant of relief or voluntary departure;
 - Whether to agree to limit the issues to be heard or the evidence presented;
 - Whether to appeal an immigration judge decision that ruled in favor of a noncitizen;
 - Whether to grant deferred action or otherwise settle the case;

3. **After issuance of a removal order.** An officer can exercise prosecutorial discretion over:
 - Whether to not oppose a motion to reopen;
 - Whether to join in a proposed joint motion to reopen;
 - Whether to stay the execution of a removal order;
 - Whether to place the individual on supervised release, rather than detain the individual;
 - Whether to grant a noncitizen deferred action; and
 - Whether to agree to a remand if a case is before a court of appeals on a petition for review.

What is deferred action status and is it a favorable grant of prosecutorial discretion?

Deferred action is a DHS decision not to pursue enforcement against a person for a specific period of time, in the exercise of the agency's prosecutorial discretion. The grant of deferred action by USCIS does not confer lawful immigration status or alter the person's existing immigration status. *See* ICE, "[Detention and Deportation Officer's Field Manual](#)" (updated Mar. 27, 2006). While deferred action does not affect any already existing period of unlawful presence, periods of time in deferred action *do* qualify as periods of stay authorized by the Secretary of DHS for purposes of INA §§ 212(a)(9)(B) and (C)(i)(I). *See* Donald Neufeld, Acting Assoc. Dir., USCIS, "[Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212\(a\)\(9\)\(B\)\(i\) and 212\(a\)\(9\)\(C\)\(i\)\(I\) of the Act](#)" (May 6, 2009). Note, however, that deferred action cannot be used to establish eligibility for any immigration benefit that requires maintenance of lawful status.

An individual with deferred action may apply for an Employment Authorization Document (EAD) if she can establish an economic necessity for employment. 8 C.F.R. § 274(a).12(c)(14). Thus, it can be a significant benefit to a person without other options for relief.

For a full discussion of deferred action, including factors that are to be considered, suggestions for preparing and advancing a deferred action request, and sample requests, see [“Private Bills and Deferred Action Toolkit,”](#) prepared and issued by Maggio Kattar, Duane Morris and Penn State Law School.

Who can make the decision to favorably exercise prosecutorial discretion in a given case?

The immigration officer or employee with the authority to exercise prosecutorial discretion will vary depending on the issue and stage of the proceeding involved. Generally, an immigration officer/employee has this authority over any prosecutorial discretion decision that falls within the scope of her duties, subject to his chain of command. Meissner memo, at 1, 5.

With respect to ICE officers, the Morton memorandum “Exercising Prosecutorial Discretion” more specifically lists who has the authority to exercise prosecutorial discretion. These are:

- Enforcement and Removal Operations (ERO) officers, agents, and their supervisors with authority to institute removal proceedings or otherwise engage in immigration enforcement;
- Homeland Security Investigations (HSI) officers, special agents, and their supervisors with the same authority;
- Attorneys and their supervisors within the Office of the Principal Legal Advisory (OPLA) who have authority to represent ICE in removal proceedings; and
- The Director, the Deputy Director, and their senior staff.

As a practical matter, practitioners should become familiar with officers within their local DHS offices and learn who has authority over what types of decisions. It is also important to know who the supervisors are, as they may have the final say over a decision. While some DHS personnel may not have the authority to make the decision, they still could be influential. For example, Assistant Chief Counsels (also known as trial attorneys) are not authorized to cancel an NTA, or to grant deferred action or a stay of removal. *See* William Howard, Principal Legal Advisor, ICE, [“Prosecutorial Discretion”](#) (Oct. 24, 2005). Nonetheless, someone from the local Office of the Chief Counsel may be able to help favorably resolve a case, and certainly ICE attorneys can advise their clients, the agency, about steps to take in a case. *Id.* Moreover, ICE attorneys do have authority over other determinations, such as whether to consent to administratively close a removal case or whether to join a motion to reopen. *Id.*; *see also*, Morton, “Exercising Prosecutorial Discretion” at (discussing ICE attorney’s exercise of prosecutorial discretion to “dismiss, suspend, or close” a case).

Additionally, other immigration attorneys in the locale can assist greatly in guiding you on local policies and procedures.

What policy memos or other guidance on the exercise of prosecutorial discretion exist and what authority do they provide for local officers to act?

Over the years, both legacy INS and components within DHS have issued numerous memoranda that discuss various aspects of prosecutorial discretion. At the end of this practice advisory is a list of agency guidance that discusses prosecutorial discretion in different contexts, with a short description of each memorandum. This list may not be exhaustive, so be sure to look for additional policy or procedural guidance supporting the exercise of prosecutorial discretion, including guidance that does not explicitly mention “discretion.”

What factors will be considered in a prosecutorial discretion decision?

The factors that will influence a decision on prosecutorial discretion will vary according to the nature of the case. However, there are some general guidelines about important factors that the agency will consider in most, if not all cases. This list of factors, taken from the June 17, 2011 memorandum, Morton, “Exercising Prosecutorial Discretion,” at 4, includes:

- The agency’s civil immigration enforcement priorities;
- The person’s length of presence in the U.S., with particular consideration to presence in lawful status;
- The circumstances of the individual’s arrival, particularly if arrival was as a young child;
- Graduation from a U.S. high school and the pursuit of higher education in the U.S.;
- U.S. military service of the individual or immediate relative, particularly combat service;
- Criminal history;
- Immigration history;
- Whether the person is a national security or public safety concern;
- Ties and contributions to the community, including family ties;
- Ties to and conditions in the home country;
- Whether the person is elderly or a minor;
- Whether a spouse, parent or child is a U.S. citizen or permanent resident;
- Whether the person is the primary caretaker of any person with a disability or illness or a minor relative;
- Whether the person or a spouse is pregnant or nursing, or suffers from a severe mental or physical illness;
- Likelihood of removal;
- Likelihood of permanent or temporary immigration relief; and
- Cooperation with federal, state or local law enforcement (including the Department of Labor and the National Labor Relations Board).

The decision should be based upon the totality of the circumstances, with the goal of conforming to ICE’s enforcement priorities. *Id.*⁸

Significantly, the 2011 Morton memos also identify certain classes or individuals warranting “particular care.” These include veterans and members of the U.S. armed forces; long-time permanent residents; minors and the elderly; those present in the U.S. since childhood; pregnant and nursing women; victims of domestic violence, trafficking, or other serious crimes; and those with serious health conditions or disabilities. Predictably, certain negative factors will warrant “particular care and consideration,” including: risks to national security; serious felons, repeat offenders, or those with a lengthy criminal record; known gang members; and individuals with an egregious record of immigration violations, including illegal reentry and immigration fraud. Morton, “Exercising Prosecutorial Discretion,” at 5.

What role can an attorney play in influencing an immigration officer to exercise favorable prosecutorial discretion?

- 1. Ask that favorable prosecutorial discretion be exercised in your client’s case.** Despite language in earlier memoranda encouraging immigration officers to consider the favorable exercise of prosecutorial discretion on their own, this has not previously happened. See, e.g., Meissner memo.⁹ Thus, an attorney can play an important role in requesting a specific type of favorable action in a case, and advocating for this result. It is not sufficient to simply ask for a favorable exercise of prosecutorial discretion. Instead, ask specifically for what it is that you want the officer to do (e.g., grant deferred action; terminate proceedings; grant a stay of removal; etc.), and outline why prosecutorial discretion is appropriate, with particular care to highlight the positive factors and how the exercise of prosecutorial discretion in your case would meet agency enforcement priorities.

⁸ The Meissner memo, at 7-8, makes clear that there also are factors that cannot be considered, including the individual’s race, religion, sex, ethnicity, national origin, or political association, activities or beliefs (unless the above is relevant to the person’s immigration status or case in another way); the officer’s own personal feelings regarding the individual; or the possible effect of the decision on the officer’s own professional or personal circumstances.

⁹ Moreover, be aware that despite its overall encouraging tone, the Meissner memo also cautions against “attempts to exploit prosecutorial discretion as a delay tactic, as a means merely to revisit matters that been thoroughly considered and decided, or for other improper tactical reasons.” Meissner Memo, at 10. For this reason, attorneys may want to be judicious in selecting the cases in which they advocate for this relief. Asking for it in cases in which it clearly is not warranted could undermine your future efforts to get this relief in meritorious cases.

2. **Put together a package of materials to support your request for prosecutorial discretion.** To better make a record, make your request in writing. Consider providing a detailed cover letter or brief, supported by material that will demonstrate that your client is deserving of prosecutorial discretion. Include all the facts that an immigration officer will need to make an informed decision, but be as concise as possible.
3. **Use the agency memoranda to support your request.** The exercise of favorable prosecutorial discretion is not mandatory in any circumstance. However, the memoranda do provide authority for an officer and/or local office to act favorably. For example, where a client in removal proceedings has an adjustment application pending before USCIS (because, e.g., she is an “arriving alien” and only USCIS has jurisdiction over the application), argue that the removal case should be terminated pursuant to the August 20, 2010 Morton memo. *See* John Morton, Assistant Secretary, ICE, [“Civil Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens”](#) (June 2010). Another example is found in the Howard memo, which contains the following advice to local ICE counsel: “[w]here a motion to reopen for adjustment of status or cancellation of removal is filed on behalf of an alien with substantial equities, no serious criminal or immigration violations, and who is eligible to be granted the relief except that the motion is beyond the 90-day limitation contained in 8 C.F.R. § 1002.23, *strongly consider* exercising prosecutorial discretion.” William Howard, Principal Legal Advisor, ICE, [“Prosecutorial Discretion”](#) (Oct. 24, 2005) (emphasis added). The 2011 Morton memoranda contain similarly strong directives.
4. **Highlight the positive factors in your client’s case.** Review the criteria supporting favorable action that are listed in the relevant memos and highlight the applicable criteria for the officer. Where a client falls within a classification deserving “particular care,” be sure to emphasize and build upon this fact. Morton, “Exercising Prosecutorial Discretion,” at 5. Develop other favorable equities, just as you would in a case seeking a discretionary benefit or relief from removal from DHS.
5. **Address any problems or inadequacies in the case or the evidence.** It is better to address such problems directly because otherwise it could appear that you were trying to hide information from the officer, which could undercut the credibility of your other arguments. Moreover, when there is negative information, you should not only disclose it, but also provide mitigating information. For example, when there is a conviction, provide evidence of completion of probation or parole.

6. **Provide the evidence that the officer needs to support the decision.** A decision to exercise prosecutorial discretion in a given case requires an individualized determination based upon the facts and the law. Meissner memo, at 6. The more developed the facts are with respect to the factors favoring your client, the stronger the request will be. Thus, where time permits, an attorney can play an important role in providing the immigration officer with evidence demonstrating why a favorable exercise of discretion is warranted in a case. Where there is a relevant memo, review the criteria to be considered in support of favorable prosecutorial discretion and offer evidence demonstrating that these criteria are satisfied.
7. **If removal proceedings have been initiated, consider seeking a continuance of the proceedings so that you can discuss prosecutorial discretion options with ICE counsel.** An immigration judge may be inclined to grant a continuance to allow—or even encourage – the parties to discuss prosecutorial discretion options. For example, an attorney was granted a continuance after he argued that his client did not fall within the enforcement priorities outlined in the June 30, 2010 Morton memo and that he wanted an opportunity to advocate for ICE to favorably exercise prosecutorial discretion and join him in a motion to dismiss.¹⁰
8. **Ensure that all details of any plan for favorable action for your client are completely worked out and are committed to writing.** For example, if deferred action will not benefit your client unless she also is granted an EAD, be sure to include this in your advocacy for your client, and if agreed to, in the written summary of the final grant of deferred action.¹¹
9. **Consider having your client contact his or her Senator or Congressional representative for additional support.** Your client can provide the elected official with a copy of the request for favorable

¹⁰ An ICE attorney has the authority under the regulations to move to dismiss a case for all of the reasons that an NTA can be cancelled. *See* 8 C.F.R. § 1239.2(c) (citing 8 C.F.R. § 239.2). These reasons include, among others, that the noncitizen is not deportable or inadmissible; that the NTA was improvidently issued; and that circumstances have changed such that it is no longer in the best interest of the government to continue the case. The motion, however, must be granted by the IJ in order to terminate proceedings, and such termination is without prejudice to new proceedings at a later date. Counsel should consider whether termination is the appropriate resolution, as some matters might benefit from continuing with immigration proceedings.

¹¹ An EAD is not automatic with a grant of deferred action, but can be granted upon a showing of economic necessity.

prosecutorial discretion that you submitted to DHS. Some officials will be receptive to this and their staff members will follow up with the local DHS office.

How will I know if the officer decided to exercise prosecutorial discretion in my client's favor or not?

The Meissner memo requires that when a decision is made to favorably exercise prosecutorial discretion, it must be documented in the file, including the specific decision taken and its factual and legal basis. Meissner memo, at 11. Additionally, when the decision is favorable, the officer must notify the individual in writing of the action to be taken in her case and the consequences. Normally, notice should be by letter to the individual and the attorney of record. *Id.* Officers are cautioned to make clear in the letter that the favorable exercise of prosecutorial discretion does not confer any immigration status, ability to travel to the United States (unless the alien applies for and receives advance parole),¹² immunity from future removal proceedings, or enforceable right or benefit. If, however, there is a potential benefit that is linked to the action (for example, the availability of employment authorization for beneficiaries of deferred action), this should be identified in the letter. *Id.* at 11-12. It is a good idea to remind the officer of this notice requirement, since otherwise it may be overlooked.

The Meissner memo, however, does not require notice to the individual if the officer decides not to favorably exercise prosecutorial discretion. *Id.* Thus, an individual who has requested the favorable action could be left hanging (or worse, arrested or deported) – not knowing if the request is still pending or if it has been denied. Practically, the only way to know definitively if a decision has been made is to periodically call the officer.

If my client receives a favorable grant of prosecutorial discretion not to be placed into removal proceedings or to stay execution of a final order, what impact does this have on his or her encounters with DHS in the future?

It is important to remember, and to fully explain to your client, that a favorable grant of prosecutorial discretion does not confer lawful immigration status on the client. *See* Meissner memo, at 12. In many cases, all that such a grant will do is provide a reprieve – of indefinite duration – from adverse action. For example, if ICE agrees not to place a client in removal proceedings, this does not give the individual any different status than that which she previously had. Additionally, there is always the chance that if the circumstances that led ICE to refrain from initiating proceedings change, there is nothing to prevent ICE from initiating removal proceedings at a future date. Similarly, where favorable action is taken by the agency – for example a stay of execution of removal, a grant of deferred action, or parole – that action is not permanent and can be reversed if the circumstances change. However, the Meissner memo advises that where an

¹² Although your client may be eligible for advance parole, be sure to check his or her vulnerability to the three or ten year inadmissibility bars before suggesting this option.

individual granted favorable prosecutorial discretion comes to the attention of an agency officer at a future date, the officer should abide by the earlier decision as a matter of agency policy, absent new facts or changed circumstances. *Id.*

If DHS refuses to exercise prosecutorial discretion in my client’s favor, can I appeal this decision or otherwise challenge it?

As noted earlier, none of the DHS guidance on prosecutorial discretion requires that an immigration officer favorably exercise his or her prosecutorial discretion in any particular case, even the most compelling ones. Instead, the immigration officer has discretion to make the decision, and this discretion is bounded only by his or her authority under the law, the DHS guidelines on the exercise of prosecutorial discretion, and any supervisory review to which the officer is subject.

Unfortunately, there is no formal appeal process to challenge the denial of a request for the exercise of favorable prosecutorial discretion. However, there are internal supervisory channels through which to informally appeal a decision or seek reconsideration, so this is an avenue worth exploring in many cases. If your request is denied, you need to learn the proper chain of command at ICE or USCIS and work your way up the ladder. This also is information that your local AILA chapter may develop through ongoing liaison efforts. (*See below*).

Additionally, as a general matter, there is no federal court review over the exercise of (or the failure to exercise) prosecutorial discretion. *See e.g. Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (finding that there is a rebuttable presumption under the Administrative Procedures Act that a decision not to prosecute is not reviewable by the courts); *see also* INA § 242(g); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) (finding that 8 U.S.C. § 1252(g) was directed against attempts to impose judicial constraints on prosecutorial discretion). Thus, once an agency decides not to exercise prosecutorial discretion, it generally will not be possible to challenge this decision in federal court.

Are there other steps I can take in particularly compelling cases if DHS refuses to favorably exercise prosecutorial discretion?

In select cases you may want to consider less conventional tactics in an attempt to influence ICE in granting deferred action or other prosecutorial discretion. Use of the media (both conventional and social), local and national advocacy organizations and your client’s congressional representative can be beneficial to the overall cause. In recent months, this sort of strategy has worked in select cases involving DREAM Act eligible persons. There is no specific procedure in employing this sort of strategy. However, it is recommended that you consider this as a last resort and only in cases where your client has compelling facts to his or her case and understands the risks involved.

Some suggested strategies include:

- Set up a Facebook group titled “Stop the Deportation of _____” and invite as many contacts as possible to help support the cause;
- Contact local and national immigration advocacy groups to get them to post Action Alerts on their websites on where the public can call or fax ICE officials in support of the client;
- Speak to local or national media contacts about the case and try to get stories written;
- Engage local human rights organizations or religious groups to assist in forwarding the cause; and
- Hold local press conferences and have your client speak about his or her plight.

How can I advocate for more consistent use of prosecutorial discretion?

There are several ways that you, your local AILA chapter (or similar groups that engage in advocacy with local ICE and/or USCIS offices) can push for more consistent, regular and humane use of prosecutorial discretion locally. First, get information about procedures that local offices follow with respect to these decisions, such as who within the office has the authority to make such decisions initially; who must sign off on them; and what procedures exist for an attorney to request the exercise of prosecutorial discretion. If it is not possible to get information through liaison channels, request this information through Freedom of Information Act requests.

In addition, efforts can be made to get the local DHS offices to adopt more favorable policies with respect to the exercise of discretion and to include consideration of favorable prosecutorial discretion as a matter of routine. Additionally, OPLA has previously indicated that it wants to know “if there is a pattern and practice” of an OCC not agreeing to exercise prosecutorial discretion such as by joining motions to reopen. “[AILA-ICE Liaison Minutes](#)” (Oct. 30, 2009) at § III. Thus, local AILA chapters and other advocates are encouraged to track the willingness of their local DHS offices to engage in favorable prosecutorial discretion. Where an office is out of compliance with national policies, consider contacting AILA National to report and remedy anomalies.

Finally, AILA and the LAC are in the process of setting up reporting and monitoring of local compliance with the June 17, 2011 Morton memoranda in order to evaluate whether the policies and procedures are effectively being put into practice, as well as to identify any issues which arise through their application. Assistance from local AILA chapters, AILA attorneys and other immigration legal services and advocacy organizations will be essential to the success of this effort.

ATTACHMENT
SUMMARY OF DHS GUIDANCE ON PROSECUTORIAL DISCRETION

DHS (or legacy INS) guidance:

Doris Meissner, Commissioner, INS, [“Exercising Prosecutorial Discretion”](#) (Nov. 17, 2000). Still followed by DHS, this is the most comprehensive of its memoranda on prosecutorial discretion. Importantly, this memo stresses that immigration officers not only have the authority to favorably exercise prosecutorial discretion but that they should consider doing so in cases that warrant it at the earliest point possible. Thus, this memo provides general authority to support an argument that an immigration officer should act favorably in your client’s case. The Meissner memo also sets forth the principles that should motivate prosecutorial discretion decisions; the process to be followed by agents in exercising this discretion; and factors that can be considered in decision-making.

Bo Cooper, General Counsel, INS, [“INS Exercise of Prosecutorial Discretion”](#) (undated). This memorandum sets forth the legal basis for legacy INS’s exercise of prosecutorial discretion in its enforcement activities. The memo is not policy guidance itself, but instead intended to lay the foundation for development of such guidance. It summarizes what prosecutorial discretion is; why law enforcement officers have prosecutorial discretion; how it applies in the immigration context; the limits on prosecutorial discretion; practical difficulties relating to the exercise of prosecutorial discretion in immigration cases; and finally, how it relates to detention, including mandatory detention.

ICE guidance:

John Morton, Assistant Secretary, ICE, [“Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions”](#) (Aug. 20, 2010). This memo explains a new policy for handling removal cases in which there is a pending or approved application or petition with USCIS. Adopted “as a matter of prosecutorial discretion” and to promote efficient use of resources, the policy allows for the dismissal of removal cases in which there is a pending or approved application or petition with USCIS and ICE determines, as a matter of law and in the exercise of discretion, that the individual is eligible for relief. Certain criteria must be met in all cases. Additionally, in detained cases, the trial attorney must consult with local ICE officers regarding adverse factors that may weigh against dismissal. Note that all local Offices of Chief Counsel are instructed to adopt local standard operating procedures to implement this policy. If you do not already have a copy of your local office’s procedure, you could ask for one, seek a copy through your local AILA liaison, or file a FOIA request.

John Morton, Assistant Secretary, ICE, [“Civil Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens”](#) (March 2, 2011) (prior version issued on June 30, 2010). This memorandum identifies priorities for the apprehension, detention and removal of noncitizens, which are to be applied in all ICE programs. It

identifies and discusses the top three ICE priorities as 1) noncitizens who pose a danger to national security or a risk to public safety; 2) recent illegal entrants; and 3) noncitizens who are fugitives or otherwise obstruct immigration controls.¹³ The memo indicates that ICE resources should primarily be committed to advancing these priorities and that, given the limited resources of the agency, ICE employees should exercise sound judgment and discretion consistent with these priorities in carrying out enforcement.

Peter S. Vincent, Principal Legal Advisor, ICE, [“Guidance Regarding U Nonimmigrant Status \(U visa\) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal”](#) (Sept. 25, 2009). This memo provides field guidance with respect to persons with pending U visa petitions who either are 1) subject to a final administrative order of removal and request a stay of removal or 2) are in removal proceedings. Explaining that ICE officers have discretion to stay removal where an individual with a pending U visa petition demonstrates prima facie eligibility for the visa, the memo explains how ICE is to coordinate with USCIS to obtain a prima facie determination of eligibility. The memo also discusses factors that ICE officers should consider in exercising their discretion where prima facie eligibility is shown.

Julie L. Myers, Assistant Secretary, ICE, [“Prosecutorial and Custody Discretion”](#) (Nov. 7, 2007). This memo concerns the exercise of prosecutorial discretion with respect to arrest and custody decisions related to nursing mothers.

John P. Torres, Director, ICE, [“Discretion in Cases of Extreme or Severe Medical Concern”](#) (Dec. 11, 2006). This memo reiterates the importance of ICE officers exercising prosecutorial discretion when making custody determinations with respect to adults and juveniles transferring from hospitals, social services or other law enforcement agencies who have severe medical conditions (including psychiatric). The memo explains that officers have a responsibility to identify and respond to cases presenting meritorious health claims in which detention may not be in ICE’s best interest. The memo explains the procedures to be followed and provides guidance on how to make a determination about the seriousness of the medical problem.

ICE, [“Detention and Deportation Officer’s Field Manual”](#) (updated Mar. 27, 2006).
-**Chapter 20.8, “Deferred Action.”** This chapter describes generally the standard and procedures for determining whether to grant deferred action.
-**Chapter 20.9, “Exercising Discretion.”** This chapter describes generally the standards and procedures for exercising prosecutorial discretion.

William Howard, Principal Legal Advisor, ICE, [“Prosecutorial Discretion”](#) (Oct. 24, 2005). This memo, which is still followed, focuses on when and how prosecutorial discretion can be used by trial attorneys. It explains how the exercise of prosecutorial discretion is critical to managing work overload and adhering to priorities. It also details various ways in which trial attorneys can and should consider exercising prosecutorial

¹³ According to the memo, numbers 2 and 3 are equal priorities to one another, but fall below number 1.

discretion and provides numerous examples. The memo indicates that proceedings should not be instituted, or if instituted, should be dismissed where an adjustment of status is clearly approvable based on an approvable I-130 or I-140 and the case is appropriate for adjudication by USCIS. Similarly, the memo also suggests that remands should be considered to allow a person to apply for naturalization; and that alternatives to removal should be considered in cases in which there are compelling humanitarian factors. Finally, among other types of discretionary action available to trial attorneys, the memo discusses motions to reopen and provides examples of when it would be appropriate for ICE to join these.

William Howard, Principal Legal Advisor, ICE, [“Exercising Prosecutorial Discretion to Dismiss Adjustment Cases”](#) (Oct. 6, 2005). This memo discusses when trial attorneys can exercise prosecutorial discretion to file or join a motion to dismiss a case without prejudice to allow USCIS an opportunity to adjudicate an adjustment of status application. It is not clear whether this memo has been superseded by the August 20, 2010 memo by John Morton that covers a similar topic. This memo is intended to preserve ICE resources in cases in which it appears that an adjustment application would be clearly approvable. The memo lays out the criteria that must be met before a trial attorney can exercise prosecutorial discretion and move to dismiss a case.

Marcy M. Forman, Acting Director, Office of Investigations, ICE, [“Issuance of Notice to Appear, Administrative Orders of Removal, or Reinstatement of a Final Removal Order on Aliens with United States Military Service”](#) (June 21, 2004). This memo explains that ICE officers can exercise prosecutorial discretion with respect to the issuance of an NTA, an administrative order of removal or a reinstatement of a final removal order when the noncitizen has military service with the U.S. The memo stipulates that the Special Agent in Charge of each field office is required to sign off on any of these actions in these cases, after review of the A file. It also sets out general guidelines for consideration of prosecutorial discretion in these cases, and emphasizes that all such cases should be reviewed for eligibility for naturalization under INA § 328 and 329 (special naturalization provisions for members of the military).

USCIS Guidance

Michael Aytes, Assoc. Dir. for Domestic Operations, USCIS, [“Disposition of Cases Involving Removable Aliens”](#) (July 11, 2006). This memo revises guidance to USCIS officers on how to process and prioritize cases in which the person appears to be removable. The memo explains that deciding whether a person is removable and whether to issue an NTA is an integral part of the adjudications process. Prosecutorial discretion comes into play with respect to whether to issue an NTA in a case that does not involve egregious public safety, national security, a regulatory requirement to issue an NTA, or fraud (each of which is discussed in the memo). In all other cases, USCIS has discretion not to issue an NTA in compelling cases, to recommend deferred action or to reinstate a person’s nonimmigrant status.

William R. Yates, Deputy Exec. Assoc. Comm’r, INS, [“Procedures for Handling Naturalization Applications of Aliens Who Voted Unlawfully or Falsely Represented Themselves as U.S. Citizens by Voting or Registering to Vote”](#) (May 7, 2002). This memorandum provides guidance on handling naturalization applications of persons who have unlawfully voted or falsely represented themselves as U.S. citizens in association with registering to vote or by voting. The memo lays out a six step process for adjudicating these cases. As part of this process, and after determining that a person is removable for having unlawfully voted or for making a false claim to U.S. citizenship when registering to vote, the officer is to determine whether the case merits the exercise of prosecutorial discretion using the Meissner memo as guidance. Where a case does warrant this exercise, the officer is to proceed with the adjudication of the naturalization application.