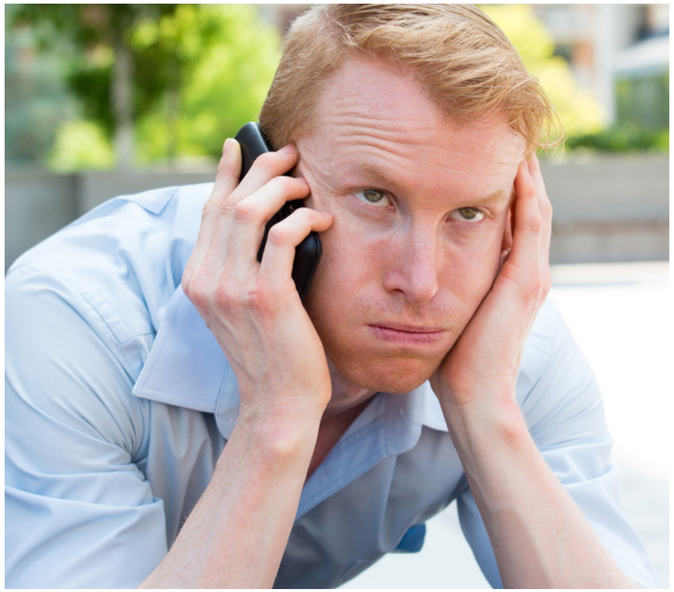
No Answer, No Problem: Overcoming Delays in District Court

by Bradley B. Banias

It is a common scenario: You file suit in district court. Thirty days pass. Nothing. Fifty-five days pass. Nothing. You check with the local U.S. Attorney's office to make sure service was perfected. It was. But on the 61st day, still, nothing. Your client is getting antsy. The local assistant U.S. Attorney explains that the Office of Immigration Litigation—District Court Section (OIL-DCS) is handling the case. You call OIL-DCS, but no one there has ever heard of it. What do you do? Your options vary.

DO consider moving for a preliminary injunction.

If the ongoing delay is or will cause your client irreparable harm—harm beyond financial harm—you should consider a motion for a temporary restraining order or preliminary injunction. The standards for these motions are well-known: likelihood of success on the merits, irreparable harm to the petitioner without a stay, prejudice to the government, and the public interest. Seeking a stay, however, can be a double-edged sword because the court will assess the merits of your underlying claims at the outset



of the case. And if the court denies your motion for a preliminary injunction and finds that you are not likely to succeed on the merits of your claims, when you get to the merits, you will practically have to overcome this finding. That said, such a motion will get the government's attention because, in certain circumstances, the government will have only three days to respond.

"So, if you are stuck in limbo, awaiting a government response … **do not move for default, but consider these options instead.**"

DO consider serving the government with discovery requests.

Generally, you must seek a court order to serve discovery if you choose to serve it before you have a discovery conference. However, if your case is exempt from initial disclosures—cases under the Administrative Procedure Act are exempt from initial disclosures—nothing in the rules precludes you from serving discovery at any time. The benefit of simply serving discovery is that you do not have to file anything with the court because as a practical matter, you are giving the government a new response deadline without getting the court involved. The downside is that, generally, there is no discovery allowed in routine visa delay and denial litigation. But if you serve discovery, at a minimum, the government will have to move for a protective order, which will allow you to achieve your goal of catalyzing government action.

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"Furthermore, if the government moves for an extension anyway and you oppose, you can explain to the court that you affirmatively offered the government 10 days in a good faith effort to resolve the dispute amicably. **Courts love that.**"

DO consider affirmatively offering the government a limited extension of time to answer.

This sounds crazy; I know. This may seem too nice, especially for a delayed case. But it does a couple of things. First, you engender goodwill with the government attorney who advises the client agency. Because the agency typically has the opportunity to moot out a case by simply granting a petition, goodwill can go far. Second, you limit the extension length. Typically, the government will move for an extension for either 30 or 60 days. If you offer them 10 days, you can limit or at least start negotiations over the extension length. Furthermore, if the government moves for an extension anyway and you oppose, you can explain to the court that you affirmatively offered the government 10 days in a good faith effort to resolve the dispute amicably. Courts love that.

DO NOT move for a default judgment.

Although the Federal Rule of Civil Procedure 55(e) allows a court to enter a default judgment against a U.S. government agency, it is widely accepted that a court will not enter default judgment against a federal agency simply for a failure to file an answer or responsive pleading. The case law on this issue is uniform and it will require an exceptional case to get around it.

So, if you are stuck in limbo awaiting a government response to your properly filed and served complaint, do not move for default, but consider these options instead. Depending on the case, your relationship with the local U.S. Attorney's Office, and your client, you can go in like a tornado by filing a motion for a preliminary injunction or you can act as a refreshing breeze by offering an extension of time to respond. Either way, you will get the government's attention and stimulate action on your otherwise stagnant case.

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