THE IMMIGRATION JUDGE WAR

by Jonathan D. Montag and Socheat Chea[*]

INTRODUCTION

For years, practitioners in immigration court have complained about immigration judges. This is not particularly remarkable. Lawyers everywhere complain about judges. But proving the validity of complaints is difficult. As in Aesop=s fable "The Boy Who Cried Wolf," why should anyone believe immigration lawyers' complaints about the courts in which they practice when all lawyers complain about the courts in which they practice?

REASONS WHY IMMIGRATION COURT COMPLAINTS GO UNNOTICED

There are substantial obstacles to airing problems with immigration court. Immigration courts are not part of an independent judiciary, but part of the Justice Department.

Although they are called "judges" (formerly called "special inquiry officers"), the role of immigration judges is different from Article III[1] judges. Immigration judges are administrative judicial officers employed by the U.S. Department of Justice. They assume a more active role in the courtroom than the traditional judge who passively lets the parties present their cases. An immigration judge can "interrogate, examine, and cross-examine the alien and witnesses."[2] The federal courts have defended the activist role for immigration judges and at times have encouraged it. *Calderon-Ontiveros v. INS.*[3] Immigration judges are obligated to fully develop the record in those circumstances where applicants appear without counsel.[4] Because of the nature of the system, immigration judges have a duty to be fair and unbiased, but they are able and sometimes commanded to examine and cross-examine, which invites the appearance of, or actual, partisanship that may provoke complaints but little attention. Further, the courts do not deal with citizens but rather with "foreigners," referred to in immigration law by a term of art: "alien." With aliens defined as outsiders, and with the term "alien" associated with words like "sedition" or "predator," there is no wonder that little interest is aroused when foreign nationals have a difficult time in immigration court. The ultimate punishment, after all, is a free trip home, back to "where they came from."

Immigration lawyers, while at times critical of the way immigration judges conduct proceedings, are wary of trying to air their complaints publicly. This is because of concerns about the propriety of publicly complaining about judges and possible repercussions for themselves and their clients.

Finally, since most immigration court cases deal with persons who have violated immigration or criminal laws, sympathy for the applicants is low. Immigration lawyers tend to minimize the wrong of the initial overstay, but the public often does not and will have little sympathy when unjust things happen to the person in immigration court.

One exception to the lack of sympathy for "law breakers" can be seen in cases of asylum-seekers. There tends to be less hostility toward asylum-seekers

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[*] **Jonathan Montag** practices immigration law at Montag & Nadalin LLP in San Diego. He is a graduate of the University of Pennsylvania and the University of San Diego School of Law. He is a past chapter chair and a member of the National Benefit Center Liaison Committee, the AILA Annual Conference Planning Committee, the AILA National Membership Committee, and the *Immigration Law Today* Editorial Advisory Board. He was named one of *California Lawyer Magazine's* attorneys of the year for 2006.

Socheat Chea has been practicing immigration law in his own firm for over 10 years in Atlanta. A graduate of Boston College Law School, he was the chair of the AILA Atlanta Chapter for 2001–02. He is a passionate advocate on immigration causes and has served as a faculty member for the past five years for the Institute of Continuing Legal Education in Georgia on immigration issues. Mr. Chea received national prominence in 2000 when he defended against the deportation of long-time permanent residents who had minor brushes with the law. He has been speaking at the AILA annual conference since 2001. He would like to extend a special thanks to his law clerk, Karen Hamilton, for her assistance in this article.

[1] *U.S. Const*. art. III, establishing the judicial branch of government.

[2] 8 USC §1252(b) (1996).

[3] 809 F.2d 1050, 1052 (5th Cir. 1986).

[4] *Jacinto v. INS*, 208 F.3d 725, 727 (9th Cir. 2000).

who have incurred "minor" immigration violations. The law certainly is more tolerant.[5]

All these factors diminish media interest in what occurs in immigration court. Without interest, there is no media attention—no sunlight. And, as Justice Louis Brandeis observed, "Sunlight is the best disinfectant." But the media are not the only source of light. The federal courts are able, albeit once to a greater degree, to review the immigration courts, and federal appellate courts have now published decisions that lambaste some recent decisions of the immigration courts.

SUNLIGHT ILLUMINATES IMMIGRATION COURT PROBLEMS

Public pronouncements by the courts of appeal have attracted some media sunlight. The *New York Times* surveyed cases in the Third, Seventh, and Ninth Circuits, where circuit judges were scathing in their criticisms of immigration courts and the Board of Immigration Appeals (BIA).[6]

Liptak's article highlighted *Benslimane v. Gonzales,*[7] where circuit judge Richard Posner pointed out that the Seventh Circuit reversed the BIA in 40 percent of the cases decided on the merits in the year preceding oral argument in *Benslimane*. He noted that the rate was 18 percent in nonimmigration cases where the United States was the appellee. Judge Posner then explained the reason for the disagreement between the courts of appeal and the administrative adjudicators:

> This tension between judicial and administrative adjudicators is not due to judicial hostility to the nation's immigration policies or to a misconception of the proper standard of judicial review of administrative decisions [*i.e.*, it is not the fault of the courts of appeal]. It is due to the fact that the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice [*i.e.*, it is the fault of the immigration judges and BIA].[8]

Judge Posner's comment about a "misconception of the proper standard of judicial review" is not incidental or accidental. Some appellate court judges have skewered their colleagues for wasting judicial resources on nitpicking by the immigration judges and BIA when there are bigger fish to fry. In *Jahed v. INS*,[9] taking into account the Supreme Court decision[10] in *INS v. Ventura*,[11] Ninth Circuit Judge Alex Kozinski wrote:

> The question in this case is, in the immortal words of Humpty Dumpty, which is to be the master—that's all. When it comes to the granting of asylum, Congress has said the BIA is the master. The statute provides it, the other courts of appeals recognize it and the Supreme Court keeps reminding us of it. But to no avail. Maybe there's something in the water out here, but our court seems bent on denying the BIA the deference a reviewing court owes an administrative agency. Instead, my colleagues prefer to tinker B to do the job of the Immigration Judge and the BIA, rather than their own.[12]

He then continued, still in light of *Ventura*:

> While the Court was careful to limit its ruling to the facts presented, its message to us was clear to anyone with eyes to see: Stop substituting your judgment for that of the BIA; give proper deference to administrative fact finding; and do not adopt rules of law that take away the agency's ability to do its job. In other words, stop fiddling with the agency's decisions just because you don't like the result.[13]

Although Judge Posner says that 40 percent of immigration cases were reversed, not because of a misconception of the proper standard of judicial review, but rather because of problems with the immi-

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[5] *See Matter of Pula*, the "circumvention of the immigration laws is only one of a number of factors that should be balanced in exercising discretion in asylum cases." 19 I&N Dec. 467 (BIA 1987).

[6] A. Liptak, "Courts Criticize Judges' Handling of Asylum Cases," *New York Times*, A1 (Dec. 26, 2005).

[7] 430 F.3d 828 (7th Cir. 2005).

[8] *Id.* at 829–30.

[9] 356 F.3d 991, 1002 (9th Cir. 2004).

[10] The case stands for the proposition that, generally speaking, a court of appeal must remand a case to the BIA for a decision of a matter that statutes placed primarily in the BIA's hands when the issue was not previously addressed by the BIA. As a result, in the vast majority of reversals by the courts of appeal, rather than granting relief, cases are remanded to the BIA to consider elements overlooked earlier by the immigration court or BIA. This is likely a major source of congestion at the BIA and immigration courts.

[11] 537 U.S. 12 (2002).

[12] *Jahed*, 356 F.3d 991, at 1002.

[13] *Id*. at 1007.

gration court and the BIA, there is merit to Judge Kozinksi's concerns. In a great many cases when the courts of appeal apply the correct law and standards, they find that the immigration courts and BIA are not adjudicating cases to meet the minimum standard of justice.

Some of the fact patterns in the cases cited by Judge Posner and the *New York Times* are instructive. In *Benslimane*, the respondent was arrested by U.S. Immigration and Customs Enforcement (ICE) despite having a valid I-130/I-485 filed with U.S. Citizenship and Immigration Services (USCIS). The immigration judge would not continue the case for I-130 adjudication and ordered removal.[14] (There is an issue in the case concerning the attorney filing an I-485, but this is a red herring.) Relying on a prior Seventh Circuit case, *Subhan v. Ashcroft*,[15] and *Matter of Garcia*,[16] a case the BIA now seems to regret as evidenced by the lengths it goes to distinguish it,[17] the court determined that failing to continue the case while awaiting the I-130 adjudication allowed "Benslimane to be ground to bits in the bureaucratic mill against the will of Congress."[18]

It is odd that Judge Posner's ire was so raised by this case, calling the BIA's holding "intelligible but not justifiable" and a case decided "below the minimum standards of legal justice," when immigration judges throughout the country routinely take this position. For many reasons—among them concerns about cluttered calendars, arguments about circumventing orderly consular procedures, and the court not being beholden to other agencies—immigration judges routinely deny continuances. The only hope in many of these cases is the fact that the wait for a hearing date in court and BIA appeals is getting longer and longer, while USCIS adjudication times are shortening. Thus, an I-130 may be approved before a removal order becomes administratively final. However, pursuant to *Matter of Velarde-Pacheco*,[19] the BIA will not reopen a case after the 90-day reopening period without the agreement of ICE; and ICE is often unwilling to agree to reopening. So, delays often do not help without the intervention of a court of appeal.

More exemplifying of immigration judicial misconduct, rather than just shoddy judgment, is *Wang v. Attorney General*.[20] The case is a Chinese family-planning asylum case. The family of four included two daughters, the older one handicapped. They came to the United States without inspection after the Chinese government forcibly sterilized the mother. The father became the respondent in a removal proceeding. The immigration judge took exception to the father on three grounds: not paying a fine in China levied against his family for having a second child without permission; not having produced evidence of efforts to have his older daughter's physical condition analyzed in the United States, and trying to obtain a visa by fraud at a consulate in China, then arranging to be smuggled into the United States. The court noted that the immigration judge considered herself "embarrassed" to have the respondent in her court, termed him "obsessed" with having a son, and accused him of "ignoring" his handicapped daughter.[21]

Commenting on the course of proceedings and quoting extensively from the record, the court wrote, "The proceedings before the IJ were conducted in too intimidating and hostile a manner to afford Wang a meaningful opportunity to develop the factual predicates of his claim, yet alone to respond to any legitimate concerns about his claim."[22] The court concluded that the immigration judge "chose to attack Wang's moral character rather than conduct a fair and impartial inquiry into his asylum claims. The tone, the tenor, the disparagement, and the sarcasm of the IJ seem more appropriate to a court television show than a federal court proceeding."[23]

The court noted that it was not only the judge's demeanor that was inappropriate, but also her analysis. "The IJ's opinion in this case was highly improper for both its contemptuous tone and its consideration of personal issues irrelevant to the merits of Wang's asylum application."[24]

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[14] Inasmuch as the very first case discussed in the article is not an asylum case at all, the headline, "Courts Criticize Judges' Handling of Asylum Cases," is inaccurate.

[15] 383 F.3d 591 (7th Cir. 2004).

[16] 16 I&N Dec. 653 (BIA 1978).

[17] See, for example, *Matter of Arthur*, 20 I&N Dec. 475 (BIA 1992), and *Matter of Velarde-Pacheco*, 23 I&N Dec. 253 (BIA 2002).

[18] *Benslimane*, at 833.

[19] *Velarde-Pacheco*, 23 I&N Dec. 253

[20] 424 F.3d 260 (3rd Cir. 2005).

[21] *Id*. at 265.

[22] *Id*. at 267.

[23] *Id*. at 269.

[24] *Id*. at 270.

Another example of justice gone awry cited by the *New York Times* was *Recinos de Leon v. Gonzales*,[25] wherein a Los Angeles immigration judge denied asylum, reciting an oral decision that the Court of Appeals for the Ninth Circuit characterized thusly:

> [t]he IJ's opinion jumbles together discussions of Recino's credibility, past persecution, future persecution, changed country circumstances, and relocation. As a result, regarding at least five crucial points, we cannot tell what factual or legal determinations, if any, the IJ made. Accordingly, in many instances, we cannot determine what holdings of the IJ we should review.[26]

The BIA affirmed the opinion without opinion, prompting the court of appeals to write, "By streamlining the case, the BIA offered no coherent alternative explanation for the decision not dependent on the IJ's deficient finding of facts. Instead, the BIA rested on the IJ's indecipherable explanation."[27] At the end of the opinion, the court of appeals appended the immigration judge's decision.

The case highlighted two problems: poor adjudication at the immigration judge level and affirmance without opinion, wherein the BIA affirmed a decision[28] that the court of appeals considered "literally incomprehensible," "incoherent,"[29] and "indecipherable."[30]

PRACTICAL REPRESENTATION CONSIDERATIONS

Because nearly all the circuits are to some extent reversing BIA and immigration judges' decisions that have fallen below the minimum standard of justice, practitioners must realize that to properly represent a client, the attorney must be focused not only on preparing for court but also creating a record that will carry the day when on appeal. In other words, an attorney must make sure there is a good record for the court of appeals to review. The attorney must preserve issues and must not bend to the will of the immigration court in such a way that will prevent relevant issues and facts from making it into the record.

Preserving Issues

As anyone who has appeared in immigration court knows, there is a tension between satisfying the fact finder—the immigration judge—and ensuring the record is complete. In an asylum case, for example, there are often a great many details involving the life of the asylum-seeker that are relevant to the asylum claim. When an immigration judge becomes impatient and seeks to move the case along, details can be skipped. Should the attorney nevertheless insist on asking his client everything he or she intended, he or she risks aggravating the immigration judge and even souring the judge to the case. While an immigration judge should not deport an alien because of the perceived iniquities of the alien's counsel, a "halo effect" can occur. Since the attorney's first goal is to prevail in immigration court, it is natural not to want to aggravate the fact finder.

In this era of detained aliens and lengthy backlogs,[31] another serious concern is that if a case does not finish in the time allotted to it, the respondent can expect a delay of many months until the continuation of the hearing. A prolonged detention may be the price the foreign national pays for his or her

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[25] 400 F.3d 1185 (9th Cir. 2005).

[26] *Id.* at 1190.

[27] *Id.* at 1193–94.

[28] The summary affirmance regulations, at 8 CFR §1003.1(e)(4), allow a single BIA member to affirm a decision without opinion if the BIA member determines the decision was correct, that any errors in the decision were harmless or nonmaterial, and the case is covered by established precedent. The court of appeals did not chastise the BIA for its summary affirmance, begging the question of how the BIA could determine the elements of appropriateness for summary affirmance when the decision it was affirming made no sense.

[29] *Recinos de Leon v. Gonzales*, 400 F.3d at 1187.

[30] *Id*. at 1190.

[31] In the Supreme Court decision regarding mandatory detention, *Demore v. Kim*, 538 U.S. 510, 529 (U.S. 2003), Chief Justice Rehnquist based his conclusion that mandatory detention was not unconstitutional on government-provided statistics that in 85 percent of cases detention lasts an average time of 47 days and a median of 30 days. In the remaining 15 percent of cases, in which the alien appeals the decision of the immigration judge to the BIA, the appeal takes an average of four months, with a median time that is slightly shorter. *Id*. at 529. For the government to suggest these as accurate statistics to the Supreme Court says more about the conjuring power of government statisticians than government concern for proffering the complete truth. In San Diego, detained aliens do not get to their initial master calendars in much less than 30 days, and cannot expect an individual hearing in much less than two months after that, and often a lot more time than that. Should a case need to be continued, the additional wait will be several more months.

need or desire to present all the details of the case by live testimony.

To avoid being coerced into abbreviating the case and skipping vital details, counsel should present everything that the client will say in court through a detailed application, a detailed declaration, and supporting documentation. Thus, if the client does not have the opportunity to testify about an event, that information is nonetheless in the record.

The importance of developing a written record is illustrated by a recent Ninth Circuit case, *Tchoukhrova v. Gonzales.*[32] In the opening of the opinion, the court described how an infant, Evgueni Tchoukhrova, was harmed during childbirth. The court wrote:

> The next morning, because the induced labor had stopped, hospital personnel decided to forcibly extract the child from its mother's body, breaking its neck in the process. Instead of giving the newborn child medical care, they initially threw Evgueni into a container holding abortion and other medical waste, telling his mother that "they didn't see the reason why he needed to live."

At the hearing, the child's mother, the respondent, did not provide all these details regarding childbirth. Had she tried, the immigration judge would have stopped her. But the details were in the written record. In seeking rehearing, the government proffered an argument that because Ms. Tchoukhrova did not say these things in court, it was "*de novo* fact finding" by the court of appeals. In a dissent, the judges did not accept the argument that declarations found in the administrative record were not part of the record.

Stating at Trial What Needs to Be Stated At Trial

Bullying is unfortunately something that can happen in immigration court. A judge can bully an attorney into not calling a witness or not pursuing a line of questioning. It takes a lot of experience, and sometimes luck, to know what an attorney can skip to appease a judge in the hope of winning a case, without dooming the case by creating an inadequate record on appeal.

In *Wang*, the immigration judge pressured the attorney to skip over issues that needed to be in the record for appeal. One issue was that Mr. Wang fled China, leaving behind parents whose pensions were withheld by the Chinese government as punishment for Mr. Wang's violating the country's birth-control policy. The immigration judge considered Mr. Wang's flight a callous move. Mr. Wang's attorney wanted to explain that he could not pay a fine in China that would have ameliorated his parents' plight and had little alternative but to flee China. The excerpts quoted in the case show the admirable tenacity of the attorney, Yee Ling Poon.

When Poon attempted to question Mr. Wang further about the pension, the IJ instructed her to "[g]et off the pension thing," but she then persisted in pursuing the very theme she told counsel to avoid. Her exchange with Poon went as follows:

> JUDGE TO MS. POON:
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> Q. It's ridiculous. Go away from this issue and move on because it's just insane.
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> A. I am not trying to stick on it. I'm only trying because I was asked for him to explain why he edits [his asylum claim] now.
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> Q. I don't even know why he put it in. To me it just makes me more convinced that your client is willing to do anything, even to the detriment of his parents, to take care of himself. You and I both know, there is nothing that happened in this case, nothing in the sworn statement that's even going to begin to explain why he chose to come here at the moment that he did, okay.
>
> A. I will ask him.
>
> Q. And you can ask him and I know what he's going to say. He finally had the money together or whatever he needed to pay the smugglers because there's nothing here at all and maybe we'll learn something suddenly today. That there's nothing here about the timing and there's nothing to convince me that he shouldn't have gone ahead and paid that fine first before he came here.
>
> A. Because he had no money when he was in China.
>
> Q. I don't know about that.
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> A. That's what he said.
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> Q. Well, that's what, he can say anything he wants.[33]

[32] 404 F.3d 1181 (9th Cir. 2005) *reh'g denied*, 430 F.3d 1222 (9th Cir. 2005).

[33] *Wang*, at 263–64.

In addition to the perseverance of counsel, putting objections in the record is extremely important.

When an immigration judge comes into court and tells you that she is not going to grant a case, either directly or by everything she says and does or has indicated by her track record, the attorney has fewer restraints. Concerns about alienating the one person who can grant the case in immigration court evaporate when the attorney knows success cannot be achieved in the immigration court itself. Then, the only objective is to make a record. In fact, the more apoplectic an immigration judge becomes, the more material needs to be created for the appeal. Of course, a lawyer should create the record within the bounds of propriety and with respect for the court. Such duties are discussed below.

THE GONZALES MEMO

As a result of the sunlight provided by the *New York Times* and other articles discussing the failure of immigration judges to dispense sound and legal decisions, Attorney General Alberto Gonzales issued two memoranda on January 9, 2006, to the immigration judges and the BIA, chiding them for "intemperate and even abusive" behavior to litigants and launching a comprehensive investigation and review of the U.S. immigration courts. Some of the shortcomings of the immigration courts and BIA are due to a lack of resources, overwhelming caseloads, judicial misconduct, and lack of review from the BIA since the streamlining rules initiated by Attorney General John Ashcroft.[34]

THE IMMIGRATION ADJUDICATION STRUCTURE

To understand the governing rules or procedures by which a practitioner can pursue judicial misconduct, it is useful to focus on the structure and confines that immigration judges operate in and to examine common situations faced by immigration practitioners.

Before 1983, immigration judges were part of the Immigration and Naturalization Service (INS) and were known as special inquiry officers. Because of the apparent bias and conflict of interest in this structure, they assumed their current title of immigration judges and were transferred to a new Department of Justice agency, the Executive Office for Immigration Review (EOIR). The EOIR also consisted of the BIA, the Chief Immigration Judge, and other officers.[35] Immigration judges are not administrative law judges but are considered a special type of administrative adjudicative officer.[36] While the Attorney General can directly appoint an immigration judge, the filling of a vacant position is generally announced to the public through various offices in the Department of Justice, with the funneling of the candidates to the Office of Chief of Immigration Judges (OCIJ). The OCIJ makes the recommendation to the deputy director and the director of EOIR, who afterward sends the recommendation to the Deputy Attorney General for the final selection. The requirements to become an immigration judge are that an applicant be a U.S. citizen, possess a J.D. or L.L.B., and have a license and authority to practice law in the United States or its territories. The applicant must have a minimum of seven years of legal experience after bar admission.[37]

THE COMPLAINT STRUCTURE

Before investigating the intricacy of handling judicial misconduct, we must consider some basic concepts of removal proceedings. While immigration proceedings are deemed to be civil and not criminal in nature, the courts and the BIA have consistently held that due process must be provided in immigration court proceedings.[38] In essence, the constitutional requirements of due process are met when the administrative hearing is found to be fair. The BIA has ruled that the alien must suffer prejudice in order to show a denial of a fair hearing.[39] Put another way, harmless error will not suffice to establish the denial of due process. When evaluating a

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[34] *See* S. Legomsky, "Deportation and the War on Independence," 91 *Cornell L. Rev*. 369, 374 (2006) (discussing the empirical effect of streamlining on the BIA).

[35] *See* Board of Immigration Appeals; Immigration Review Function; Editorial Amendments, 48 Fed. Reg. 8056, 8056 (Feb. 25, 1983) (codified at 28 CFR pt. 0); Board of Immigration Appeals; Immigration Review Function; Editorial Amendments, 48 Fed. Reg. 8038, 8039 (Feb. 25, 1983) (codified at 8 CFR pts. 1, 3, & 100).

[36] *See generally* 3 Gordon & Mailman, *Immigration Law and Procedure* §5.1 (rev. ed. 1989).

[37] *See* AILA-EOIR Liaison Agenda Questions 14 (Oct. 17, 2005), *www.aila.org/content/default.aspx?docid=17987*.

[38] *See, inter alia*, *Farrokhi v. INS*, 900 F.2d 697, (4th Cir. 1990); *Larita-Martinez v. INS*, 220 F.3d 1092 (9th Cir. 2000); *In re Huete*, 20 I&N Dec. 250 (BIA 1991).

[39] *See In re Santos*, 19 I&N Dec. 105 (BIA 1984).

possible claim of judicial misconduct, one must focus on the concept of due process.

Many practitioners and the American Immigration Lawyers Association (AILA) voiced complaints and sought reform of the disciplinary systems because there is no clear standard for evaluating and disciplining immigration judges,[40] unlike the disciplinary system that exists for private attorneys practicing before EOIR, which is quite efficient. (One can find the list of disciplined attorneys on the EOIR's website posted almost in real time.[41]) But the provisions for disciplining private attorneys do not apply to government attorneys. Instead, government attorneys and immigration judges are subject to the Standard of Conduct for Executive Branch Employees.[42] The Office of Professional Responsibility (OPR) of the Department of Justice is responsible for the investigation of allegations of misconduct by immigration judges.[43] Although the Office of the Chief of the Immigration Judge (OCIJ) also accepts complaints of judicial misconduct,[44] it appears the more effective practice would be to submit allegations of misconduct to the OPR.[45] The EOIR stated at an AILA liaison meeting that the OCIJ will make its own preliminary assessment, and if it determines that the charges have substance, only then will it refer the complaint to the OPR.[46] An immigration practitioner's best approach is to file the charges with OPR, since it is separate from the EOIR branch.[47]

COMPLAINT STANDARDS

What is the standard that governs misconduct by immigration judges? Who investigates to determine whether the charge is actionable? In April 2001, the Director of EOIR sent a memorandum to all BIA members, immigration judges, and administrative law judges outlining the adoption of an ethics manual. According to the memo, the manual is essentially an annotated version of the Standard Conduct for Executive Branch Employees.[48] This manual contains four parts: *Ethics Handbook for Immigration Judges, Members of the Board of Immigration Appeals, and the Administration Law Judges*; Standards of Conduct for Executive Branch Employees and the Supplemental Standards of Conduct for Department of Justice Employees; Departmental Memoranda and Orders that bear on ethical considerations EOIR judges may encounter; and the American Bar Association (ABA) Model Code of Judicial Conduct (MCJC). Importantly, the manual only serves as a "useful guide for anyone seeking guidance on particular ethical issues."[49] Nevertheless, the manual does acknowledge the ABA Model Code of Judicial Conduct by stating that "[a]lthough EOIR judges are not required to comply with the Model Code of Judicial Conduct, its canons and commentary represent principles of ethical conduct EOIR Judges should aspire to achieve."[50] Practitioners should also look to the state rules relating to professional responsibility because the immigration judge, if an attorney, will be a member of a state bar. Members of a state bar are subject to those ethical standards as well.

In looking at the specific provisions that might provide guidance to practitioners, Canon 3 of the MCJC may be helpful:

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[40] P. MacLean, "Immigration Bench Plagued by Flaws," 27 *Nat'l L.J.* 1 (Feb. 6, 2006) (describing the difficulty in disciplining immigration judges).

[41] *See* Executive Office for Immigration Review, Disciplinary Release (Feb. 2006), *www.usdoj.gov/eoir* (illustrating the website's near constant updates regarding attorneys whom they discipline).

[42] 5 CFR §2365, *et. seq*.

[43] *See* Jurisdiction for Investigation of Allegations of Misconduct by Department of Justice Employees, Att'y Gen. Order No. 1931-94 (Nov. 8, 1994), *www.usdoj.gov/ag/readingroom/agencymisconducta.htm*.

[44] *See* AILA-EOIR Liaison Agenda Questions (Mar. 7, 2002), *published on* AILA InfoNet at Doc. No. 02041871 (*posted* Apr. 18, 2002).

[45] AILA-EOIR Liaison Agenda Questions (Mar. 16, 2005), *published on* AILA InfoNet at Doc. No. 05051268 (*posted* May 12, 2005).

[46] AILA-EOIR Liaison Minutes of March 7, 2002, *published on* AILA InfoNet at Doc. No. 02041871 (*posted* Apr. 18, 2002). Specifically, on question 4, the response from the EOIR states, "A complaint against an Immigration Judge may be filed with the OCIJ, and it may later be referred to OPR. A complaint can also be filed directly with OPR." A copy of this memo also can be found AILA's *Interpretations of Immigration Policy: Cables, Memos, and Liaison Minutes for 2002*. For more information or to order a copy of this book, see *www.ailapubs.org*.

[47] Dep't of Justice, *Ethics Manual for Members of the Board of Immigration Appeals, Immigration Judges, and Administrative Law Judges Employed by the Executive Office for Immigration Review* 4 (2001), *www.usdoj.gov/eoir/statspub/handbook.pdf* [hereinafter *Manual*].

[48] 5 CFR §2635 (2005).

[49] *Manual*, *supra* note 47.

[50] *Id*.

> A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.[51]

It appears that this problem exists with some immigration judges currently on the bench.[52] "Time and time again, we have cautioned immigration judges against making intemperate or humiliating remarks during immigration proceedings. Three times this year we had to admonish immigration judges who failed to treat the asylum applicants in their court with the appropriate respect."[53]

Another provision of Canon 3 of the MCJC is relevant:

> A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and other subject to the judge's direction and control to do so.[54]

Several immigration judges have breached this canon by their actions. The *Los Angeles Times* reported on an immigration judge who wrongly deported a U.S. citizen and "had failed to conduct herself as an impartial judge but rather as a prosecutor anxious to pick holes in the petitioner's story."[55] Another immigration judge, now retired, was often a subject of criticism and motions to recuse by the local bar. He became infamous for various remarks, including his joking reference to himself as "Me Tarzan" to a Ugandan asylum-seeker named Jane, a rape victim. In another case, when the attorney suggested that his client take off his shirt to show his scars, the same immigration judge yelled in the courtroom, "I am not going to turn this courtroom into a monkey house."[56]

WHEN AND HOW TO COMPLAIN

The question remains: How should a litigant handle a situation when he or she encounters bias from the immigration judge? Bias may manifest in many ways: remarks off the record or rulings unsubstantiated by law, assumption of a prosecutorial role in the hearing, a ruling that was appealed and reversed and remanded to the same immigration judge for an additional hearing, or adverse credibility findings on shaky grounds. The key analysis is whether the immigration judge deprived the client of a fair hearing and due process.

If the practitioner feels that the immigration judge denied a fair hearing, the practitioner must make a motion to recuse during the hearing. Whether it is a written or oral motion, the practitioner must take steps to perfect the record for appellate review. The *Immigration Judge Benchbook*[57] provides instructions to immigration judges regarding this matter. The *Benchbook* directs the immigration judge never to go off the record to deal with the issue of recusal. A memorandum issued by the Chief Immigration Judge in March 2005 provides further guidance regarding recusal.[58] The memo sets out the specific criteria under which immigration judges must recuse themselves, as well as the objective criteria for situations that fall outside the mandatory requirement. In a recusal situation, practitioners should refer to this memorandum for guidance.

The practitioner should rely on his or her sound professional judgment in deciding whether to take further steps. If the conduct is egregious, perhaps the next step is the formal filing of a complaint with OPR or OCIJ. The complaint should document in detail the alleged judicial misconduct and cite the alleged violations of the Standards of Conduct for Executive Employee, the *Ethics Manual*, or the MCJC. In this situation, the immigration judge has possibly violated the requirement that "employees shall put forth honest effort in the performance of their duties."[59] The alleged conduct may also violate

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[51] Model Code of Judicial Conduct Canon 3 (1997), available at *www.abanet.org/cpr/mcjc/mcjc_home.html*.

[52] A. Simmons, "Some Immigrants Meet Harsh Face of Justice," *L.A. Times*, Feb. 12, 2006; A. Liptak, *supra note* 6, at A1.

[53] Wang, *supra* note 33 (quoted in MacLean, *supra* note 7).

[54] *Supra* note 51.

[55] Simmons, *supra* note 52.

[56] *Id*.

[57] *Immigration Judge Benchbook* 214 (Oct. 2001), *www.usdoj.gov/eoir/statspub/benchbook.pdf*.

[58] Michael J. Creppy, Operating Policies and Procedures Memorandum 05-02: EOIR on Procedures for Issuing Recusal Orders in Immigration Proceedings, Mar. 21, 2005, *www.usdoj.gov/eoir/efoia/ocij/oppm05/05-02.pdf*; *published on* AILA InfoNet at Doc. No. 05032369 (*posted* Mar. 23, 2005).

[59] *See* 5 CFR §2365; *Ethics Manual*, *supra* note 47.

several canons of the MCJC.[60] The drawback of these actions is the requirement of specificity in providing the name of the client and case number, which could invite retaliation. If this is a concern, the practitioner may consult the chair of AILA's EOIR committee regarding the possibility of AILA itself filing an informal and anonymous complaint of judicial misconduct to the regional assistant chief immigration judge. Whatever action is selected for dealing with possible judicial misconduct, a practitioner should keep in mind the client's best interest.

Remember, the litmus test is whether the immigration judge denied the client due process under the law, to wit—was the client denied a fair hearing?

CONCLUSION

With increased awareness that there are serious problems with immigration courts, attorneys must be proactive in preserving issues in court to raise at the courts of appeal. And while attorneys have outlets to register complaints against judges who deny their clients due process, doing so requires careful preparation and documentation.

[60] *Supra* note 51.