

Immigration Court Practitioner's Guide **Responding To Inappropriate Immigration Judge Conduct**



CATHOLIC LEGAL
IMMIGRATION
NETWORK, INC.

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I. INTRODUCTION

Immigration judges, or IJs, face tremendous burdens and pressures to manage and dispose of enormous caseloads.¹ As more noncitizens are targeted for the initiation of removal proceedings under the Trump Administration's broadened enforcement priorities,² immigration court dockets will likely become even more backlogged.³ Given these strains and the reality of human fallibility, there will continue to be instances in which practitioners observe inappropriate and problematic IJ conduct. Some such instances have garnered wide public attention.⁴

This guide is intended to provide practitioners with information about the range of options available when inappropriate IJ conduct occurs, including filing an administrative complaint with the agency where the immigration court is housed, the Executive Office for Immigration Review (EOIR), which is part of the Department of Justice (DOJ). This guide is not meant to encourage or discourage practitioners from taking a particular action, or any action, in response to problematic IJ conduct. An IJ might have a bad day or a temporary lapse of judgment. Not every such lapse should or must become the subject of a complaint. In some cases, the conduct can be adequately addressed through the appeals process during the course of an individual case's litigation. In some circumstances, for example when an IJ displays a pattern of misapplying or misinterpreting the law or abusing discretionary authority after several remands or reversals after appeal to the Board of Immigration Appeals (BIA), the BIA itself may bring the problem to the attention of the Office of the Chief Immigration Judge (OCIJ).⁵ A stinging rebuke by a U.S. Court of Appeals will also likely garner the

1 TRACImmigration, *Immigration Court Backlog Tool: Pending Cases and Length of Wait in Immigration Courts* (last visited July 26, 2017), http://trac.syr.edu/phptools/immigration/court_backlog/ (reflecting that as of June 2017, the immigration court backlog had risen to 610,524); see also TRACImmigration, *Despite Hiring, Immigration Court Backlog and Wait Times Climb* (May 2017), <http://trac.syr.edu/immigration/reports/468/> (“As of the end of April 2017, the number of cases waiting for a decision had reached an all-time high of 585,930.”). Although the latter report notes that 79 IJs had been hired in the past 18 months, it observes that “there is little evidence that this increase in hiring is sufficient to handle the incoming caseload, let alone make a dent in the court’s mountainous backlog.” See also Hon. Dana Leigh Marks, *Now Is the Time to Reform the Immigration Courts*, INT’L AFF. F., at 48 (Winter 2016) (“The delicate balance that has allowed this complicated system to function in the past has begun to unravel due to the crushing caseloads currently facing the courts.”).

2 See Exec. Order No. 13768, 82 Fed. Reg. 8799, *Enhancing Public Safety in the Interior of the United States* § 5 (Jan. 25, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united> (announcing broad new enforcement priorities); Memorandum, DHS Sec’y John Kelly, *Enforcement of the Immigration Laws to Serve the National Interest* § A (Feb. 20, 2017), available at https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf (detailing enforcement priorities); CLINIC, *Interior Enforcement Executive Order and DHS Memo FAQs* (Mar. 2017), available at <https://cliniclegal.org/resources/interior-enforcement-executive-order-and-dhs-memo-faqs>.

3 See, e.g., TRACImmigration, *Immigration Court Dispositions Drop 9.3 Percent Under Trump* (July 17, 2017), <http://trac.syr.edu/immigration/reports/474/> (noting that new policies including “shifting judge assignments, revised case processing priorities, and the termination of prosecutorial discretion (‘PD’) closures” contributed to the decline); Dana Leigh Marks, *Immigration Courts Need Independence to Work Fairly and Efficiently*, NEWSDAY, July 16, 2017, <http://www.newsday.com/opinion/commentary/want-to-boost-immigration-courts-1.13801499> (noting rising immigration court caseloads and dropping case completion rates and arguing for structural reform).

4 See, e.g., Carimah Townes, *Judge Won’t Delay Hearing for Lawyer’s Maternity Leave, Then Berates Her for Bringing Baby to Court*, THINK PROGRESS, Oct. 17, 2014, <https://thinkprogress.org/judge-wont-delay-hearing-for-lawyer-s-maternity-leave-then-berates-her-for-bringing-baby-to-court-a698db0177fd>; Dan Whisenhunt, *Emory University Law Students Issue Damning Report about Behavior of Atlanta Immigration Judges*, ATLANTA LOOP, May 3, 2017, <http://www.atlantaloop.com/emory-university-law-students-issue-damning-report-behavior-atlanta-immigration-judges/>.

5 According to the EOIR’s website, “[t]he Office of the Chief Immigration Judge (OCIJ) is led by the chief IJ, who establishes operating policies and oversees policy implementation for the immigration courts. OCIJ provides overall program direction and establishes priorities for approximately 250 IJs located in 58 immigration courts throughout the Nation.” EOIR, *Office of the Chief*

attention of the OCIJ.⁶

In some situations, however, a complaint filed by the practitioner may be the only effective means of bringing an IJ's problematic conduct to the attention of EOIR. Conduct that is not otherwise reflected in the record (and thus is not easily brought to the BIA's attention in an appeal) and that negatively impacts a party or his or her ability to obtain justice should be brought to the attention of EOIR. Off-record discussions, intemperance, and other conduct that shows bias or prejudging of cases or issues will not come to the attention of EOIR unless they are communicated by a complaint or in an appeal. One goal of this guide is to help practitioners determine whether and how to file a complaint.

Section II of this guide discusses the requirements for becoming an IJ. Section III covers DOJ rules and guidance governing IJ behavior. Section IV provides an overview of the options that a practitioner has when he or she wishes to raise or report problematic IJ conduct. These could include any of the following:

- informal discussion with the IJ;
- reporting complaints to the Assistant Chief Immigration Judge (ACIJ);
- reporting administrative or procedural issues to the court administrator;
- filing a motion to recuse;
- filing an interlocutory appeal;
- addressing the issue through the appeals process;
- making a referral to the relevant state bar association; and
- filing an administrative complaint.

Section V discusses factors to consider in deciding whether to file a complaint about an IJ's conduct. Section VI provides an overview of the complaint process and what to expect after a complaint is filed with EOIR, including the range of potential outcomes. Section VII provides a short conclusion, and Section VIII gives further resources on these topics.

Immigration Judge, <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge>.

⁶ For an example of such a rebuke, see for example Judge Posner's dissent in *Chavarria-Reyes v. Lynch*, 845 F.3d 275, 280-82 (7th Cir. 2016) (stating that the respondent was "railroaded by the immigration judge" and calling EOIR "the least competent federal agency, though in fairness it may well owe its dismal status to its severe underfunding by Congress, which has resulted in a shortage of IJs that has subjected them to crushing workloads").

II. REQUIREMENTS FOR BECOMING AN IMMIGRATION JUDGE

Unlike Article III judges who are part of the federal judiciary, IJs are federal government employees who work within EOIR, an administrative agency.⁷

The qualifications for the IJ position that EOIR requires include: (1) being a U.S. citizen; (2) being registered in the Selective Service, if applicable; (3) having a law degree and being admitted to a bar in the United States; and (4) having a minimum of seven years of post-bar legal experience.⁸ According to an EOIR announcement about IJ hiring from 2010, “[a]pplicants are evaluated on the following criteria: 1) ability to demonstrate the appropriate temperament to serve as a judge; 2) knowledge of immigration laws and procedures; 3) substantial litigation experience, preferably in a high volume context; 4) experience handling complex legal issues; 5) experience conducting administrative hearings; and 6) knowledge of judicial practices and procedures.”⁹ New IJs must also undergo a security clearance process and it can take more than two years for EOIR to hire new judges, according to a 2017 Government Accountability Office report.¹⁰

According to the EOIR website last viewed on the date of this guide’s issuance, there are approximately 250 IJs working in 58 immigration courts across the United States.¹¹ However, e-mail correspondence received by the authors from the EOIR Office of Communications and Legislative Affairs indicates that as of June 2017 the number of IJs may be significantly higher, at approximately 326 IJs.¹² A review of the biographies posted on the EOIR website of 84 IJs hired from June 2016 to June 2017 shows that approximately 82 percent were previously Immigration and Customs Enforcement trial attorneys or otherwise had a background as a federal prosecutor.¹³ Immigration advocates highlighted this fact at a public hearing before the Inter-American Commission on Human Rights on December 9, 2017. The petitioners comprised of non-profits, including CLINIC, private attorneys, and law school clinics testified, in part, about the importance of diversifying the pool of IJs by choosing IJs from the immigrant defense community as well as those with a prosecutor background.¹⁴

⁷ See, e.g., 8 C.F.R. § 1003.10(a) (“The immigration judges are attorneys whom the Attorney General appoints as administrative judges within the Office of the Chief Immigration Judge to conduct specified classes of proceedings, including hearings under section 240 of the Act. Immigration judges shall act as the Attorney General’s delegates in the cases that come before them.”).

⁸ EOIR Fact Sheet, *Executive Office for Immigration Review Immigration Judge Hiring Initiative* (Mar. 11, 2010), AILA Infonet Doc. No. 10031261, at 2 [hereinafter “EOIR IJ Hiring Fact Sheet”], available at <http://www.aila.org/infonet>.

⁹ *Id.*

¹⁰ U.S. Government Accountability Office Report to Congressional Requestors, *Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, at 40 (June 2017), available at <http://www.gao.gov/assets/690/685022.pdf>.

¹¹ EOIR, *Office of the Chief Immigration Judge*, <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge>.

¹² E-mail from EOIR Office of Communications and Legislative Affairs (June 20, 2017) (on file with authors).

¹³ EOIR, *News and Information*, <https://www.justice.gov/eoir/news-and-information> (reviewed swearing in announcements from June 27, 2016 through June 16, 2017) (last visited June 20, 2017). According to e-mail correspondence received from EOIR’s Office of Communications and Legislative Affairs discussing the most recent position held before becoming an IJ, of the IJ corps as of June 2017, 126 came from ICE, 67 came from private practice, and 133 came from other backgrounds. Of those 133 who came from other backgrounds, 79 came from another government position (not EOIR or ICE), 32 from another EOIR position, 13 from non-profits, 5 from the Armed Forces, and 4 from academia. E-mail from EOIR Office of Communications and Legislative Affairs (June 20, 2017) (on file with authors).

¹⁴ A video recording of the hearing and a copy of the written submission presented to the Commission can be viewed on the CLINIC website. CLINIC, *Request for Hearing on Human Rights of Asylum Seekers in US*, <https://cliniclegal.org/resources/request-hearing->

III. DOJ RULES AND GUIDANCE COVERING IMMIGRATION JUDGE CONDUCT

IJs should be held to the highest of judicial standards, not only because they hold the future lives of respondents in their hands, but also because they are frequently the first introduction to the U.S. judicial system for a respondent and may be the only such contact a respondent ever has. For a statement of the honor and responsibility of this position, readers may wish to review former EOIR Director Juan P. Osuna's June 19, 2015 welcome to new IJs, in which he notes,¹⁵

Perhaps most important, you will be a face of justice—of the Department of Justice, and of the ideal of justice. To paraphrase our Attorney General, in the gritty reality of immigration court, your work will be ennobling, and in the highest spirit of public service.

An ancient philosopher once said that justice lies at the intersection of order and compassion. Without order, society has no rules, the laws have no meaning and chaos ensues. Without compassion, those same laws become draconian, harsh, inflexible, inhuman. Without a proper balancing between order and compassion, law simply cannot work, and serves no one.

IJs are subject to various rules and guidance concerning their conduct. The Immigration and Nationality Act (INA) defines an IJ as “an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings” and directs that an IJ “shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe, but shall not be employed by the Immigration and Naturalization Service.”¹⁶ IJs are considered attorney adjudicators and are subject to the oversight of the DOJ's Office of Professional Responsibility.¹⁷ As DOJ employees, they are also subject to the oversight of the DOJ's Office of the Inspector General.¹⁸ IJs are administered an oath of office prior to assuming their sworn duties:

[human-rights-asylum-seekers-us.](#)

15 EOIR, *Executive Office for Immigration Review Director Juan P. Osuna Welcomes New Immigration Judges at Investiture Ceremony* (June 19, 2015), <https://www.justice.gov/opa/speech/executive-office-immigration-review-director-juan-p-osuna-welcomes-new-immigration-judges>.

16 8 U.S.C. § 1101(b)(4).

17 According to its website, the DOJ's “Office of Professional Responsibility, reporting directly to the Attorney General, is responsible for investigating allegations of misconduct involving Department attorneys that relate to the exercise of their authority to investigate, litigate or provide legal advice, as well as allegations of misconduct by law enforcement personnel when related to allegations of attorney misconduct within the jurisdiction of OPR.” DOJ, *Office of Professional Responsibility*, <https://www.justice.gov/opr>.

18 Per the DOJ's OIG website, this office “is a statutorily created independent entity whose mission is to detect and deter waste, fraud, abuse, and misconduct in DOJ programs and personnel, and to promote economy and efficiency in those programs. The OIG investigates alleged violations of criminal and civil laws by DOJ employees and also audits and inspects DOJ programs. The Inspector General, who is appointed by the President subject to Senate confirmation, reports to the Attorney General and Congress.” USDOJ OIG, *About the Office*, <https://oig.justice.gov/about/>.

*I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.*¹⁹

It is important to note that IJs do not take a judicial oath. The oath they take is administered to all civil service employees.

IJs are required to maintain active membership with at least one state bar, and to be in good standing.²⁰ Accordingly, they are subject to the rules of professional conduct and CLE requirements in their jurisdictions as are any other attorneys. IJs also are subject to various department and agency rules, including the Ethics and Professionalism Guide for Immigration Judges (“Guide”).²¹ The Guide’s Preamble reads as follows:

To preserve and promote integrity and professionalism, Immigration Judges employed by the [EOIR] should observe high standards of ethical conduct, act in a manner that promotes public confidence in their impartiality, and avoid impropriety and the appearance of impropriety in all activities.²²

The Guide, which states that it is binding on all IJs, contains *inter alia* the following:

- The Guide directs that IJs “should be patient, dignified, and courteous, and should act in a professional manner towards all litigants, witnesses, lawyers and others with whom the Immigration Judge deals in his or her official capacity, and should not, in the performance of official duties, by words or conduct, manifest improper bias or prejudice;”²³
- The Guide provides non-exhaustive examples of “manifestations of bias or prejudice” including “epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant reference to personal characteristics;”²⁴
- The Guide prohibits an IJ from “adjudicating any cases in which he/she participated personally and substantially prior to becoming an Immigration Judge;”²⁵ and
- The Guide directs that an IJ “should not initiate, permit, or consider *ex parte* communications, or consider other communications made to the Immigration Judge outside the presence of the parties or their lawyers, concerning a pending matter” except in limited and specified circumstances.²⁶

IJs are subject to performance appraisals that are designed to gauge their ability to interpret and apply the law, their ability to contribute to the efficiency of EOIR through completing cases and issuing decisions in a timely

19 5 U.S.C. § 3331; see U.S. Office of Personnel Management, *Oath*, https://archive.opm.gov/constitution_initiative/oath.asp.

20 Cf. EOIR IJ Hiring Fact Sheet, *supra* note 8, at 2.

21 EOIR, *Ethics and Professionalism Guide for Immigration Judges*, available at <https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf> [hereinafter “IJ Ethics Guide”].

22 IJ Ethics Guide, *supra* note 21, at 1.

23 *Id.* at 3 § IX.

24 *Id.*

25 *Id.* at 5 § XI.

26 *Id.* at 15 § XXXII.

manner, and their demeanor.²⁷ They are also subject to the following sources of authority and guidance:

- The Immigration and Nationality Act (INA);
- The federal regulations governing immigration proceedings found at 8 C.F.R., including the duty to resolve issues in an “impartial manner”;²⁸ and
- Numerous guidance memoranda (Operating Policies and Procedures Memoranda, or OPPM).²⁹ The OPPM cover such topics as continuances and administrative closure, changes of venue, attorney discipline, procedures for going off-record during proceedings, procedures for issuing recusal orders, guidelines for facilitating *pro bono* legal services, guidelines for telephonic appearances, and asylum application filing procedures.³⁰ These memoranda and other authority also direct that IJs provide special protections and procedures to certain vulnerable populations, such as unaccompanied children, those with mental capacity concerns or other disabilities, and those with limited English proficiency.³¹

While not binding on IJs, the American Bar Association’s Code of Judicial Conduct is referenced in EOIR’s memorandum about IJ recusal as setting forth principles to which IJs should aspire.³² The ABA Code’s Preamble states that judges “should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives.” Canon 2 of the ABA Code provides a number of rules aimed at the judicial duties of impartiality, competence, and diligence.³³ Practitioners may wish to familiarize themselves with the ABA Code because, while not binding on IJs, its standards set forth principles that may help define inappropriate IJ conduct.

IJs are supervised by ACIJs, who usually are not stationed on-site at the local immigration court but rather are based out of another location or out of EOIR headquarters in Falls Church, Virginia.³⁴ Each of the ACIJs who

27 It appears that these performance evaluations were ordered to be put into place by then Attorney General Alberto Gonzales. See DOJ, Memo from Attorney General, *Measures to Improve the Immigration Courts and the Board of Immigration Appeals*, at 1 (Aug. 9, 2006), available at <https://www.justice.gov/sites/default/files/ag/legacy/2009/02/10/ag-080906.pdf> (ordering that the Deputy Attorney General “develop and implement a process to enable EOIR leadership to review periodically the work and performance of each IJ and member of the Board of Immigration Appeals”) [hereinafter “EOIR Improvement Memo”]. The authors did not find information about how often these reviews are required or their scope or substance. See TRACImmigration, *Supporting Details: Implementation of the 22 Improvement Measures*, available at <http://trac.syr.edu/immigration/reports/194/details.html> (noting that as of the article’s publication in 2008 “EOIR has not conducted any annual performance evaluations of immigration court judges or Board of Immigration Appeals members, or set a firm date for the first set of review”).

28 8 C.F.R. § 1003.10(b).

29 Some OPPM are catalogued on the EOIR website. EOIR, *OPPM Log*, <https://www.justice.gov/eoir/oppm-log>.

30 See *id.*

31 See EOIR OPPM 07-01, *Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children* (May 22, 2007), available at <https://www.justice.gov/sites/default/files/eoir/legacy/2007/05/22/07-01.pdf>; EOIR, *The Executive Office for Immigration Review’s Plan for Ensuring Limited English Proficient Persons Have Meaningful Access to EOIR Services*, available at <https://www.justice.gov/sites/default/files/eoir/legacy/2012/05/31/EOIRLanguageAccessPlan.pdf>; *Matter of M-A-M*, 25 I. & N. Dec. 474, 478 (BIA 2011) (directing that “[i]f an Immigration Judge determines that a respondent lacks sufficient competency to proceed with the hearing,” the IJ “shall prescribe safeguards to protect the rights and privileges of the alien”) (internal citations omitted).

32 EOIR OPPM 05-02, *Procedures for Issuing Recusal Orders in Immigration Proceedings*, at 2 nn. 2 & 3 (Mar. 21, 2005) available at <https://www.justice.gov/sites/default/files/eoir/legacy/2005/03/22/05-02.pdf> (stating that the ABA judicial canons “do apply to immigration judges”). The ABA Model Code of Judicial Conduct (2011 ed.) is available at https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct.htm.

33 ABA Model Code of Judicial Conduct, *Canon 2* (2011 ed.), available at https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2.html.

34 The EOIR website lists twelve ACIJs, based in locations such as New York, Falls Church, Miami, Los Angeles, Chicago, Atlanta,

supervise courts is responsible for supervising a number of the approximately 58 local immigration courts.³⁵ For this reason, the court administrators (CAs), who are also supervised by the ACIJs, can play a key role in the relationship between the IJ and the ACIJ.³⁶ The CA may frequently address local issues and act as an interface with the Department of Homeland Security (DHS), American Immigration Lawyers Association (AILA), or other private attorneys, and can advise attorneys of the proper avenue to redress grievances with an IJ.³⁷ However, the extent to which a CA has a healthy ongoing relationship with the IJs in the particular court, or with the ACIJ, and the extent to which the CA effectively communicates with DHS and the private bar, will vary from court to court.³⁸

Depending on the court and the particular ACIJ, the fact that the ACIJ is often not stationed in the local immigration court could be advantageous for practitioners wishing to report problematic IJ behavior. For example, there may be situations where a report to the local CA could be shared with the IJ and prompt retaliation, whereas the ACIJ's distance from the IJ could make it more effective for practitioners to report problems there. As discussed further below, EOIR's complaint process for reporting problematic IJ conduct contemplates that complaints can be filed with the supervising ACIJ.³⁹

The relationship between ACIJs and IJs can be an open, easy and professional one – but that may not always be the case.⁴⁰ Some ACIJs only meet the IJs they supervise at annual conferences or when they are sent to the field to correct a significant problem.⁴¹ Some ACIJs are very familiar with the duties of an IJ because they have themselves performed those duties; some are entirely new to EOIR when they assume the duties as an ACIJ.⁴² If an IJ does not follow the instructions of an ACIJ, he or she can be charged with insubordination.⁴³

Newly-appointed IJs are subject to a two-year probationary period, during which time they can be terminated from the position fairly easily.⁴⁴ Once the probationary period has successfully concluded, they are subject to various protections of law, including the EOIR's Agreement with the National Association of Immigration

San Francisco, Tucson, and San Diego. EOIR, *ACIJ Assignments – June 2017*, <https://www.justice.gov/eoir/acij-assignments> (last visited June 20, 2017).

35 *See id.*

36 Court administrator information for each local immigration court can be found on the EOIR website. EOIR, *EOIR Immigration Court Listing*, <https://www.justice.gov/eoir/eoir-immigration-court-listing>.

37 EOIR, *Immigration Court Practice Manual*, Ch. 1.3(b), available at <https://www.justice.gov/eoir/office-chief-immigration-judge-0>.

38 Information obtained from Eliza C. Klein, former IJ (1994-2015) and Grievance Chair for NAIJ from January 2012 to January 2015.

39 *See infra* Section VI.

40 Information obtained from Eliza C. Klein, former IJ (1994-2015) and Grievance Chair for NAIJ from January 2012 to January 2015.

41 *Id.*

42 *Id.*

43 *See, e.g.*, Hon. Denise Noonan Slavin & Hon. Dana Leigh Marks, *Conflicting Roles of Immigration Judges: Do You Want Your Case Heard by a "Government Attorney" or by a "Judge"?*, 16 BENDER'S IMMIGR. BULL. 1785 (Nov. 15, 2011), available at <http://nieman.harvard.edu/wp-content/uploads/pod-assets/Image/microsites/immigration2013/resources/Conflicting%20Roles%20of%20Immigration%20Judges,%2016%20Bender's%20Immig%20Bulletin%201785.%202011-15-11.pdf> (noting that IJs, as government employees, are "subject to the rules relating to employee insubordination if [they] fail[] to follow [their] supervisor's instructions").

44 *See* EOIR Improvement Memo, *supra* note 27, at 2 ("Like many other Department employees, newly appointed IJs and Board members have a two-year trial period of employment. The Director of EOIR should use that period both to assess whether a new appointee possesses the appropriate judicial temperament and skills for the job and to take steps to improve that performance if needed.").

Judges (NAIJ).⁴⁵ NAIJ is the IJ union, and IJs are entitled to representation and other assistance should they become the subject of a complaint.⁴⁶ NAIJ also is frequently able to provide guidance and mentoring to IJs and may be better able to help them develop insight and skills.⁴⁷

IJs as a general rule are extremely hard-working, and face pressure to complete the cases on their docket in an efficient manner.⁴⁸ They are of course expected to administer the laws fairly and to act with judicious temperament, but unless they are falling very short of these goals their most frequent interaction with the ACIJ will concern their ability to “handle the docket.”⁴⁹

In the past, the training provided to IJs has included an annual, mandatory week-long conference, either in person or by DVD.⁵⁰ The 2017 annual conference was cancelled altogether without offering any training alternative as a replacement, ostensibly due to the pressures of the docket.⁵¹ EOIR sometimes provides DVD trainings on particular topics, and is mandated to provide annual training on religious-based persecution. EOIR also must provide time off the bench for IJs to meet their state bar’s CLE requirements. The annual conference usually afforded these opportunities for all IJs. The DVD trainings do not adequately replace the value of in-person conferences.⁵² The lack of an in-person conference hampers IJs’ ability to interface with each other and exchange ideas on how to handle difficult issues or situations that arise in the courtroom. Particularly for IJs in small court locations, in-person conference opportunities could also provide valuable time to build working relationships with IJ colleagues in other jurisdictions. Given the number of hours each day that IJs are expected to be on the bench, their day-to-day ability to discuss with colleagues issues that arise in their particular courts is very limited.⁵³ This is particularly true given that IJs must devote their scant time off the bench to ruling on motions and reviewing files, and because there is not much time when IJs in a particular court would be off the bench at the same time. For example, IJs are typically scheduled to be on the bench for four and a half days a week, leaving approximately one half-day a week to review files and rule on pending matters.⁵⁴ IJs do have assistance from judicial law clerks and interns who help with research and drafting of memos and decisions.⁵⁵

45 National Association of Immigration Judges Website, <https://www.naij-usa.org/>

46 National Association of Immigration Judges, *About the NAIJ*, <https://www.naij-usa.org/about>.

47 Information obtained from Eliza C. Klein, former IJ (1994-2015) and Grievance Chair for NAIJ from January 2012 to January 2015.

48 See Hon. Dana Leigh Marks, *Immigration Courts Should Be Independent – Not an Arm of the Administration*, THE AMERICAN PROSPECT, Apr. 24, 2017, <http://prospect.org/article/immigrant-courts-should-be-independent-not-arm-administration> (discussing how IJs are under-resourced); Slavin & Marks, *supra* note 43, at 1787 (discussing case completion goal system in immigration court and noting that IJs “perceive these goals to be mandatory and frequently in conflict with ideal conditions for adjudicating cases fairly and independently”).

49 Information obtained from Eliza C. Klein, former IJ (1994-2015) and Grievance Chair for NAIJ from January 2012 to January 2015.

50 Much of the information in this paragraph was obtained from Eliza C. Klein, former IJ (1994-2015) and Grievance Chair for NAIJ from January 2012 to January 2015.

51 See Sarah Sherman-Stokes, *Immigration Judges Were Always Overworked. Now They’ll Be Untrained Too*, WASH. POST, July 11, 2017, available at https://www.washingtonpost.com/opinions/immigration-judges-were-always-overworked-now-theyll-be-untrained-too/2017/07/11/e71bb1fa-4c93-11e7-a186-60c031eab644_story.html?utm_term=.7c61af1e465c.

52 Information obtained from Eliza C. Klein, former IJ (1994-2015) and Grievance Chair for NAIJ from January 2012 to January 2015.

53 IJs are scheduled to be on the bench for 7 to 7.5 hours a day Monday through Thursday and 3 to 4 hours a day on Fridays. The schedule is in accordance with an agenda for each IJ that their ACIJ must approve, and the NAIJ Agreement with EOIR sets forth the limits. Information obtained from Eliza C. Klein, former IJ (1994-2015) and Grievance Chair for NAIJ from January 2012 to January 2015.

54 See *supra* note 53.

55 Judicial law clerks are law school graduates who frequently get admitted to the bar in the first year of the two-year position. Interns

For the most part, however, IJs are left to their own devices when it comes to managing their courtrooms.

When an IJ makes mistakes, it can take many months or even years before this comes to the attention of a supervising ACIJ or the BIA. This is because of the timeframe for an immigration case to make its way through the appeals process, and because often problems go on for a lengthy time before someone attempts informal resolution or makes a complaint. In the meantime, the IJ may be unaware of the fact that he or she is making a mistake at all, and may lack perspective to comprehend the effect of this mistake on the parties. The IJ may actually sincerely believe that he or she is doing the job the way he or she is supposed to, and that an aggrieved party is simply a miscreant or whiner.⁵⁶ It can be very difficult to change embedded behaviors or reinforced perceptions, but practitioners have options when confronting inappropriate IJ conduct.

are typically rising 3L law students who work full-time over the summer; some courts may also have part-time interns during the academic year. Intern positions are unpaid. Information obtained from Eliza C. Klein, former IJ (1994-2015) and Grievance Chair for NAIJ from January 2012 to January 2015.

⁵⁶ Much of the information in this paragraph was obtained from Eliza C. Klein, former IJ (1994-2015) and Grievance Chair for NAIJ from January 2012 to January 2015.

IV. OVERVIEW OF OPTIONS FOR ADDRESSING PROBLEMATIC IMMIGRATION JUDGE CONDUCT

While this advisory will focus on the process for filing a complaint to report inappropriate IJ conduct, practitioners should remember that other options besides filing a complaint exist for raising concerns about IJ conduct. Practitioners should consider all options available and carefully analyze which option may be the most appropriate and effective given the specific circumstances of the situation. This section briefly discusses the range of options practitioners may consider for addressing problematic IJ behavior.

A. Informal Discussion with the Immigration Judge

Informal practitioner discussions with an IJ may be unusual and should be approached with caution. They should only occur after a case is completed, and not while a case is pending or on appeal. This is best done when something appears to be a fluke, and the practitioner otherwise has a good working relationship with the IJ in question. It should not be undertaken when there is an ongoing pattern of misconduct or intemperate behavior.

An example of when this might be appropriate is if an IJ gets angry, seemingly with the practitioner, during a hearing, but the practitioner has never had this problem before and it is not otherwise normal for the IJ. The practitioner can ask to speak to the IJ as a way of gaining insight into what went wrong and what the IJ's concerns were. Another example is a procedural issue such as the IJ not admitting testimony or evidence into the record and the practitioner wants to discuss what he or she might have done differently.

The gist of this is that the practitioner is seeking guidance from the IJ, not in hopes of having a successful outcome in a case, but rather to understand if the IJ considered the practitioner's litigation skills to be deficient and, if so, to improve his or her own skills, as a form of professional development. In this context, the practitioner can also bring to the IJ's attention the action the IJ took that affected the practitioner. If a practitioner wishes to bring up an issue through discussion with the IJ, he or she should take care to do so in a way that does not run afoul of the rules prohibiting *ex parte* communications.

Another way of raising issues with an IJ is through the local AILA chapter's EOIR liaison, for those who are AILA members.⁵⁷ The liaison may know of informal procedures in place with the local court whereby concerns could be addressed. The liaison could reach out to the IJ, the CA, or the ACIJ to address a problem, depending on the circumstances.⁵⁸

⁵⁷ AILA Group Directory, available at <http://www.aila.org/group-directory>. Practitioners can use the "Search for Chapter Liaisons" feature to find the EOIR liaisons in their jurisdiction.

⁵⁸ See Magali Suarez Candler, Matthew Holt & Jeremy McKinney, *The Ethics of Dealing with Difficult Judges*, AILA Immigration Practice Pointers, at 778 (2016-17 Ed.), available at agora.aila.org (noting that "a particular judge within a court may be assigned to address complaints in an informal setting" and that "[t]aking this approach is useful when you (as opposed to your client) are the target of an immigration judge's perceived hostility").

B. Discussion with the Court Administrator

In some cases, actions of an IJ that cause undue burden to one or both of the parties can be dealt with by bringing them to the attention of the court administrator. This is usually best handled through the local AILA liaison. Bringing the matter to the CA's attention may be effective in resolving administrative or procedural issues, such as coding for the asylum clock, filing restrictions, failing to start court on time, and failure to rule on motions in a timely manner. The CA does not supervise the IJs, but does supervise the IJs' clerks.⁵⁹ This is significant because sometimes an IJ's failure to rule on motions is due to the fact that the clerk has not given them to the IJ.⁶⁰ Otherwise, some CAs have close working relationships with the IJs and can bring problematic behavior to their attention without it becoming a personal dispute.⁶¹ The CA can also bring problems to the attention of the ACIJ without the necessity of a formal complaint.⁶²

C. Raising the Issue in the Context of the Individual Case's Litigation

Depending on the issue, the most appropriate way to raise the concern may be in the context of litigating the individual case where the incident occurred. There are several ways that this could be done, and their appropriateness will depend on the specific conduct that occurred. First, the practitioner might consider filing a motion to recuse the IJ and seeking to have a different IJ assigned to the case. Second, the practitioner might consider an interlocutory appeal to the BIA prior to the conclusion of the case. Third, the practitioner may be able to raise the issue as part of the overall appeal of the IJ's final decision to the BIA (assuming the respondent does not achieve a favorable result in the case and thus there is a need for an appeal). In all of these circumstances, it will be crucial for the practitioner to ensure that he or she has a complete record. The practitioner must ensure that the issue was raised and presented to the IJ, and that the IJ had a chance to correct or address the problematic conduct. If the problematic conduct occurred off-record, the practitioner should be sure to, once back on the record, state for the record what happened or otherwise ensure that the conduct is reflected in the record. An adequate record is necessary so that the reviewing party can properly assess the situation.

1. Motion to Recuse

Where an IJ has demonstrated an inability to fairly and impartially rule on an issue, the practitioner can raise this in a motion to recuse. Recusal is disfavored by EOIR because it could be used by IJs to avoid difficult cases and can unduly burden other IJ colleagues.⁶³ However, there are circumstances in which recusal is necessary, and regulations, OPPM 05-02, and case precedents also discuss when recusal is appropriate.

The regulations governing removal proceedings direct that “[t]he immigration judge assigned to conduct the hearing shall at any time withdraw if he or she deems himself or herself disqualified” and in such case “another

⁵⁹ Information obtained from Eliza C. Klein, former IJ (1994-2015) and Grievance Chair for NAIJ from January 2012 to January 2015.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ EOIR OPPM 05-02, *Procedures for Issuing Recusal Orders in Immigration Proceedings*, at 3 (Mar. 21, 2005), available at <https://www.justice.gov/sites/default/files/eoir/legacy/2005/03/22/05-02.pdf> [hereinafter “EOIR Recusal Memo”].

immigration judge may be assigned to complete the case.”⁶⁴ The BIA in its precedent decision, *Matter of Exame*,⁶⁵ “recognized three instances that warrant recusal: (1) when the alien demonstrates that he was denied a constitutionally fair proceeding; (2) when the IJ has a personal bias stemming from an ‘extrajudicial’ source; and (3) when the IJ’s judicial conduct demonstrates ‘such pervasive bias and prejudice.’”⁶⁶

Reviewing courts have analyzed recusal challenges on appeal within a due process framework and required that the respondent also demonstrate that he or she was prejudiced by the IJ’s conduct.⁶⁷ Appellate decisions considering challenges to an IJ’s impartiality may find the IJ’s conduct appropriate, reasoning for example that “charges of judicial bias and partiality cannot be established solely by ‘expressions of impatience, dissatisfaction, annoyance, and even anger.’”⁶⁸ Courts may find remand appropriate, however, if the appellant can establish that the IJ’s conduct prevented the respondent from reasonably presenting his or her case,⁶⁹ where the IJ displayed moral judgment of the respondent and abandoned his or her role as neutral adjudicator,⁷⁰ where the IJ failed to provide the respondent with a chance to develop the record and pressured him to drop a claim for relief,⁷¹ or where the IJ’s conduct suggested bias and hostility.⁷² Note that many of the cases cited here did not arise in

64 8 C.F.R. § 1240.1(b). A federal statute governing conduct of judges “of the United States” sets forth certain circumstances in which a judge “shall disqualify himself.” 28 U.S.C. § 455. These circumstances include where the judge’s “impartiality might reasonably be questioned,” *id.* § 455(a), where the judge has financial or familial ties to a case, where the judge was previously involved in the matter while in private practice or as a government attorney, and “[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.” 28 U.S.C. § 455(b). Some courts of appeals have applied this statute to the IJ context. *See, e.g., Perlaska v. Holder*, 361 F. App’x 655, 660 (6th Cir. 2010) (unpublished); *see also* EOIR Recusal Memo, *supra* note 63, at 2 (citing statute and noting that it “offers strong guidance on the recusal issue”).

65 18 I. & N. Dec. 303 (BIA 1982).

66 EOIR Recusal Memo, *supra* note 63, at 3 (quoting *Matter of Exame*); *see id.* at 4 (noting that “[t]he test for determining whether recusal is an appropriate remedy is an objective one. Under this standard, a judge should recuse him or herself when it would appear to a reasonable person, knowing all the relevant facts, that a judge’s impartiality might reasonably be questioned.”).

67 *See, e.g., Hassan v. Holder*, 604 F.3d 915, 923 (6th Cir. 2010); *Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 925 (9th Cir. 2007). Recusal cases often also cite to the Supreme Court standard for judicial recusal, whereby “opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.” *Litky v. United States*, 510 U.S. 540, 555 (1994).

68 *Aguilar-Solis v. INS*, 168 F.3d 565, 569 (1st Cir. 1999) (quoting *Litky*, 510 U.S. at 555-56); *see also Ni v. BIA*, 439 F.3d 177, 181 (2d Cir. 2006) (concluding that recusal was not warranted based on IJ’s expressions of frustration with respondents).

69 *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000) (analyzing case under due process framework); *see also Serrano Alberto v. Att’y Gen.*, -- F.3d -- (3d Cir. 2017), available at <http://cases.justia.com/federal/appellate-courts/ca3/15-3146/15-3146-2017-06-12.pdf?ts=1497286806> (finding that IJ denied the petitioner due process “by actively preventing him from making his case for asylum, withholding of removal, and protection under the Convention Against Torture (CAT)” and urging reassignment to a different IJ on remand); *Cham v. Att’y Gen.*, 445 F.3d 683, 690-91 (3d Cir. 2006) (remanding asylum claim citing IJ belligerence, abuse, and nitpicking of respondent which prejudiced the respondent’s ability to present his claim and urging assignment to a different IJ).

70 *See Reyes-Melendez v. INS*, 342 F.3d 1001, 1006-09 (9th Cir. 2003) (discussing IJ bias under due process framework).

71 *See Cano-Merida v. INS*, 311 F.3d 960, 964-65 (9th Cir. 2002); *see also Wang v. Att’y Gen.*, 423 F.3d 260, 271 (3d Cir. 2005) (remanding for various reasons including that “the immigration judge’s conduct so tainted the proceedings below that we cannot be confident that [the respondent] was afforded the opportunity fully to develop the factual predicates of his claim”).

72 *See, e.g., Ali v. Mukasey*, 529 F.3d 478, 492-93 (2d Cir. 2008) (remanding because IJ’s conduct created an appearance of bias or hostility precluding meaningful review and instructing the BIA to assign a different IJ on remand); *Ti Wu Gao v. Gonzales*, 200 F. App’x. 31, 34-35 (2d Cir. 2006) (unpublished) (directing the BIA to assign case to a different judge on remand where the IJ’s conduct had been found to suggest bias and hostility toward Chinese petitioners in three separate cases); *see also Matter of Y-S-L-C-*, 26 I. & N. Dec. 688 (BIA 2015) (“Conduct by an Immigration Judge that can be perceived as bullying or hostile is never appropriate, particularly in cases involving minor respondents, and may result in remand to a different Immigration Judge.”); *cf. Cojocari v. Sessions*, --- F.3d ---, 2017 WL 2953043 (July 11, 2017) (remanding asylum case where IJ “made mountains out of molehills, fashioned inconsistencies from whole cloth, and held [the respondent’s] efforts to obtain corroborating documents against him” and urging the BIA to assign the case to a different IJ on remand); *Sukwanputra v. Gonzales*, 434 F.3d 627, 638 (3d Cir. 2006) (noting that the court was “deeply troubled” by IJ’s “intemperate and bias-laden remarks” and “strongly encourage[ing]”

the context of recusal motions. Nevertheless, they are examples of the reviewing court concluding that the IJ's inappropriate conduct warranted remand and thus could be instructive in considering whether grounds exist for a recusal motion. They are also useful in considering appropriate challenges on appeal.

A practitioner may file a written request for recusal prior to the hearing. The motion should be supported by "specific reasons why recusal is warranted."⁷³ If a written motion is filed, the IJ should issue a written decision that contains "a well-reasoned opinion explaining the circumstances and legal reasoning behind either the grant or the denial of the recusal."⁷⁴ If the problematic conduct arises during a hearing, the practitioner can make an oral motion for recusal. The IJ must then "go on the record and issue an oral decision describing the reasons behind the grant or denial of the recusal motion," which should contain "a well-reasoned opinion explaining the circumstances and legal reasoning behind either the grant or the denial of the recusal."⁷⁵

2. Interlocutory Appeal

When an IJ makes a ruling that is outcome-determinative prior to the conclusion of the case, or shows a pattern of acting in violation of regulations, BIA precedent, or the law, the practitioner should consider filing an interlocutory appeal with the BIA. Interlocutory appeals are generally disfavored "in order to avoid the piecemeal review of the many questions that may arise in a deportation proceeding."⁷⁶ However, the BIA may consider interlocutory appeals "involving either important jurisdictional questions regarding the administration of the immigration laws or recurring questions in the handling of cases by Immigration Judges."⁷⁷ The BIA has taken jurisdiction over interlocutory appeals where, for example, the IJ denied termination or administrative closure despite the agreement of both parties,⁷⁸ the IJ denied law student interns' request to enter an appearance in a case,⁷⁹ and the IJ granted the government's motion to change venue to a jurisdiction far from where the unaccompanied child respondents resided and their pro bono counsel was located, in response to the children's filing of a motion to suppress.⁸⁰

Practitioners should consider the pros and cons of filing an interlocutory appeal. For example, filing may

the BIA to assign the case on remand to a different IJ "to ensure fairness and the appearance of impartiality"). For further discussion of cases evaluating the conduct of IJs, see Maria Baldini-Potermín, *Immigration Judges: A Review of Duties, Due Process, and (Mis)Conduct*, 16-06 IMMIGR. BRIEFINGS 1 (June 2016).

73 See EOIR Recusal Memo, *supra* note 63, at 7.

74 *Id.*; see also *In re Urias Oliver Roblero Gonzalez*, A205 974 849 - BUF, 2017 WL 1130696, at *1 (BIA Jan. 26, 2017) (unpublished) (remanding to the IJ for "preparation of a decision on the Motion to Recuse" where the IJ had not issued a written decision giving the reasons for the denial of the motion and finding that "an explanation of the reasons in the transcript is not sufficient").

75 EOIR Recusal Memo, *supra* note 63, at 7.

76 *Matter of K-*, 20 I. & N. Dec. 418, 419 (BIA 1991).

77 BIA Practice Manual Ch. 4.14(c), available at <https://www.justice.gov/eoir/board-immigration-appeals-2>.

78 See, e.g., *Matter of Aleesha Marshalle Pinnock*, A074 089 677 (BIA Oct. 14, 2015) (unpublished), available at <https://www.scribd.com/document/286370097/Aleesha-Marshalle-Pinnock-A074-089-677-BIA-Oct-14-2015>; *Matter of Jose Angel Parada Montufar*, A074 092 123 (BIA July 30, 2015) (unpublished), available at <https://www.scribd.com/document/274516981/Jose-Angel-Parada-Montufar-A074-092-123-BIA-July-30-2015>; *Matter of J-E-H-*, AXXX XXX 133 (BIA June 29, 2015) (unpublished), available at <https://www.scribd.com/document/274417515/J-E-H-AXXX-XXX-133-BIA-June-29-2015>.

79 *Matter of Mariano Rafael-Paz*, A202 070 379 (BIA Jan. 29, 2016) (unpublished), available at <https://www.scribd.com/document/299284596/Mariano-Rafael-Paz-A202-070-379-BIA-Jan-29-2016> (sustaining interlocutory appeal and reversing IJ decision denying motion to be represented by students at Cornell Law School).

80 *Matter of M-M-J-*, AXXX XXX 522 (BIA Mar. 15, 2017) (unpublished), available at <https://www.scribd.com/document/342627095/M-M-J-AXXX-XXX-522-BIA-March-15-2017> (reversing IJ order granting DHS motion to change venue from Los Angeles to Tucson).

delay the case, particularly if the Record of Proceedings is not back to the immigration court before the next scheduled hearing. Filing an interlocutory appeal may also further irritate an IJ or create an impression that counsel is seeking to delay or obfuscate the proceedings. However, even if unsuccessful, an interlocutory appeal can have the effect of bringing problematic conduct or rulings to EOIR's attention, and may thereby result in improvement.

3. Appeal

Most issues that arise in removal proceedings are best dealt with through the direct appeal process. However, for this to be successful it is extremely important that the issues are raised and preserved on the record, and that any problematic conduct that is not discernible in print is also noted for the record. Examples include facial expressions, tone of voice, raising of voice, evidence that the IJ was distracted, and going off the record and thus eliminating any evidence of IJ oral statements.

The practitioner should also consider whether there are disadvantages to addressing the issue only through the appeals process. For example, the appeals process is very time consuming, and in truly problematic cases the practitioner might not receive a decision within a reasonable period of time. The practitioner is not likely to get a published decision, so the IJ or other IJs who engage in the same problematic conduct might continue to do so without significant deterrence. Further, given that respondents in immigration court proceedings are not guaranteed appointed counsel, many respondents may lack the means to be able to file an appeal or effectively raise issues of IJ conduct. Also, in some cases the respondent could win his or her case before the IJ (thus obviating the need to file any appeal), but the practitioner or respondent may still wish to bring problematic IJ conduct to the attention of EOIR.

D. Filing a Complaint with the State Bar Association

Practitioners should review their own ethical obligations to report attorney misconduct under the applicable state bar rules, as well as the rules of the state bar to which the IJ belongs. Practitioners may have an affirmative duty to report misconduct to the IJ's state bar, depending on the nature of the misconduct. For example, the ABA Model Rules of Professional Conduct direct that a lawyer "who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."⁸¹ The ABA Model Rules further direct that a lawyer "inform the appropriate authority" when he or she "knows that a judge has committed a violation of the applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office."⁸² A number of states have adopted the ABA Model Rules;⁸³ however, the practitioner should carefully consult the applicable rules to determine whether a duty to report has been triggered in the specific case.

Practitioners should also consider whether, even where there is a duty to report and the attorney reports the misconduct to state bar authorities, such reporting is sufficient to remedy the problem presented in the

81 ABA Model Rules of Professional Conduct, Rule 8.3(a), available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_3_reporting_professional_misconduct.html.

82 *Id.* Rule 8.3(b).

83 ABA Center for Professional Responsibility, *State Adoption of the ABA Model Rules of Professional Conduct*, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html.

individual respondent's case. It may be that other action, in addition to compliance with state bar ethical rules, may be necessary to fully protect the client's interests or to achieve the goals identified in addressing inappropriate IJ conduct.⁸⁴

E. Filing a Complaint with the DOJ's Office of Professional Responsibility

The DOJ's Office of Professional Responsibility (OPR) is an oversight agency whose job is to assist in identifying and preventing misconduct by DOJ attorneys. OPR has jurisdiction to investigate allegations of professional misconduct against DOJ attorneys that relate to the exercise of their authority to investigate, litigate, or provide legal advice.⁸⁵ This includes allegations of professional misconduct against IJs.

OPR does not directly sanction IJs, but does conduct independent investigations, reach conclusions, and make recommendations to EOIR regarding discipline where it concludes that wrongdoing has been established. An OPR investigation is taken extremely seriously by EOIR and the IJ.⁸⁶ This type of complaint should not be filed unless the practitioner has something egregious to report, and solid evidence to support the complaint.⁸⁷ The OPR website provides information about how to file a complaint and directs that the complaint should include "the names and titles of the individuals suspected of misconduct, the details of the allegations including case names, any other relevant information, copies of any documentation pertaining to the matter."⁸⁸ Examples of OPR investigations into complaints regarding IJs include:

- An allegation that the IJ improperly failed to recuse herself in a matter where she had a conflict of interest;⁸⁹
- Whether an IJ "purposefully, knowingly, or recklessly violated any rule of professional conduct" or "abdicated his judicial responsibility to decide the case;"⁹⁰
- Whether the IJ violated her obligation to be fair and impartial by exhibiting belligerence, hostility, or bias;⁹¹ and
- An allegation that the IJ "participated inappropriately in a state court proceeding involving [the respondents], conducted proceedings without their lawyer present, and later required the state court lawyer to enter an appearance in the immigration matter, over the attorney's objection."⁹²

⁸⁴ See *infra* Section V (considering various goals of reporting problematic IJ conduct).

⁸⁵ U.S. Dep't of Justice, OPR, *How to File a Complaint*, <https://www.justice.gov/opr/how-file-complaint>.

⁸⁶ Information obtained from Eliza C. Klein, former IJ (1994-2015) and Grievance Chair for NAIJ from January 2012 to January 2015.

⁸⁷ *Id.*

⁸⁸ U.S. Dep't of Justice, OPR, *How to File a Complaint*, <https://www.justice.gov/opr/how-file-complaint>.

⁸⁹ U.S. Dep't of Justice, Office of Professional Responsibility, *Annual Report*, at 18 (2015), available at <https://www.justice.gov/opr/file/881211/download> (finding no violation of the rules of professional conduct regarding conflicts of interest).

⁹⁰ U.S. Dep't of Justice, Office of Professional Responsibility, *Annual Report*, at 17 (2014), available at <https://www.justice.gov/opr/file/798006/download> (concluding that no such conduct had occurred).

⁹¹ U.S. Dep't of Justice, Office of Professional Responsibility, *Annual Report*, at 13-14 (2007), available at <https://www.justice.gov/sites/default/files/opr/legacy/2009/10/16/annualreport2007.pdf> (concluding that professional misconduct had occurred and that the IJ "should have known that her belligerent and hostile conduct and selective consideration of the evidence undermined the fairness of the hearing and created an appearance of partiality in the immigration court" and recommending discipline but IJ retired).

⁹² U.S. Dep't of Justice, Office of Professional Responsibility, *Annual Report*, at 32 (2012), available <https://www.justice.gov/sites/default/files/opr/legacy/2013/08/21/annualreport2012.pdf> (concluding that professional misconduct had occurred because the IJ failed to recuse himself despite bias and acted in reckless disregard to his authority, obligations, and procedures and recommending

F. Filing a Complaint with the DOJ's Office of the Inspector General

The Office of the Inspector General (OIG) is responsible for detection and deterrence of waste, fraud, abuse, and misconduct throughout the DOJ and for promoting economy and efficiency in DOJ programs.⁹³ OIG has jurisdiction over allegations of misconduct against DOJ attorneys that do not fall within OPR's jurisdiction, including those that relate to violations of civil rights or civil liberties.⁹⁴ Some IJ misconduct could potentially give rise to a colorable complaint to the OIG, but these are limited to situations involving a type of misconduct within OIG's jurisdiction and in which there is extremely serious misconduct.⁹⁵ Examples of instances in which OIG investigated IJ conduct include an allegation:

- That an IJ inaccurately recorded her work hours and was given more compensation than she was due;⁹⁶
- That an IJ “solicited immigration attorneys to purchase jewelry from her; borrowed money from an immigration attorney as well as an interpreter employed by the immigration court; failed to recuse herself from cases involving attorneys that were actively representing her family members on various criminal matters when they appeared in her court; and used her title on multiple occasions to request personal information, including a state criminal history report related to a family member”;⁹⁷ and
- Of improper practices of selecting and hiring IJs based on their political and ideological views.⁹⁸

G. Seeking Media Involvement

Attorneys may consider bringing particular IJ misconduct to the attention of the media. There are instances in which media stories have shed light on concerning immigration court practices,⁹⁹ and such attention can be a catalyst for EOIR action. One such example was the petition for a public hearing before the Inter-American Commission on Human Rights by immigration advocates, including CLINIC, alleging extreme disparities in asylum adjudications among IJs that cannot be explained by normal case variation among neutral decision-makers. While this advocacy discussed specific immigration courts rather than specific IJs, the media reported on this issue and helped prompt positive changes in asylum adjudications.¹⁰⁰

a range of discipline from a 7-day suspension to termination).

93 U.S. Dep't of Justice, Office of the Inspector General, *About the Office*, <https://oig.justice.gov/about/> (mission statement).

94 Information about submitting a complaint can be found on the OIG website. U.S. Dep't of Justice, Office of the Inspector General, *Hotline*, <https://oig.justice.gov/hotline/>.

95 Information obtained from Eliza C. Klein, former IJ (1994-2015) and Grievance Chair for NAIJ from January 2012 to January 2015.

96 U.S. Dep't of Justice, Office of the Inspector General, *Summaries of Investigations Provided Pursuant to Request by Senators Grassley and Coburn*, at 1 (Apr. 1, 2014-Sept. 30, 2014), available at <https://oig.justice.gov/reports/2014/f140930.pdf>.

97 U.S. Dep't of Justice, Office of the Inspector General, *Summaries of Investigations Provided Pursuant to Request by Senators Grassley and Coburn*, at 4 (Apr. 1, 2013-Sept. 30, 2013), available at <https://oig.justice.gov/reports/2013/f130930.pdf> (concluding that the IJ had violated the EOIR Ethics and Professionalism Guide as well as an EOIR policy regarding recusal and forwarding its results to EOIR for “appropriate action”).

98 U.S. Dep't of Justice, *Office of the Inspector General Semiannual Report to Congress*, at 9 (Apr. 1, 2008-Sept. 30, 2008), available at <https://oig.justice.gov/semiannual/0811/final.pdf>.

99 See, e.g., Elise Foley, *Here's Why Atlanta Is One of the Worst Places to Be an Undocumented Immigrant*, HUFFINGTON POST, May 25, 2016, http://www.huffingtonpost.com/entry/deportation-raids-immigration-courts_us_574378d9e4b0613b512b0f37.

100 See, e.g., John Washington, *These Jurisdictions Have Become “Asylum Free Zones,”* THE NATION, Jan. 18, 2017, available at <https://www.thenation.com/article/these-jurisdictions-have-become-asylum-free-zones/>; see also *supra* note 14.

When considering whether to seek media involvement on specific cases, practitioners should carefully consider their ethical obligations, such as the duty of confidentiality and the duty of zealous advocacy. Practitioners should ensure that any media strategy clearly serves the client's interests and is consistent with the practitioners' ethical duties. Of course, any media strategy involving a client should only be undertaken with the client's informed consent, preferably in writing. Practitioners should also consider whether media involvement furthers the goals in the particular case. For example, publicity may bring poor IJ conduct to the attention of the ACIJ and could help encourage the agency to redress the issue. On the other hand, the relationship between the immigration courts and the media should be encouraged so as to further government transparency and not developed in adversity. IJs are not allowed to speak to the media without ethics clearance, and never about particular cases.¹⁰¹

Immigration court hearings are generally open to the public, including members of the media.¹⁰² The EOIR website directs that “[w]hen courtroom space is limited, media representatives have priority over the general public.”¹⁰³ According to the Immigration Court Practice Manual, members of the media are “strongly encouraged to notify the Office of Communications and Legislative Affairs and the court administrator before attending a hearing.”¹⁰⁴ If a member of the media notifies EOIR of his or her presence at a hearing, the presiding IJ will typically be alerted as well.¹⁰⁵

H. Filing a Complaint with EOIR

The remainder of this guide will focus on this last option: filing a complaint with EOIR. Section V will discuss factors to consider before filing a complaint with EOIR. Section VI will discuss the EOIR complaint process in more detail, including how to file a complaint, the investigation process, possible outcomes of filing a complaint, and what a practitioner can expect after a complaint is filed.

101 Information obtained from Eliza C. Klein, former IJ (1994-2015) and Grievance Chair for NAIJ from January 2012 to January 2015.

102 One exception is asylum hearings, which can be closed to the public upon the respondent's request. *See* 8 C.F.R. § 1240.11(c)(3)(i).

103 EOIR, *Observing Immigration Court Hearings*, <https://www.justice.gov/eoir/observing-immigration-court-hearings>.

104 EOIR, Immigration Court Practice Manual, Ch. 4.9(b), *available at* <https://www.justice.gov/eoir/office-chief-immigration-judge-0>.

105 Information obtained from Eliza C. Klein, former IJ (1994-2015) and Grievance Chair for NAIJ from January 2012 to January 2015.

V. FACTORS TO CONSIDER BEFORE FILING A COMPLAINT AGAINST AN IMMIGRATION JUDGE

Practitioners should consider various factors before deciding whether to file a complaint. Practitioners should first consider whether the subject of the complaint is one that is appropriate for filing of a complaint. If, for example, the inappropriate conduct occurred in the course of a hearing in an individual's removal case, the practitioner should consider whether the complaint would more appropriately be addressed through the appeals process. If the issue can be addressed through the appeals process, that would normally be the better route, and complaints are frequently dismissed for this reason.¹⁰⁶ Factors to consider in determining whether the issue is appropriate for a complaint include whether:

- The issue is a disagreement about the merits of an IJ's decision that will be subject to review on appeal;
- The alleged inappropriate conduct involved the IJ engaging in vigorous questioning of the client, or expressing doubts about the legal arguments presented in support of a claim despite there being BIA decisions on point. These are issues that should ordinarily be left to the appeal;¹⁰⁷
- There are other options available that might better serve the client's interests;¹⁰⁸ and
- Colleagues, mentor attorneys, and/or AILA liaisons share the practitioner's concerns or at least consider them reasonable.¹⁰⁹ In some instances, a negative dynamic can develop between an attorney and an IJ, and the attorney's perceptions of the problem might not be accurate when viewed in an objective light. Practitioners should get feedback and then reconsider their own conduct. It is also advisable to review the record of proceedings (such as by listening to the audio recording) to ensure that the subjective perception of what happened in an emotionally tense moment matches the record.

Examples of conduct that might be the appropriate subject of a complaint include:

- The IJ's conduct prevents the practitioner from presenting the case, or exhibits a pattern of disregarding the law, or some bias, prejudice, or incompetence;
- The IJ makes belittling comments, exhibits intemperance, or otherwise prevents an application from being fully presented or even heard and there is an ongoing pattern of this behavior;

106 The complaints referred to as "EOIR Complaint No. []" throughout this guide were obtained by AILA as part of a FOIA lawsuit and can be viewed on the AILA website. AILA, *AILA Receives Records Relating to EOIR Misconduct in FOIA Lawsuit*, AILA Doc. No. 13111458 (Dec. 1, 2015), <http://www.aila.org/infonet/eoir-records-relating-misconduct> [hereinafter "AILA Data from EOIR FOIA Lawsuit"]. *See, e.g.*, EOIR Complaint Nos. 250 (allegation that IJ failed to review all the evidence); 317 (allegation that IJ errors caused respondent to be treated unfairly in court); 341 (allegation that IJ's bad temperament and bias toward the attorney deprived the respondent of a fair hearing); 596 (allegation of improper denial of a continuance).

107 Practitioners will of course want to make a strong record raising objections and legal arguments in order to preserve issues for appeal. For CLINIC removal defense trainings, please refer to the CLINIC training calendar at cliniclegal.org/training/calendar.

108 *See* Section IV *supra*.

109 By consulting with peers, practitioners may also learn about similar complaints already filed concerning the conduct, and the results if any of such complaints.

- An IJ has engaged in an ongoing pattern of misconduct that affects the client’s or other respondents’ access to justice; and
- The IJ engages in conduct that interferes with the appearance of neutrality, shows impropriety of some kind, would embarrass EOIR if made public, or otherwise establishes some lack of qualification for the bench.¹¹⁰

Keep in mind that many actions taken by IJs that could give rise to a complaint are topics covered by OPPMs, the Immigration Court Practice Manual, the regulations, or BIA precedent. If a practitioner sees this type of conduct, he or she should remind the IJ of the law in a neutral and professional manner on the record during the hearing. This highlights the need for practitioners to become and remain knowledgeable on relevant rules and laws governing IJ conduct, including BIA decisions touching on these issues. Knowing the standards of conduct that apply is part of the practitioner’s duty of competence and allows him or her to zealously advocate for clients before the immigration court.

Prior to filing a complaint, the practitioner should also consider the goal. The goal of a complaint might be to protect a client’s rights, achieve the due process that is supposed to be afforded to respondents in removal proceedings, or more broadly safeguard respondents’ access to fair and just immigration court proceedings. Other goals of filing a complaint might include improving the conduct of an IJ, increasing the professionalism and dignity of the immigration court system, and forestalling egregious temperament problems. The goal should not be to punish or retaliate against an IJ based on a decision the practitioner does not like. Disciplinary actions imposed on IJs by EOIR are supposed to promote and encourage improvement.¹¹¹

Finally, if a practitioner believes the conduct of the IJ is serious enough to warrant a complaint, the practitioner should ensure he or she has clear references as to what happened, when it happened, to whom it happened, and what the resulting harm was. The practitioner should be prepared to alert EOIR as to what the effect of the misconduct was—either to the practitioner, the client, the administration of justice, the efficiency of EOIR, or the perception of bias.

110 One example might be if the IJ asked a child respondent’s parents about their immigration status, and then asked the ICE trial attorney to issue Notices to Appear for the parents. *Cf. Matter of Yesenia Iveth Pacheco-Figueroa*, A205 733 029 (BIA May 6, 2016) (unpublished), available at <https://www.scribd.com/document/313273500/Yesenia-Iveth-Pacheco-Figueroa-A205-733-029-BIA-May-6-2016> (reopening and remanding record after IJ denied motion to reopen and noting that it was inappropriate for IJ to ask the child respondent’s father about his immigration status and whether he had helped the child enter illegally, “[t]o the extent that the Immigration Judge’s inquiry was irrelevant to the respondent’s immigration proceedings”). For strategies on protecting the rights of family members of child respondents, see CLINIC & Public Counsel, *Practice Advisory: Working with Child Clients and Their Family Members in Light of the Trump Administration’s Focus on “Smugglers”* (July 2017), available at <https://cliniclegal.org/resources/working-child-clients-and-their-family-members-light-trump-administrations-focus-smugglers>.

111 See EOIR, *Summary of OCIJ Procedure for Handling Complaints Against Immigration Judges*, at 2, available at <https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/IJComplaintProcess.pdf> [hereinafter “EOIR Summary of IJ Complaint Process”].

VI. THE COMPLAINT PROCESS

A. Filing a Complaint with EOIR

A complaint can be filed by email, letter, or phone call to the supervising ACIJ or to the ACIJ for Conduct and Professionalism.¹¹² A complainant can ask to remain confidential, but the complaint should at a minimum contain a brief statement describing the IJ's alleged conduct.¹¹³ Complaints can be made by an individual (such as an immigration attorney) or a group.¹¹⁴ The ACIJ also opens complaint investigations when it receives referrals from other agencies, such as the BIA or the Office of Immigration Litigation.¹¹⁵ The ACIJ may also initiate an investigation after receiving a report from OPR or OIG.¹¹⁶ Sometimes problematic IJ conduct comes to the ACIJ through other means, such as because of media attention or a circuit court criticizing the IJ's behavior.

The complaint process is available to private litigants as well as to government parties. The information about IJ complaints obtained through FOIA litigation shows that the DHS's Office of Chief Counsel (OCC)¹¹⁷ occasionally uses the complaint process to raise concerns about IJ behavior.¹¹⁸ However, complaints about IJ conduct from OCC are frequently handled in a different matter—during meetings between the OCC and the ACIJ in which some complaints about IJ conduct or rulings might be discussed.¹¹⁹ Those types of “complaints” do frequently come to the IJ's attention during their meetings with their supervisors and may be handled informally. For this reason, ICE trial attorneys may be less likely to file formal complaints against IJs, and are required to obtain approval before doing so.¹²⁰

112 See EOIR Summary of IJ Complaint Process, *supra* note 111, at 1; see also EOIR, *Instructions for Filing a Complaint Regarding an Immigration Judge's Conduct*, <https://www.justice.gov/eoir/instructions-filing-complaint-regarding-immigration-judges-conduct>; EOIR, *Immigration Court Practice Manual*, Ch. 1.3(c), available at <https://www.justice.gov/eoir/office-chief-immigration-judge-0>. Note that as of the date of this guide's issuance, the EOIR website does not list any ACIJ for Conduct and Professionalism. The Immigration Court Practice Manual also specifies that a complaint may be filed directly with the OCIJ including by sending an e-mail to EOIR.IJConduct@usdoj.gov.

113 EOIR Summary of IJ Complaint Process, *supra* note 111, at 1.

114 *Id.* While many complaints from private parties come from the respondent or the respondent's attorney, FOIA data show that some complaints originate from witnesses, family members of respondents, or court staff such as interpreters. See AILA Data from EOIR FOIA Lawsuit, *supra* note 106.

115 *Id.* Review of IJ complaint investigations received by AILA through a FOIA lawsuit reveal that not all BIA referrals to EOIR regarding an IJ's conduct necessarily resulted in the BIA reversing or remanding the decision. See AILA Data from EOIR FOIA Lawsuit, *supra* note 106.

116 EOIR Summary of IJ Complaint Process, *supra* note 111, at 2.

117 U.S. Immigration & Customs Enforcement, *Principal Legal Advisor Offices*, <https://www.ice.gov/contact/legal>. The Office of Chief Counsel, within ICE's Principal Legal Advisor Offices, are the attorneys who represent the DHS in removal proceedings.

118 See, e.g., EOIR Complaint No. 607, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (noting that DHS filed a complaint to report “improper and unprofessional conduct toward DHS attorneys” in the courtroom, resolved through oral counseling).

119 Information obtained from Eliza C. Klein, former IJ (1994–2015) and Grievance Chair for NAIJ from January 2012 to January 2015. To the extent that such meetings may discuss particular cases without all of the parties present, such meetings raise potential *ex parte* communications concerns.

120 Information obtained from Eliza C. Klein, former IJ (1994–2015) and Grievance Chair for NAIJ from January 2012 to January 2015.

B. The Investigation

After a complaint is filed, the ACIJ or other EOIR representative begins to investigate. The EOIR will assign a number to the complaint and enter it into the OCIJ's complaint tracking system.¹²¹ The EOIR will also acknowledge receipt of the complaint with the complainant, assuming that person provided name and contact information.¹²²

The complaint investigation process involves ascertaining the nature of the complaint and whether action might be justified. If the ACIJ believes the complaint involves conduct that might fall within the scope of OPR or OIG, he or she will refer the complaint for investigation by that agency.¹²³ If the complaint, even if supported by all evidence, would not warrant taking any action, it is usually disposed of fairly quickly. For example, the complaint may be dismissed as unfounded, case-related (i.e. should have been appealed to the BIA or is pending with the BIA), or frivolous. Some examples¹²⁴ include:

- The EOIR dismissed complaints for **failure to state a claim** where the complainant alleged that the IJ was improperly appointed,¹²⁵ or the complainant wanted the Chief Immigration Judge's help with a motion to recuse,¹²⁶
- A complaint about the unprofessional conduct of the judge and court staff was dismissed as **frivolous**;¹²⁷
- The following complaints were dismissed because the allegations were deemed **merits-related**: the IJ worked on a case while an attorney at DHS¹²⁸; the IJ's adverse credibility determination, on second remand, was still based on factors the BIA said were insufficient and clearly erroneous;¹²⁹ the IJ did not provide a fair hearing because the rulings were based on feelings rather than facts and law;¹³⁰ the DHS complained that the IJ granted an unwarranted three-week continuance to a respondent;¹³¹ the IJ did not rule on the attorney's motion to withdraw;¹³² the court failed to answer the phone or provide information and the IJ denied a change of venue motion;¹³³
- The following complaints were dismissed with the justification that the allegations were **not substantiated or were disproven**: allegations of racial and gender bias toward an attorney;¹³⁴ allegations that the IJ was

121 EOIR Summary of IJ Complaint Process, *supra* note 111, at 1.

122 *Id.*

123 *Id.* at 1 & n.1 (noting that "OPR has jurisdiction over complaints where there is an appearance or allegation of professional misconduct" and that "OIG has jurisdiction over allegations of criminal conduct or serious waste, fraud or abuse").

124 This guide lists just a few examples. Many more instances are found in the FOIA data. See AILA Data from EOIR FOIA Lawsuit, *supra* note 106.

125 EOIR Complaint No. 35, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.

126 EOIR Complaint No. 4, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.

127 EOIR Complaint No. 632, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.

128 EOIR Complaint No. 10, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (referral from BIA).

129 EOIR Complaint No. 8, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (referred from BIA).

130 EOIR Complaint No. 14, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (sources were media and third party).

131 EOIR Complaint No. 624, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.

132 EOIR Complaint No. 705, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.

133 EOIR Complaint No. 763, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.

134 EOIR Complaint No. 12, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.

biased, prejudiced, or acted unprofessionally;¹³⁵ allegations of sexual harassment or sexual misconduct;¹³⁶ allegation that the IJ inappropriately questioned the attorney's qualifications;¹³⁷ a DHS complaint that the IJ was unprofessional and created a hostile work environment for DHS attorneys;¹³⁸ allegations that the IJ defamed a third party and rebuked the person in open court based on misinformation from a court clerk.¹³⁹

If the allegations would, if true, support some action being taken, the ACIJ will review all evidence that may be available – including reviewing the audio recording from the hearing, speaking with the complainant, witnesses, or the IJ, and reviewing Records of Proceedings or other documents.¹⁴⁰ It is very important that practitioners include in the complaint the specific information that may be needed in order for the ACIJ to ascertain the scope of conduct (*e.g.* the A number, party name, IJ name, and dates and times of relevant hearings) and to identify all sources of evidence to support the complaint (*e.g.*, audio recording, witnesses, written evidence).

When a practitioner files a complaint, he or she should generally assume the IJ will be made aware of it, even if the IJ does not display any behavior indicating such awareness. Even if the practitioner's name is kept confidential, the actual complaint will often be revealed and thus in many circumstances it may be possible for the IJ to deduce the identity of the complainant. In some cases, the IJ is included in the investigation process, but in others, such as where the complaint is dismissed, the IJ might not be questioned or even alerted to the complaint.¹⁴¹ This would usually be to protect the individual who filed the complaint, but can also be to protect the IJ from any accusation of retaliation, or temptation to retaliate.¹⁴² When the IJ is alerted to a complaint during the investigation process, he or she has an opportunity to provide a response before a decision is made on the complaint.¹⁴³

The investigation process is confidential, and significant complaints may take a long time to resolve. Sometimes other IJs and immigration court staff will not be aware of the complaint; sometimes everyone is aware.¹⁴⁴

If an ACIJ is concerned over reported conduct he or she can instruct an IJ to cease doing something or to do something, and then if the IJ fails to follow instructions this can aggravate the situation because it can be deemed “insubordination.” If the IJ learns of a complaint and then engages in retaliatory conduct, this can also result in more significant discipline. If there is significant misconduct and evidence is presented to support that, an IJ might be temporarily removed from the bench in order to protect the nature of the proceedings, the “efficiency of the Agency,” or to otherwise prevent further wrongdoing. This action is rarely taken.¹⁴⁵

135 EOIR Complaint No. 642, AILA Data from EOIR FOIA Lawsuit, *supra* note 106; EOIR Complaint No. 660, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (allegations that IJ not acting impartially, has pro government bias, and does not comply with ethical standards); EOIR Complaint No. 769, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.

136 EOIR Complaint No. 626, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.

137 EOIR Complaint No. 661, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.

138 EOIR Complaint No. 666, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.

139 EOIR Complaint No. 13, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.

140 EOIR Summary of IJ Complaint Process, *supra* note 111, at 2.

141 Information obtained from Eliza C. Klein, former IJ (1994-2015) and Grievance Chair for NAIJ from January 2012 to January 2015.

142 *Id.*

143 *Id.*

144 *Id.*

145 The source for the information in this paragraph is Eliza C. Klein, former IJ (1994-2015) and Grievance Chair for NAIJ from January 2012 to January 2015.

C. Actions Taken by EOIR

If the EOIR determines that the complaint raises an issue that EOIR deems appropriate for action, after the investigation EOIR can take various actions, including counseling, reprimand, training, suspension, and removal from the bench.¹⁴⁶ An IJ cannot object to counseling, but has the right to grieve a reprimand, suspension, or removal.¹⁴⁷ Once an IJ learns of a complaint, even during the initial stages of an investigation, he or she can seek advice and assistance from the National Association of Immigration Judges.¹⁴⁸

Figure 1 provides brief descriptions of complaint allegations, grouped by source and by the outcome or disposition imposed by EOIR. The information in this table was compiled from review of records of EOIR complaints related to IJ misconduct, which were obtained by AILA through FOIA litigation and are available on the AILA website.¹⁴⁹ The FOIA data reviewed (obtained in October of 2013) includes “closed cases on or after October 1, 2009.”¹⁵⁰ Figure 1 provides some examples of the complaints described in the FOIA data and is intended to provide practitioners with a general sense of what kind of alleged conduct resulted in what kind of agency action or follow-up. Of course, each example and its outcome was likely greatly influenced by the individual details and circumstances of each case, which the summary data does not describe and the authors have not reviewed. Practitioners wishing to obtain more detailed information may wish to visit the AILA website and review the more detailed FOIA disclosures also available there.

146 See EOIR Summary of IJ Complaint Process, *supra* note 111, at 2.

147 Information obtained from Eliza C. Klein, former IJ (1994-2015) and Grievance Chair for NAIJ from January 2012 to January 2015.

148 See National Association of Immigration Judges, Brochure, *Promoting Independence and Enhancing the Professionalism, Dignity, and Efficiency of the Immigration Court*, available at https://www.naij-usa.org/images/uploads/page-documents/IFPTE_NAIJ_Brochure_v6aMarch29_2017.pdf. Any IJ can ask for assistance from NAIJ, even if he or she is not a dues-paying member.

149 AILA Data from EOIR FOIA Lawsuit, *supra* note 106.

150 Letter from EOIR General Counsel accompanying FOIA disclosures, available at <http://www.aila.org/File/Related/Cover%20Letter.pdf>.

FIGURE 1. Brief descriptions of complaint allegations and outcomes

Complaint Source	Allegations	Outcome
Respondent's attorney	IJ spoke to attorney inappropriately and threw papers at her; ¹ IJ participated inappropriately in a state court adoption proceeding involving an "alien child and parent" and maligned the complainant's law firm, attorneys, and clients ²	Suspension
EOIR	IJ yelled at legal assistants about files being rearranged; ³ IJ failed to record master calendar hearings despite previous supervisor instructions; ⁴ continuing allegations of IJ's "intemperate conduct" while on the bench; ⁵ altercation between IJs ⁶	Suspension
DHS	IJ made disparaging remarks off the record about a child present at a hearing, calling the child a "wild animal posing as a child" ⁷	Suspension
BIA	Respondent raised questions about fairness of IJ on appeal; BIA agreed and remanded to different IJ; ⁸ IJ was hostile, partial, argumentative, and badgering to a witness ⁹	Written reprimand
BIA and Respondent	IJ went off the record and treated attorney and respondent with disrespect by referencing attorney's "home country" (she was Muslim but born in Texas), rolling eyes, and reading a magazine on the bench ¹⁰	Written reprimand
Second Circuit and Respondent's attorney	IJ showed bias against the respondent and deprived respondent of right to fair hearing. OPR found professional misconduct and recommended discipline ¹¹	Written reprimand
U.S. Marshal	IJ was uncooperative with security officers and engaged in inappropriate conduct ¹²	Written reprimand
BIA	IJ made legal errors in decision; ¹³ IJ displayed rudeness and sarcasm; ¹⁴ IJ made comments that could be construed as prejudgment; ¹⁵ IJ failed to act within IJ Ethics and Professionalism Guide; ¹⁶ IJ relied on third party evidence in deciding a case; ¹⁷ IJ expressed skepticism about respondent's religion based on speculation and conjecture and compared to another case heard that week ¹⁸	Written counseling
U.S. Marshal	IJ used profanity with security officers ¹⁹	Written counseling
Respondent's attorney	IJ wrongfully denied attorney's telephonic motion ²⁰	Written counseling
EOIR	IJ issued an <i>in absentia</i> order against a juvenile 15 minutes after the hearing start time, even though the juvenile was in the waiting room. IJ refused to reopen when s/he found out that the child had been in the waiting room. ACIJ spoke with the IJ and suggested s/he reopen case; IJ did not. ²¹	Written counseling
DHS	IJ started 2+ hours late on multiple occasions ²²	Leave restriction
BIA	IJ continued to repeat same errors made in earlier decision; ²³ IJ made inappropriate comments during hearing including calling the respondent a "pack of lies" ²⁴	Training

Anonymous	Complainant alleged that IJ violated ethics canons and improperly accepted a gift (complaint was referred to OIG; which referred it back to EOIR. EOIR determined that the IJ did not violate ethics regulations). ²⁵	Training
EOIR	IJ yelled at a clerk during a master calendar hearing because she did not make a good copy ²⁶	Detailed to BIA (temporarily)
BIA	IJ failed to make specific findings apart from adverse credibility finding; ²⁷ IJ failed to hold a new hearing on remand from BIA and denied respondent's application based on evidence from prior hearing; ²⁸ IJ made pejorative, <i>ad hominem</i> remarks at respondent; ²⁹ IJ used unnecessarily sarcastic tone and based adverse credibility finding on undue speculation; ³⁰ IJ made comments about respondent's income and manner of dress, which appeared to influence the decision; ³¹ IJ made adverse credibility finding based on speculation and conjecture and called the respondent "exceedingly mousy," stating that a "mousy" woman would not be able to supervise construction crews; ³² IJ engaged in impermissible stereotyping about homosexuals; ³³ IJ called the respondent an "absolute liar" whose assertions are "utterly absurd" and accused counsel of taking "ludicrous" positions; ³⁴ IJ exhibited bias, engaged in <i>ex parte</i> communication with DHS and coerced respondent to take voluntary departure ³⁵	Action determined to be unnecessary because of IJ retirement, termination, resignation, or for other reason
Other	IJ misused position to influence court action against IJ's own husband, represented her husband without prior permission, and was disrespectful to state court judge (referred to OIG, which determined that IJ violated regulations) ³⁶	Action determined to be unnecessary because IJ was terminated during trial period
Respondent's Attorney (and BIA)	IJ referenced a "victim of abuse gene," appeared to exhibit bias and prejudice, and engaged in an "unsettling level of sarcasm" (notes show that IJ was provided oral counseling and attended a domestic abuse training prior to termination) ³⁷	Action determined to be unnecessary because IJ was terminated during trial period
BIA	IJs made inappropriate comments, ³⁸ such as "I don't have time for your confusion"; ³⁹ IJ made inappropriate comments about the respondent's personal standards and attire at home as shown in photos; ⁴⁰ IJ made inappropriate comments regarding female genital mutilation; ⁴¹ IJ told the respondent that his crying did not impress the IJ; ⁴² IJ expressed personal opinion and conjecture about the respondent's sexual orientation; ⁴³ IJ made inappropriate comments about rape victims and premarital sex; ⁴⁴ IJ appeared to disparage the respondent's decision to have a fifth child under impoverished conditions and speculated that she did so to establish hardship in her case; ⁴⁵ IJ remarked that the respondent had no value to the community "but for a sexual service"; ⁴⁶ IJ engaged in overly prosecutorial questioning that deprived the respondent of a fair hearing; ⁴⁷ IJ improperly did not allow telephonic testimony; ⁴⁸ IJ went on and off the record without notice; ⁴⁹ IJ conducted hearing on remand without any written decision or transcript of hearing; ⁵⁰ IJ was previously the government attorney in the case; ⁵¹ IJ scheduled hearing on a date the attorney was unavailable ⁵²	Oral counseling
EOIR	IJ engaged in hostile treatment and rudeness to staff ⁵³	Oral counseling

DHS	IJ was emotionally unstable, abusive, partial, not suited to be an IJ, and discriminated based on national origin; ⁵⁴ IJ made DHS attorneys uncomfortable by giving respondents advice about sexual practices and whether to have additional children; told one respondent to look at his crotch and "stop using it" ⁵⁵	Oral counseling
Circuit court	IJ's homosexual stereotyping precluded meaningful review; ⁵⁶ IJ used insensitive comments in written decision ⁵⁷	Oral counseling
Third party	IJ prejudged case, acted as prosecutor, and chastised respondent's counsel; ⁵⁸ IJ yelled "IDIOT" at respondent ⁵⁹	Oral counseling
Other	IJ referred to the respondent as an "ass" after the hearing had concluded and the respondent had left ⁶⁰	Oral counseling
Respondent's attorney	IJ discussed cases prior to going on the record; ⁶¹ IJ inappropriately denied telephonic testimony/appearance or refused to rule on requests; ⁶² IJ engaged in excessive delay in rendering a decision; ⁶³ IJ kept parties waiting for two hours, then reset the case and stopped the clock; ⁶⁴ IJ surfed the web and watched YouTube video during hearings; ⁶⁵ IJ engaged in <i>ex parte</i> communication with the client in the courtroom including regarding privileged attorney/client information; ⁶⁶ IJ divulged confidential particulars about an asylum case (referring to "sexual orientation case") during master calendar hearing; ⁶⁷ IJ unreasonably denied continuance request; ⁶⁸ IJ made disparaging comments about the attorney's law firm in open court; ⁶⁹ IJ made disparaging comments about Muslim religion; ⁷⁰ on BIA remand, IJ retaliated and displayed offensive demeanor; ⁷¹ IJ mocked facial expression of attorney and witness, denied right to an interpreter, stormed out of courtroom, and engaged in inappropriate questioning of the respondent; ⁷² IJ raised voice and asked counsel if they were challenging the "finding" when counsel asked to set language as Arabic; ⁷³ IJ required parent of juvenile to be present even when attorney objected because parent may be undocumented; IJ was harsh and intimidating with juveniles ⁷⁴	Oral counseling

References for Figure 1 can be found at the end of the guide.

D. What a Practitioner Can Expect When Filing a Complaint

While a complainant should receive acknowledgement of receipt shortly after filing,¹⁵¹ he or she may or may not hear back from the person who is conducting the investigation, or the ACIJ. The practitioner should be prepared to participate in the investigation if asked, by providing additional details and other potential witnesses,¹⁵² but he or she might not hear for a long time as to whether there even has been an investigation.¹⁵³ The reporting practitioner may never be notified of the particular action taken in response to the complaint, but the practitioner should be informed of EOIR's conclusions, that action has been taken if needed to remedy the situation, and, if EOIR has made a determination that there was an error, told to communicate if the problem persists or arises again.¹⁵⁴

Once the investigation is closed, the practitioner should receive notice of the findings.¹⁵⁵ The practitioner will likely not be informed as to any disciplinary action taken.¹⁵⁶ If the practitioner is informed, he or she may also be requested to keep the matter confidential, particularly in cases involving OPR or OIG.¹⁵⁷ If this happens, and if the practitioner wishes to disclose the results, he or she should check with his or her state bar before doing so.

It is also important to know that the complaint process and discipline that may result is not always fair and transparent to the IJs themselves. EOIR does not always deal with complaints appropriately. In some cases, EOIR has allowed problems to fester and only addressed them when they have grown into systemic, embedded patterns or caused embarrassment or adverse publicity to EOIR.¹⁵⁸

The practitioner might immediately notice some change in conduct of the IJ after he or she files a complaint. Or the practitioner might notice no change at all. If there is a change in conduct, and it appears to be retaliatory against the practitioner or someone else because of the complaint, this again is something that the practitioner may wish to bring to the ACIJ's attention, or speak directly to the IJ about. It may be wise to speak first with another attorney before taking action on what the practitioner believes may be retaliatory behavior before filing further complaints or approaching an IJ directly. The practitioner's perception might be inaccurate due to heightened anxiety or fear, and the practitioner will want to be able to corroborate any of his or her claims. Many of these situations devolve into a "he said, she said" situation where the truth is impossible to ascertain,

151 EOIR Summary of IJ Complaint Process, *supra* note 111, at 1.

152 *Id.* at 2.

153 *See, e.g.*, EOIR Complaint No. 619, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (about 5 months from complaint to final decision); EOIR Complaint No. 666, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (about 7 months before complaint dismissed because it could not be substantiated); EOIR Complaint No. 683, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (5 months). However, the FOIA data also show that many complaints were disposed of within a matter of weeks.

154 Information obtained from Eliza C. Klein, former IJ (1994-2015) and Grievance Chair for NAIJ from January 2012 to January 2015; *see* EOIR Summary of IJ Complaint Process, *supra* note 111, at 3.

155 *See* EOIR Summary of IJ Complaint Process, *supra* note 111, at 3 ("When there is an identifiable complainant, he or she will be notified in writing once action is taken and/or the matter is closed. Such notification will not disclose information that would violate the privacy rights of an IJ.").

156 Information obtained from Eliza C. Klein, former IJ (1994-2015) and Grievance Chair for NAIJ from January 2012 to January 2015.

157 *Id.*

158 Because ACIJs are frequently not present in the local immigration court, they may not have personal experience working with the IJs, and may rely more on the CAs to advise them of what is happening. The CAs may or may not be aware of particular problems with IJs, either in or out of the court. The information in this paragraph was obtained from Eliza C. Klein, former IJ (1994-2015) and Grievance Chair for NAIJ from January 2012 to January 2015.

particularly where the alleged conduct occurred off the record.¹⁵⁹ Corroboration and affirmation from an objective source are critical.

¹⁵⁹ This once again highlights the need to ensure an adequate record. If the conduct occurred off the record, the practitioner should note the issue on the record and describe any nonverbal conduct on the record.

VII. CONCLUSION

It is extremely important that EOIR have a transparent and readily available process for people to bring to its attention misconduct and behavioral problems exhibited by IJs. Individuals who appear before IJs need to have a means of filing complaints without fear of retaliation. The complaint process is one means for EOIR to learn of misconduct by its IJs, and the process is intended to be available to the public, confidential when requested, and efficient. The reality though is far from what it should be,¹⁶⁰ and practitioners need to approach a complaint professionally and to be prepared for potential retaliation. In general, practitioners should not file complaints over isolated incidents,¹⁶¹ petty annoyances, or issues that can be resolved on appeal. It is also important for practitioners considering a complaint to understand how cumbersome, opaque, and uncertain the process may be.¹⁶²

Despite these caveats, the IJ complaint process is an important means for protecting respondents' rights, ensuring fairness and due process in removal proceedings, and promoting professionalism and respect in immigration court. These goals are all the more important in a time of increased enforcement and unprecedented strain on the immigration court system.

160 Cf. Appleseed Network Immigration Collaborative, *Getting off the Assembly Line: Overcoming Immigration Court Obstacles in Individual Cases*, at 56-58 (2016), available at www.appleseednetwork.org/wp-content/uploads/2017/02/APPLESEED__Getting-Off-Assembly-Line_122116.pdf (noting deficiencies with fairness in immigration court and providing recommendations for improvement).

161 Of course, if the conduct was egregious or impeded the respondent's rights and for some reason cannot be adequately addressed by an appeal, it may be appropriate to file a complaint based on a single instance of inappropriate conduct.

162 Information obtained from Eliza C. Klein, former IJ (1994-2015) and Grievance Chair for NAIJ from January 2012 to January 2015.

VIII. RESOURCES

Agency Websites and Contact Information

Executive Office for Immigration Review
www.justice.gov/eoir

List of ACIJ assignments
www.justice.gov/eoir/acij-assignments

The DOJ's Office of Professional Responsibility (OPR)
www.justice.gov/opr

How to file a complaint with OPR
www.justice.gov/opr/how-file-complaint

The DOJ's Office of the Inspector General (OIG)
oig.justice.gov

How to file a complaint with OIG
oig.justice.gov/hotline/index.htm

Information about Filing a Complaint with EOIR

Summary of EOIR procedure for handling complaints against IJs (*available in appendix*)
www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/IJComplaintProcess.pdf

Flow chart on complaint process (*available in appendix*)
www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/IJComplaintProcessFlowchart.pdf

Instructions for filing a complaint
www.justice.gov/eoir/instructions-filing-complaint-regarding-immigration-judges-conduct

Resources Related to IJ Conduct

Ethics and Professionalism Guide for Immigration Judges (*available in appendix*)
www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf

ABA Model Code of Judicial Conduct
Note: this is not binding on IJs but is treated as aspirational guidance by OCIJ
www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct.html

ABA Model Rules of Professional Conduct
www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html

Immigration Court Practice Manual:
www.justice.gov/eoir/office-chief-immigration-judge-0

EOIR Operating Policies and Procedures Memoranda (OPPM)
www.justice.gov/eoir/oppm-log

*Some specific OPPMs that may be particularly relevant include:*¹⁶³

17-01 *Continuances*

www.justice.gov/eoir/file/oppm17-01/download

13-01 *Continuances and Administrative Closure*

www.justice.gov/sites/default/files/eoir/legacy/2013/03/08/13-01.pdf

07-01 *Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children*

www.justice.gov/sites/default/files/eoir/legacy/2007/05/22/07-01.pdf

05-02 *Procedures for Issuing Recusal Orders in Immigration Proceedings (available in appendix)*

www.justice.gov/sites/default/files/eoir/legacy/2005/03/22/05-02.pdf

03-06 *Procedures for Going Off-Record During Proceedings*

www.justice.gov/sites/default/files/eoir/legacy/2003/10/15/03-06.pdf

Unpublished BIA Decisions Relating to Alleged Bias/Misconduct of IJs

Matter of A-G-L-, AXXX-XXX-744 (BIA July 12, 2017) (unpublished)

(Remanding cancellation case and instructing that a different IJ be assigned due to “intemperate remarks.”)

www.scribd.com/document/354694812/A-G-L-AXXX-XXX-744-BIA-July-12-2017

Matter of W-L-A-M-, AXXX-XXX-560 (BIA Dec. 23, 2016) (unpublished)

(Reversing IJ’s denial of a continuance so child could pursue state court action necessary for Special Immigrant Juvenile Status petition, where the IJ had accused the respondent’s attorney of committing an ethical violation because statements in the state court petition conflicted with information in the child’s I-213, and remanding to a different IJ due to concerns about the fairness of the proceedings.)

www.scribd.com/document/336509054/W-L-A-M-AXXX-XXX-560-BIA-Dec-23-2016

Matter of Yesenia Iveth Pacheco-Figueroa, A205 733 029 (BIA May 6, 2016) (unpublished)

(Reopening and remanding record after IJ denied motion to reopen and noting that it was inappropriate for IJ to ask the child respondent’s father about his immigration status and whether he had helped the child enter illegally, “[t]o the extent that the IJ’s inquiry was irrelevant to the respondent’s immigration proceedings.”)

www.scribd.com/document/313273500/Yesenia-Iveth-Pacheco-Figueroa-A205-733-029-BIA-May-6-2016

Matter of Ihab Darwish, A029 878 318 (BIA June 2, 2015) (unpublished)

(Upholding IJ’s denial of motion for recusal where respondent’s attorney alleged IJ bias because the attorney’s firm had filed complaints against that IJ.)

www.scribd.com/document/268761375/Ihab-Darwish-A029-878-318-BIA-June-2-2015

¹⁶³ Please note that these are subject to revocation and change at any time; practitioners should always review the EOIR website for updates prior to citing.

Matter of Juan Aguilar-Perez, A027 190 905 (BIA Sept. 13, 2013) (unpublished)
(Refusing to consider collateral review of a reinstated removal order based on the fact that the IJ in that case had previously been involved in the case as an OCC attorney, because the respondent had not shown prejudice.)
www.scribd.com/document/169222419/Juan-Aguilar-Perez-A027-190-905-BIA-Sept-13-2013

Matter of Maria Dalila Hernandez-Alanis, A087 709 313 (BIA Sept. 21, 2011) (unpublished)
(Concluding that the IJ acted unfairly and denied respondent due process when he denied her a continuance to find an attorney.)
www.scribd.com/document/199171712/Maria-Dalila-Hernandez-A087-709-313-BIA-Sept-21-2011

Matter of Raul Maldonado Ochoa, A028 892 793 (BIA June 30, 2011) (unpublished)
(Remanding where IJ had denied voluntary departure and a request for a continuance after making “inappropriately derogatory” remarks about the respondent and in part relying the wrong file.)
www.scribd.com/document/199144060/Raul-Maldonado-Ochoa-A028-892-793-BIA-June-30-2011

Matter of Abu Bakarr Dizo-Kamara, A200 515 968 (BIA June 8, 2012) (unpublished)
(Remanding where, among other things, the hearing included “testimony” of an unsworn witness who was not clearly identified for the record.)
<https://www.scribd.com/document/140609243/Abu-Bakarr-Dizo-Kamara-A200-515-968-BIA-Jun-8-2012>

Matter of Richard Michreka Nyamwange, A029 043 107 (BIA Mar. 17, 2011) (unpublished)
(Remanding to a different IJ where the IJs decision on removability had focused on the attorney’s actions, including in an unrelated case, and failed to provide adequate legal analysis of removability.)
www.scribd.com/document/145933709/Richard-Michreka-Nyamwange-A029-043-107-BIA-March-17-2011

Information Regarding Complaints about IJ Conduct

Documents AILA obtained through FOIA litigation about complaints related to IJ conduct
www.aila.org/infonet/eoir-records-relating-misconduct

EOIR statistics on complaints received about IJ conduct
www.justice.gov/eoir/immigration-judge-conduct-and-professionalism

APPENDIX A. SAMPLE COMPLAINTS

Redacted EOIR Complaint about IJ Conduct (2008 referral from BIA)

EOIR Complaint No. 337, AILA Data from EOIR FOIA Lawsuit, supra note 106



Detail

Complaint Number: 337

Immigration Judge: (b)(6)

Complaint Received Date: 09/01/08

Current ACU
Burr, Sarah M.

Base City
(b)(6)

Status
CLOSED

Final Action
Complaint concluded -- IJ
termination during trial period
made action unnecessary

Final Action Date
12/22/08

Part ACUI:

A-Numbers(s)	Complaint Nature(s)	Complaint Source(s)
(b)(6)	Bias Due process In-court conduct Legal	BIA Respondent Atty [Redacted]

Complaint Narrative: (b)(6) (b)(7)(C) -- IJ referenced a "victim of abuse genre" and appeared to exhibit bias and prejudice. Complainant alleges R engaged in an unsettling level of sarcasm and made legal and factual errors.

Complaint History

- 09/01/08 Complaint referred to ACU
- 09/25/08 Oral counseling
- 09/30/08 Training - IJ attended domestic abuse training w/ IJ (b)(6) (b)(7)(C)
- 12/22/08 Complaint concluded -- IJ termination during trial period made action unnecessary - (b)(6)
- 07/02/10 Database entry created

Sep 11, 2013

1 of 1

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013536

Redacted EOIR Complaint about IJ Conduct (2008 referral from BIA)

EOIR Complaint No. 337, AILA Data from EOIR FOIA Lawsuit, supra note 106

Page 1 of 3

(b) (6)

Keller, Mary Beth (EOIR)

From: Keller, Mary Beth (EOIR)
Sent: Friday, September 19, 2008 11:18 AM
To: Sukkar, Elisa (EOIR)
Cc: Pomeranz, Sharon (EOIR)
Subject: RE: Alien Number Requested
Follow Up Flag: Follow up
Flag Status: Red

Elisa,

(b) (5)

mtk

MaryBeth Keller
Assistant Chief Immigration Judge
OCIJ/EOIR

(b) (6)
703.305.1247

From: Sukkar, Elisa (EOIR)
Sent: Wednesday, September 17, 2008 4:25 PM
To: Keller, Mary Beth (EOIR)
Cc: Pomeranz, Sharon (EOIR)
Subject: RE: Alien Number Requested

Dear Mary Beth and Sharon:

Judge (b) (6) spoke to (b) (6) this morning and I had a meeting with IJ (b) (6) at noon and the IJ (b) (6) came to see me this afternoon and we went over this matter. (b) (6) acknowledges that these are (b) (6) words and (b) (6) regrets them. (b) (6) points out that (b) (6) wrote this in December of 2007 before all the meetings that we have had with (b) (6)

I went over with (b) (6) the sensitive nature of cases dealing with rape, sexual orientation and battered spouses or family members. (b) (6) did say the case was old and (b) (6) was frustrated with the attempts of the family to bring this last minute claim.

Non-Responsive

Again I told (b) (6) that this can happen at anytime to any of us beyond any probationary period.

(b) (5)

We have addressed this with (b) (6) fully today. Thank you, Elisa

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013537

Redacted EOIR Complaint about IJ Conduct (2008 referral from BIA)

EOIR Complaint No. 337, AILA Data from EOIR FOIA Lawsuit, supra note 106

Page 2 of 3

From: Keller, Mary Beth (EOIR)
Sent: Wednesday, September 17, 2008 9:46 AM
To: Sukkar, Elisa (EOIR)
Cc: Pomeranz, Sharon (EOIR)
Subject: RE: Alien Number Requested

Elisa,

This is a big set of files. (Started w/ (b) (6) and Judge (b) (6) conducting initial hearings). However, at first and quick review, I do not see the respondent's counsel asserting a "victim of abuse" gene as set forth in the judge's December 19, 2007, denial of the respondent's "motion for pre-trial conference and identification of additional potential relief." It looks like the respondent was stating a long and violent history of abuse of herself and several of her female children, three daughters in particular. In her motion, she notes "Unfortunately, the cycle of violence has not stopped with [the respondent]" and that the daughters "have each themselves unfortunately found themselves in abusive relationships with the fathers of their own children." But that's all I see at this point.

It looks like the respondent filed a very similar motion for continuance etc. on December 5, which the judge denied in a decision dated December 4 (??), mailed out on December 6. In that denial (b) (6) notes "Respondents have had four (4) years to generate relief. They will not be given any more time."

This case looks very messy, and the judge was clearly frustrated with the lengthy amount of time the case had been pending. (b) (6) found a lack of credibility and good moral character in (b) (6) final decision. The case is very very complex factually, and either extremely awful and sad, or extremely awful and a travesty if these stories are not true. But either way, this quote by the judge is not good.

(b) (5)

mtk

MaryBeth Keller
Assistant Chief Immigration Judge
OCT1/EOIR
(b) (6)
703.305.1247

From: Sukkar, Elisa (EOIR)
Sent: Tuesday, September 16, 2008 3:04 PM
To: Keller, Mary Beth (EOIR)
Cc: Neal, David L. (EOIR)
Subject: Alien Number Requested

Dear Mary Beth:

We appear to have been able to track down the alien numbers but I am unable to review the ROPs because they are at the BIA. We narrowed it down to these alien numbers for the entire family:

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9/24/2008

013538

Redacted EOIR Complaint about IJ Conduct (2008 referral from BIA)

EOIR Complaint No. 337, AILA Data from EOIR FOIA Lawsuit, *supra* note 106

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(b) (6) (Lead)

The judge's decision is on a Motion to Continue in which (b) (6) makes references to the date the NTA was issued, the fact they are applying for cancellation, the attorney's name and the date in which the motion was denied. All of this data is consistent with the above referenced files.

Our CASE records indicate that cancellation of removal was denied and that the ROPs were sent to the BIA on June 10, 2008 based upon the alien's appeal which was filed on June 3, 2008.

Please advise if you are able to obtain a transcript or a copy of the tapes. Thank you, Elisa

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9/24/2008

013539

Redacted EOIR Complaint about IJ Conduct (2008 referral from BIA)

EOIR Complaint No. 337, AILA Data from EOIR FOIA Lawsuit, supra note 106

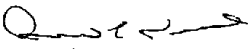


U.S. Department of Justice
Executive Office for Immigration Review
Office of the Chief Immigration Judge
5107 Leesburg Pike, Suite 2500
Falls Church, Virginia 22041

Chief Immigration Judge

MEMORANDUM

TO: Kevin A. Ohlson
Director

FROM: 
David L. Neal
Chief Immigration Judge

DATE: September 23, 2008

SUBJECT: Trial period evaluation for Judge (b) (6)

Judge (b) (6) is scheduled to complete (b) (6) trial period on December 23, 2008. Because there are unusual elements in (b) (6) evaluation, this memorandum sets out specific items for your consideration.

Non-Responsive

Non-Responsive

Non-Responsive (There was one item of anonymous criticism that (b) (6) is not sensitive to political asylum cases rooted in domestic violence.) **Non-Responsive**

Non-Responsive

Non-Responsive

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013540

Redacted EOIR Complaint about IJ Conduct (2008 referral from BIA)

EOIR Complaint No. 337, AILA Data from EOIR FOIA Lawsuit, *supra* note 106

Trial period evaluation for Judge (b) (6)
page 2

Domestic violence case. We recently learned of a case – through the trial period process, not through a formal complaint – in which Judge (b) (6) issued a sharply worded written decision on a motion for continuance. The case involved a cancellation of removal application premised on domestic violence. The master calendar hearing had been reset multiple times and was scheduled for a merits hearing when this motion for continuance was submitted. Judge (b) (6) perceived the respondents' motion as an effort to interject additional delay into an already lengthy case, and (b) (6) frustration is visible in the wording of the motion. Given the procedural history of the case, (b) (6) misgivings about the evidence being offered, and counsel's lack of courtesy toward Judge (b) (6) legal assistant (which is referenced in the ruling on the motion), some degree of frustration is understandable. Nonetheless, the caustic tenor of (b) (6) ruling on the motion and (b) (6) sardonic reference to the respondents having a "victim of abuse gene" are simply inappropriate and are cause for concern.

Recommendations. Prior to this case coming to light, you had indicated that Judge (b) (6) should be retained. (b) (6) has received favorable reviews from (b) (6) supervisor, (b) (6) mentors, and both bars. The only complaints that have been formally lodged against (b) (6) have been addressable errors.

This particular ruling certainly raises concerns, at least about (b) (6) sensitivity to domestic violence issues. The fact that there is another instance of criticism in which domestic violence comes into play (albeit that the case is unidentified and the claim unsubstantiated) is not comforting.

I am concerned about Judge (b) (6) sensitivity to cases involving domestic violence, but observe that we have only one concrete instance in which poor judgment has been shown. In the absence of other instances and other negative information, I recommend that Judge (b) (6) be retained. However, I condition my recommendation on this office taking additional measures to ensure that Judge (b) (6) acts appropriately in cases involving domestic violence or similar concerns. Specifically, we will require Judge (b) (6) to participate in training focused on this particular area (which I have already put into motion), and we will continue to monitor (b) (6) very carefully and take prompt corrective action should it be needed, not only through the duration of the probationary period but also until such time as we are confident that (b) (6) is appropriately sensitive to issues involving domestic violence.

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013541

Redacted EOIR Complaint about IJ Conduct (2008 referral from BIA)

EOIR Complaint No. 337, AILA Data from EOIR FOIA Lawsuit, supra note 106

Page 1 of 2

(b) (6)

Moutinho, Deborah (EOIR)

From: Keller, Mary Beth (EOIR)
Sent: Thursday, October 23, 2008 12:00 PM
To: Moutinho, Deborah (EOIR)
Subject: FW: Completion of Dometic Violence Training
Follow Up Flag: Follow up
Flag Status: Purple

Is (b) (6) updated in the db to reflect that he completed the below training? Also, a copy of the below should be in (b) (6) hard copy file.

Tx.
mtk

MaryBeth Keller
Assistant Chief Immigration Judge
OCLJ/EOIR

(b) (6)
703.305.1247

From: Sukkar, Elisa (EOIR)
Sent: Tuesday, September 30, 2008 5:59 PM
To: Keller, Mary Beth (EOIR)
Cc: Neal, David L. (EOIR)
Subject: FW: Completion of Dometic Violence Training

Dear Mary Beth: I have the materials in a binder which I will send to you for your review. I will also keep a copy here in (b) (6). Thank you, Elisa

From: (b) (6) (EOIR)
Sent: Tuesday, September 30, 2008 4:17 PM
To: Sukkar, Elisa (EOIR)
Subject: Completion of Dometic Violence Training

Dear Assistant Chief Judge Sukkar,
September 30, 2008

Tuesday

Judge (b) (6) met me in the 7th floor conference room this afternoon at approximately 1:15 PM and we discussed from our reading of advance prepared materials the law review articles, administrative materials, cases and other publicly available resources on domestic violence. I found from our discussion that (b) (6) had thoroughly read the material in advance of the session and was prepared to have an open discussion on the topic and frank exchange. Further, Judge (b) (6) was sensitive to the issues and (b) (6) noted that (b) (6) has a record of granting a majority of VAWA claims.

Judge (b) (6) expressed freely (b) (6) regretted immediately a statement (b) (6) made in a decision in December of 2007 when (b) (6) denied a motion for a second continuance of a scheduled individual hearing. The Judge explained to me that the case had been pending for five years and was on the old case list, that at the time of this decision (b) (6) was scheduling five merits hearings a day and attempting to reduce the 1,700 cases (b) (6) had inherited from the previous Judge who had retired and was putting pressure on (b) (6) to perform at a very high level. (b) (6) was contrite and I found (b) (6) sincere in (b) (6) apology for an insensitive misstatement that (b) (6) understands the

FOIA 2013-2789
10/23/2008

013542

Redacted EOIR Complaint about IJ Conduct (2008 referral from BIA)

EOIR Complaint No. 337, AILA Data from EOIR FOIA Lawsuit, *supra* note 106

Page 2 of 2

respondent and counsel could find demeaning in the context that it was written. (b) (6) freely admitted that (b) (6) would refrain from its use or reference again in the future. (b) (6) assured me that it was not a phrase that (b) (6) had ever used before nor heard from any other source but an expression that was not properly thought out and happened while tired and in a hurry to type a response to a motion. Ultimately, when in April 2008 (b) (6) issued a written decision on the merits of the application for cancellation pursuant to section 240A(b) of the I&N Act, (b) (6) did not make any reference to the phrase that appeared in the denial of the motion seeking a continuance. This further supports (b) (6) statement of remorse and regret for its initial use and that it was a one time misstatement.

I spoke at some length with (b) (6) provided counsel, (b) (6) listened intently and (b) (6) reassured me that this was aberration from (b) (6) character. I believe (b) (6) and was pleased and satisfied with our session. We concluded about 2:30 PM. I hope this is helpful to you and please let me know if you need any further information or follow up.

submitted,

Respectfully

(b) (6)

(b) (6)

FOIA 2013-2789
10/23/2008

013543

Redacted EOIR Complaint about IJ Conduct (2008 referral from BIA)

EOIR Complaint No. 337, AILA Data from EOIR FOIA Lawsuit, supra note 106

(b) (6)



Memorandum

Subject Matter of (b) (6) (BIA December 11, 2008)	Date December 23, 2008
To David Neal, Chief Immigration Judge	From Juan P. Osuna, Chairman

Pursuant to a previous understanding that the Board would bring to the attention of the Chief Immigration Judge any Board decision which remands a case to a different Immigration Judge, you will find attached a copy of the Board's decision dated December 11, 2008, and relevant portions of the record of proceedings, in the above-referenced matter. Please take the necessary steps to ensure that this matter is assigned to a different Immigration Judge on remand.

Further, the Board anticipates returning the record of proceedings for this remanded case to the Immigration Court on January 6, 2009. If you wish to review the record prior to its return to the Immigration Court, please contact Terry Smith (Tower 24).

Thank you for your attention to this matter.

Attachment

FOIA 2013-2789

013544

Redacted EOIR Complaint about IJ Conduct (submitted Oct. 2011)

EOIR Complaint No. 559, AILA Data from EOIR FOIA Lawsuit, supra note 106



[Detail](#)

Complaint Number: 559

Immigration Judge: (b)(6)

Complaint Received Date: 10/26/11

0002796

Current ACIJ
Nadkarni, Deepali
Past ACIJS:

Base City
(b) (6)

Status
CLOSED

Final Action
Written counseling

Final Action Date
01/04/12

A-Numbers(s)	Complaint Nature(s)	Respondent Atty	Complaint Source(s)
(b)(6)	Due process In-court conduct		

Complaint Narrative: IJ wrongfully denied attorney's telephonic motion

Complaint History	
10/27/11	Complaint referred to ACIJ
10/27/11	Database entry created
01/04/12	Written counseling
01/11/12	IJ will come to OCIJ for additional training
02/01/12	Training at HQ with ACIJ Weil.

Sep 11, 2013

1 of 1

Redacted EOIR Complaint about IJ Conduct (submitted Oct. 2011)

EOIR Complaint No. 559, AILA Data from EOIR FOIA Lawsuit, *supra* note 106

Moutinho, Deborah (EOIR)

From: (b) (6)
Sent: Wednesday, October 26, 2011 6:15 PM
To: IJConduct, EOIR (EOIR)
Subject: re: judicial complaint
To whom it may concern,

This complaint is in regard to Judge (b) (6) in the (b) (6) Detention Center. I would prefer that it would remain anonymous because I am concerned that (b) (6) would potentially respond by punishing me down the road. However, if necessary, I would understand if the complaint could not remain anonymous and would not abandon it for that reason. It regards case A (b) (6)

The case was initially heard before (b) (6) as a bond motion. (b) (6) denied bond based on some serious drug charges which were pending and a number of voluntary returns that occurred when the Respondent was 14. (b) (6) also stated that (b) (6) would not allow any future bond hearings on the case even though the client would become cancellation eligible within a week due to his parents' adjustment of status.

I appealed for the above-listed reasons, and because Respondent's parents had adjusted, and because I was concerned that the judge had potentially engaged in ex parte communication because (b) (6) was aware of a number of circumstances regarding my client's voluntary returns and charges which had not been raised by DHS counsel. The case was remanded to the court for rehearing.

Following the remand, I filed a motion for telephonic bond hearing, which is standard procedure because I am in (b) (6) which is (b) (6) hours from (b) (6) by car (Aliens are moved from (b) (6) to (b) (6) following their apprehension). I called to follow up on Friday the bond hearing on September 30, 2011, and was told by (b) (6) clerk that the bond hearing would be the following Tuesday but that the judge had specifically denied my request to appear telephonically. It was too late at that point to file anything new because the hearing was to take place the following Tuesday.

I appeared in (b) (6) on Tuesday, October 4th at 8AM as requested. The guards notified the judge I was present with my witness. There were other masters going on that morning as well, but no individuals, and I was the only attorney. I was not called in until after waiting in the lobby approximately 4 to 5 hours.

Eventually we had the hearing. During the appeal, my client had become eligible for non-LPR cancellation because his parents had become U.S. permanent residents. Additionally, his criminal charges had been dismissed by the court. The District Attorney had appealed the judge's decision. At the conclusion of the bond hearing, the judge set a \$35,000 bond on my client. Part of (b) (6) reasoning was that "if the cases were important enough to the district attorney to appeal them, then your client must be a serious offender," when the more obvious conclusion would be that there are major issues in sustaining the allegations.

After the bond hearing, I had prepared several motions to address with the judge. The first motion was a motion to withdraw which I had prepared because I would be unable to continue to travel to (b) (6) because my client would not be able to pay my travel expenses. (b) (6) said (b) (6) would not rule on it and to "file it at the window." I then asked if (b) (6) would at least continue the next master hearing which (b) (6) had set for October 19th, only 2 weeks later because I would be out of town for my wife and I's 1st anniversary and that I had filed for secure leave with the immigration courts. (b) (6) refused to hear the motion and told me to file it at the window as well. I asked (b) (6) if I could appear telephonically and the response was the same.

As I left the courtroom, and I don't remember the exact words used, the judge said to me that, "just so you know, I read your appeal brief and I read everything that you said about me and my decision." This
10/27/2011

0002796

Redacted EOIR Complaint about IJ Conduct (submitted Oct. 2011)

EOIR Complaint No. 559, AILA Data from EOIR FOIA Lawsuit, supra note 106

left me with the distinct impression that (b) (6) had denied my telephonic motion and forced me to appear in (b) (6) and that (b) (6) set an extraordinarily high bond on my client, as a vindictive response to having (b) (6) decision overturned.

I have discussed this matter with a number of other attorneys who feel that they have been treated with a complete lack of respect by Judge (b) (6) as well. Most told me they would prefer not to file complaints out of fear of retribution because our cases continually get moved to (b) (6) courtroom from (b) (6). However, if necessary, I could probably get them to respond if they knew it would be anonymous. Also, a large number of attorneys refuse to represent individuals there for this reason, which is causing individuals to have difficulty in securing representation.

Sincerely,

(b) (6)

10/27/2011

0002794

Redacted EOIR Complaint about IJ Conduct (submitted Oct. 2011)

EOIR Complaint No. 559, AILA Data from EOIR FOIA Lawsuit, supra note 106



U.S. Department of Justice

Executive Office for Immigration Review

Office of the Chief Immigration Judge

5107 Leesburg Pike, Suite 2500
Falls Church, Virginia 22041

January 4, 2012

Immigration Judge (b) (6)

(b) (6)

Subject: Letter of Counseling

Dear Judge (b) (6):

This letter is to follow up on our December 12, 2011 telephone conversation. As I explained during this conversation, I have recently received two written complaints and numerous oral complaints regarding your conduct on the bench. I also related my concerns regarding your job performance in the professionalism rating element of your performance work plan. Lastly, I reminded you that you are currently in your trial period of your employment as an Immigration Judge, and that the large number of complaints could impact your continued employment.

In an email sent on December 7, 2011, I advised you that I had received a number of complaints and requested that you review the Digital Audio Recording (DAR) records for a number of specific cases. When we spoke on December 12, 2011, you acknowledged that you had listened to the recordings, and you apologized for your behavior.

I expressed serious concerns and provided several examples from the DAR records regarding your conduct.¹ Specifically, I addressed the following issues:

- **Your tone and diction do not demonstrate that you treat all people with appropriate respect.**

For example, in A (b) (6), you scolded an attorney for offering the respondent's employer as a general character witness in the context of a bond redetermination hearing. You stated: "Wait a minute. Are you telling me that you have an employer who has hired an illegal alien in this country who wants to testify as to good moral character for this respondent when he

¹ I note that your conduct also implicates your performance under Job Element 2 (Professionalism) of your performance work plan.

0002798

Redacted EOIR Complaint about IJ Conduct (submitted Oct. 2011)

EOIR Complaint No. 559, AILA Data from EOIR FOIA Lawsuit, *supra* note 106

is knowingly hiring someone who is not eligible to work in this country?" "Well, I'll take testimony. But I'm going to give that testimony the weight that it is due considering the state of the law in the United States on the responsibility of employers to verify the status of their employees. I'll be happy to hear from anyone who wants to testify."

Later, you addressed the witness in the following manner: "Sir, I want to know why you are knowingly hiring someone who is not authorized to work in this country." When the witness stated, "2 issues. . .," you interrupted, stating, "Wait, wait. I get to identify the issues, not you. I want you sir, please, with all due respect, to answer my question." This line of questioning was not relevant or probative with regard to the respondent's bond redetermination.

- **Your tone and diction do not demonstrate that you act in a dignified manner, exercising patience and self-control. Rather, your remarks have been hostile and inflammatory.**

For example, in A(b)(6), you admonished an attorney: "you filed for bond for someone who's got a conviction for child abuse?" Not only does this question reflect your general feeling about child abuse cases, but it also reflects disapproval and prejudgment of counsel's argument regarding the respondent's specific conviction.

In another case (A(b)(6)), you chastened an attorney, "Bond is denied. Your client is a danger to the community. I'm not giving him permission to go back and beat the bejeezus out of (b)(6)." As I related to you, I was told by counsel that the manner in which you read the police report in court and conducted the bond proceeding caused the respondent such distress that he was later placed under suicide watch at the detention facility. Although the respondents' well-being is not your immediate priority, some sensitivity regarding respondents' safety in a detention facility is necessary.

In A(b)(6), you expounded, "Wait, wait, wait. Now let's stop right here and everybody calm down. You don't get to blackmail the government in my court. If you want to threaten (b)(6) you are free to call the ICE office, talk to him personally, and threaten him with anything you want. But you're not doing it in my courtroom." The "blackmail" and "threat" to which you referred was counsel's statement that she would challenge in court ICE's detention of her client without issuing a Notice to Appear. I advised you to refrain from using words such as "threat" and "blackmail" as they are inflammatory, not dispassionate, and unbecoming. I also asked you to be careful of using the term "my courtroom." I reminded you that the courtroom is that of the United States Department of Justice and that you are there representing the Attorney General.

- **Your tone and diction do not reflect that you act in a fair and impartial manner toward all parties.**

For instance, your following introductory statement in A(b)(6) implies a predisposition to deny or set a high bond: "All right, counsel. You know how I feel about drugs and alcohol on the road. What say you?" Later in this hearing you stated, "I will grant the

Redacted EOIR Complaint about IJ Conduct (submitted Oct. 2011)

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government's motion, and ONLY the government's motion, should they find that something that you have said to this court is not true." This comment does not reflect the impartiality of a neutral adjudicator, but rather suggests that you have decided to deny outright any motions offered by the respondent without due consideration.

In addition, the manner in which you have asked whether a party reserves appeal may reasonably be viewed as intimidating. For example, in A(b)(6), you stated, "Counsel, \$50,000. Reserved or waived, counsel? I can deny it. I can deny it. I can call him a danger to the community and deny it if you'd like me to." Your statement reflects a threat to deny bond altogether if counsel did not waive appeal with regard to the amount.

In A(b)(6), when counsel tried to reserve appeal regarding bond amount, you stated, "What you're saying is that it's okay that I should ignore the fact that he's got a conviction for (b)(6)? That's what's submitted to the court. \$75,000." In A(b)(6), you noted, "You just said that if they don't file a Notice to Appear that you're going to file with the Board. I consider that a threat." Your comments are argumentative and suggest that you view reservation of appeal as a personal criticism. As I advised you, reserving the right to file an appeal is not a threat or challenge to your authority; it is a right afforded the parties by law. As I also advised you, your actions in this regard have been described to me by private attorneys as having a chilling effect on their exercise of appeal rights.

- **Your tone and diction do not demonstrate that you are giving each side a fair opportunity to present their respective cases, while maintaining proper decorum within the court.**

In A(b)(6), when counsel tried to direct your attention to a document, you stated, "I want to know. . . Counsel, counsel. You and I are going to get crossed wires every single time if you don't learn to start telling me what things are and providing the statutes that go with your argument." I recounted several attorneys' descriptions of your behavior, including the following: "delusions of grandeur"; "repeatedly disrespectful"; "very (b)(6)"; "random revocation of telephonic privileges"; "doesn't care about due process"; "felt threatened"; and "kangaroo court."

I explained that due to concerns regarding your conduct, you will no longer be (b)(6) judge for new Immigration Judge (b)(6) and that I planned to ask Judge (b)(6) to assume that responsibility.

I also reminded you that you are in the probation stage of your employment as an Immigration Judge, and that your trial period ends on (b)(6). I explained that prior to recommending to the Department that the probationary status be lifted, I will seek feedback regarding your performance from stakeholders-- including fellow judges, the Court Administrator, DHS Office of Chief Counsel, and the private bar. I cautioned that due to the volume and gravity of complaints, I could not make such a recommendation if were I asked to do so today; whether I can do so in the future depends on how you are able to turn your behavior around. I stated that as a result of this conversation, I would like to see your behavior improve

Redacted EOIR Complaint about IJ Conduct (submitted Oct. 2011)

EOIR Complaint No. 559, AILA Data from EOIR FOIA Lawsuit, supra note 106

immediately.

Please feel free to contact me if you would like to discuss this matter further.

Sincerely,



Deepali Nadkarni
Assistant Chief Immigration Judge

Redacted EOIR Complaint about IJ Conduct (submitted Nov. 2012)

EOIR Complaint No. 694, AILA Data from EOIR FOIA Lawsuit, supra note 106



Detail

Complaint Number: 694

Immigration Judge: (b)(6)

Complaint Received Date: 11/28/12

Current ACJ
Sukkar, Elisa M.

Base City
(b)(6)

Status
CLOSED

Final Action
Complaint dismissed because it cannot be substantiated

Final Action Date
03/14/13

Past ACJ's:

A-Number(s)	Complaint Nature(s)	Respondent Atty	Complaint Source(s)
(b)(6)	Due process In-court conduct Other: factual error-as to whereabouts of the R	(b)(6)	(b)(6)

Complaint Narrative: The respondent's attorney complains that her client was removed in-absentia although respondent was present in the courtroom. The attorney acknowledges she was covering another hearing in a courtroom next door. The IJ was informed that counsel was present and so was the respondent.

Complaint History

- 11/29/12 Complaint referred to ACJ
- 11/29/12 Database entry created
- 11/30/12 ACJ contacts IJ for response
- 01/17/13 ACJ contacts the IJ since no response was received.
- 02/15/13 BIA remands because of lack of jurisdiction
- 03/06/13 Case was placed on docket for MC hearing for 8/8/13
- 03/14/13 Complaint dismissed because it cannot be substantiated

Sep 11, 2013

1 of 1

FOIA 2013-2789

012144

Redacted EOIR Complaint about IJ Conduct (submitted Nov. 2012)

EOIR Complaint No. 694, AILA Data from EOIR FOIA Lawsuit, supra note 106

EOIR FOIA Processing (EOIR)

From: Sukkar, Elisa (EOIR)
Sent: Monday, January 14, 2013 4:09 PM
To: Keller, Mary Beth (EOIR); Moutinho, Deborah (EOIR)
Cc: Morris, Florencio (EOIR)
Subject: RE: IJ Complaint A (b) (6)

MTK:

We will work on it.

I pulled all my files so that Tony and I can get this on track for all of us!

Thanks,

EMS

From: Keller, Mary Beth (EOIR)
Sent: Wednesday, January 09, 2013 2:00 PM
To: Moutinho, Deborah (EOIR); Sukkar, Elisa (EOIR)
Subject: FW: IJ Complaint A (b) (6)

D –

ACIJ contacts IJ for response. (Complaint #694, (b) (6)).

Elisa,

This one remains “uncategorized” in the db and isn’t showing the short narrative; could you please select the “nature” and give us the blurb?

Many thanks.

Mtk

From: Sukkar, Elisa (EOIR)
Sent: Friday, November 30, 2012 4:27 PM
To: Keller, Mary Beth (EOIR)
Cc: Kelly, Ed (EOIR); McGoings, Michael (EOIR); O’Leary, Brian (EOIR)
Subject: FW: IJ Complaint A (b) (6)

FYI

From: Sukkar, Elisa (EOIR)
Sent: Friday, November 30, 2012 4:26 PM
To: (b) (6) (EOIR)
Subject: IJ Complaint A (b) (6)

Good Afternoon Judge (b) (6)

This is to inform you that a complaint has been filed against you by Attorney (b) (6) in reference to the above captioned matter.

1

FOIA 2013-2789

012145

Redacted EOIR Complaint about IJ Conduct (submitted Nov. 2012)

EOIR Complaint No. 694, AILA Data from EOIR FOIA Lawsuit, supra note 106

I have listened to the DAR recording of the in-absentia hearing conducted on October 31, 2012.

In her complaint, the attorney indicates that her client was present in court while the court went forward indicating that the respondent was not present and removed her in absentia.

(b) (6) indicates that she went to your courtroom at 8:30 am and since the court was addressing another matter, she went to IJ (b) (6) courtroom to sign in as she had a master calendar case pending before (b) (6) as well.

She states that, in the interim, her client was removed in absentia at 8:47 am. The attorney states that she had no idea you had ordered her client removed when she sat at counsel's table with her client in order to be heard by the court. She said it was the ACC, (b) (6) who actually informed her that the respondent had just been ordered removed.

Prior to the removal order, another attorney in the courtroom informed you and (b) (6) that counsel was present and she stood up and indicated that she would summon (b) (6) from the other courtroom so she could appear. As I listened to the DAR recording, none of what transpired off the record is reflected. The DHS never moved the court to proceed in absentia. The DHS attorney should have informed the court on the record the fact that the respondent attorney's was being summoned and, more importantly, that the government had agreed to prosecutorial discretion.

(b) (6) states that after she returned to your courtroom, she addressed the court and informed you that she and her client were present but that you indicated that you did not conduct hearings in the hallway and did not address her concerns.

The attorney indicates that the government had agreed to amend the charges against her client and had also agreed to prosecutorial discretion and the case was going to be administratively closed.

The primary DHS attorney assigned to the case, after being informed of what transpired, joined a Motion to Reopen the proceedings which was filed on November 1, 2012. The attorney for the respondent indicates that a ruling on the motion was not received and that, in order to protect her client's rights, she has filed an appeal of the removal order with the BIA.

Please review the ROP and the DAR recording and indicate whether the attorney and her client were in your court that day as she has indicated and whether she made the court aware of her presence and that of her client while you were still conducting master calendars on October 31, 2012.

After you review this matter, please advise on a convenient time for you next week so that we can discuss this further.

Thank you,

Judge Sukkar

Redacted EOIR Complaint about IJ Conduct (submitted Nov. 2012)

EOIR Complaint No. 694, AILA Data from EOIR FOIA Lawsuit, supra note 106

EOIR FOIA Processing (EOIR)

From: Sukkar, Elisa (EOIR)
Sent: Wednesday, May 01, 2013 9:55 AM
To: Moutinho, Deborah (EOIR)
Cc: Keller, Mary Beth (EOIR); Morris, Florencio (EOIR)
Subject: RE: Complaint Regarding An Immigration Judge's Conduct

Follow Up Flag: Follow up
Flag Status: Completed

Hi Deborah:

We do need to close it out. I addressed this with the judge.

The BIA remanded the case. [REDACTED] decision was vacated. I pressed the CA so the matter would be placed on the docket. The CA confirmed a few weeks ago that the matter was calendared.

Let me take a look at my notes and folder before we close it out.

I wonder if something else has now happened that may have triggered attorney to follow up. I will listen to DAR.

Thanks,

EMS

From: IJConduct, EOIR (EOIR)
Sent: Wednesday, May 01, 2013 8:39 AM
To: Sukkar, Elisa (EOIR)
Cc: Keller, Mary Beth (EOIR)
Subject: FW: Complaint Regarding An Immigration Judge's Conduct

Good Morning

Please complaint is still open in the database. If you would like to respond via the conduct email box, please send me what you would like to communicate and I will send it out via the mailbox.

Thank you
Deborah

From: (b) (6)
Sent: Tuesday, April 30, 2013 3:13 PM
To: IJConduct, EOIR (EOIR)
Subject: FW: Complaint Regarding An Immigration Judge's Conduct

Greetings,

I filed a complaint (below and attached) on November 28 2012 and I just realized I did not receive a complaint number. Was there one assigned? I just wanted to follow up.

1

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012147

Redacted EOIR Complaint about IJ Conduct (submitted Nov. 2012)

EOIR Complaint No. 694, AILA Data from EOIR FOIA Lawsuit, supra note 106

Thank you,

(b) (6)

...with additional offices in (b) (6) and (b) (6) and (b) (6)

Join Us!



(b) (6)

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From: (b) (6)
Sent: Wednesday, November 28, 2012 5:23 PM
To: EOIR.IJConduct@usdoj.gov
Subject: Complaint Regarding An Immigration Judge's Conduct

Dear Assistant Chief Immigration Judge for Conduct and Professionalism,

Good afternoon. I am writing you to file an official complaint against Immigration Judge (b) (6) of the (b) (6) Immigration Court. In addition to the statement of events below, I am also attaching a copy of sworn affidavits, one from myself and one from (b) (6) one of my colleagues, as both of us have personal knowledge of the events described below. I appreciate your assistance in this difficult matter and if I can provide any additional information, please do not hesitate to contact me.

Name of the Judge: (b) (6)

Time and Place of the Occurrence: October 31, 2012 (b) (6) Immigration Court

Redacted EOIR Complaint about IJ Conduct (submitted Nov. 2012)

EOIR Complaint No. 694, AILA Data from EOIR FOIA Lawsuit, *supra* note 106

Statement of What Occurred:

On October 31, 2012, our client was scheduled for a master calendar hearing with Immigration Judge (b) (6) Sr. at 8:30 a.m. The government had agreed to prosecutorial discretion at the last master hearing but this hearing was scheduled as the pleadings were to be amended to indicate that our client entered as a tourist with inspection. This was necessary so that there would be no issues in the event that our client becomes eligible for relief in the future, as she is expected to do. (Her son is currently a LPR, who will be eligible to naturalize in just less than three years and she entered with inspection).

That particular morning I was covering three master calendar hearings before Judge (b) (6) and Judge (b) (6). Myself and one other attorney from our law office, (b) (6) were present at the (b) (6) Immigration Court on this day. (b) (6) entered Judge (b) (6) courtroom at 8:15 a.m. that morning as she also had an early morning hearing with Judge (b) (6). She was sitting in the front row of the courtroom. I entered the court room at approximately 8:30 a.m. Upon seeing that Judge (b) (6) was in the middle of another hearing, I continued to Judge (b) (6) court room so that I could sign (b) (6) master calendar hearing list.

I knew that Judge (b) (6) often has many individuals on (b) (6) master calendar docket and it can sometimes take up to a few hours before a master case is called. (b) (6) permits attorneys to sign in when they arrive and then calls them in that order. Attorney will remember their place in line and check periodically to make sure they are in the court when their case is called. Even by signing in on this list, I knew that I would mostly likely have to wait about one hour. Thus, I planned to sign in with Judge (b) (6) and then return to Judge (b) (6). I knew from past experience that while Judge (b) (6) allows attorneys to sign the list as long as they are back before they are called, Judge (b) (6) does not have this procedure and does not appreciate attorneys signing in and leaving (b) (6) courtroom.

While I was signing Judge (b) (6) list, Judge (b) (6) called our client's case. According to (b) (6) the Judge discussed with counsel for the government what was to be done with the case. Counsel for the government then turned to (b) (6) and asked her if she would be doing the hearing. In response, (b) (6) stated that I was to handle the hearing and that I was in the building and that she would summon me right away. (b) (6) then stood up and stated that she would summon me.

When (b) (6) left to summon me, the IJ called our client's case and issued an order of removal. Per the DAR recording, this order was entered at 8:47 a.m. I was present as Judge (b) (6) was finishing the order as the entire process of (b) (6) summoning me from Judge (b) (6) courtroom took only about two minutes. However, I had no idea the order the Judge was issuing was for our client. In fact, after reviewing the DAR tape recording, you can hear the court door being opened as the Judge is finishing (b) (6) order. Furthermore, Judge (b) (6) did not give DHS an opportunity to speak on the DAR record of proceedings. Counsel for the government informed (b) (6) that immediately prior to the commencement of the hearing, he had informed the Immigration Judge that (b) (6) had gone to summon me and that the hearing was simply for the purpose of amending the pleading and administratively closing the case. DHS was not seeking an order of removal.

As I had no idea what was happening, when I returned to Judge (b) (6) court room, my client and I sat at the attorney table in front of the Judge. Judge (b) (6) was busy writing so I handed my Form EOIR-28 to the government attorney, (b) (6). I also whispered (b) (6) to confirm that amended pleading were ready. (b) (6) responded that Judge (b) (6) had just ordered my client removed. When I heard that I was so shocked I was not sure what to do. I sat down next to my client still expecting to be called. Judge (b) (6) then called the next case. I indicated to (b) (6) that both the client and myself were present in court and that I was under the impression (b) (6) called my case. The IJ responded that (b) (6) did not conduct (b) (6) court in the hall and then did not address me further.

Redacted EOIR Complaint about IJ Conduct (submitted Nov. 2012)

EOIR Complaint No. 694, AILA Data from EOIR FOIA Lawsuit, supra note 106

Upon completing my other two cases, I saw the primary Government Attorney assigned to the case (b) (6) and explained to her what happened. Since it was supposed to be a straightforward administrative closure she was as surprised as I was at what had occurred. She indicated to me that she would be willing to sign any joint motion to reopen the case if we decided to file one. A joint motion was filed on November 1, 2012, but Judge (b) (6) never ruled on this Joint Motion. As such, to protect our client's appeal rights, were forced to file an appeal with the BIA yesterday.

I deeply regret having to file a complaint, but I feel the need to do so to protect my client's rights and the preserve the integrity of the Immigration Court. The order of removal in this case was not the actions of an impartial and neutral judge. The Judge played a prosecutorial role outside the scope of the court's responsibility as an unbiased adjudicator.

My name, address, telephone number:

(b) (6)

(b) (6)

Thank you,

(b) (6)

...with additional offices in (b) (6) and (b) (6) and (b) (6)

Join Us!



(b) (6)

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Redacted EOIR Complaint about IJ Conduct (submitted Nov. 2012)

EOIR Complaint No. 694, AILA Data from EOIR FOIA Lawsuit, supra note 106

EOIR FOIA Processing (EOIR)

From: Sukkar, Elisa (EOIR)
Sent: Tuesday, May 21, 2013 1:11 PM
To: Keller, Mary Beth (EOIR)
Cc: Moutinho, Deborah (EOIR)
Subject: FW: A (b) (6)

Follow Up Flag: Follow up
Flag Status: Completed

MTK:

This is confirmation, although not reflected in CASE, that the judge granted the Motion to Reopen. The case is now pending before the Judge (b) (6) for a full hearing.

The parties wanted to reopen to them AC the case due to PD.

Hopefully, this remedies the concerns of the complainant, (b) (6), as to the rights of her client.

Thanks,

EMS

From: (b) (6) (EOIR)
Sent: Tuesday, May 21, 2013 11:09 AM
To: Sukkar, Elisa (EOIR)
Cc: Morris, Florencio (EOIR)
Subject: RE: A (b) (6)

Hello Judge Sukkar,

Once the case was remanded Judge (b) (6) granted the original Joint Motion to Reopen on Feb. 28, 2013. There were no comments in the written decision, and a master hearing was set for August 8, 2013. Both the order and notice were mailed together. There have been no further filings or actions in this case to date.

Thanks,

(b) (6)

From: Sukkar, Elisa (EOIR)
Sent: Monday, May 20, 2013 12:44 PM
To: (b) (6) (EOIR)
Cc: Morris, Florencio (EOIR)
Subject: A (b) (6)

Good Afternoon (b) (6)

Can you confirm when IJ (b) (6) placed this case back on the docket?

I have Tony also checking CASE for a history of the case.

1

FOIA 2013-2789

012151

Redacted EOIR Complaint about IJ Conduct (submitted Nov. 2012)

EOIR Complaint No. 694, AILA Data from EOIR FOIA Lawsuit, supra note 106

Was the Joint Motion to Reopen granted? The BIA returned the case not remanded.

I know the case has a hearing set for August 08, 2013.

I need to close out the complaint and I would like to provide the most recent case history.

Please do not discuss with the judge as I would not want [REDACTED] to think we are rehashing this. I just want to know how the case stands procedurally.

Please advise,

EMS

APPENDIX B. SELECTED EOIR DOCUMENTS

EOIR, Summary of OCIJ Procedure for Handling Complaints Against Immigration Judges

Available at www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/IJComplaintProcess.pdf

Summary of OCIJ Procedure for Handling Complaints Against Immigration Judges

The Office of the Chief Immigration Judge (OCIJ) regularly monitors immigration judge (IJ) performance and conduct through EOIR's performance management program, and through its daily supervision of the courts. In instances where concerns regarding an immigration judge's conduct arise, the OCIJ is committed to ensuring that any allegations are investigated and resolved in a fair and expeditious manner.

Intake/Docketing

Complaints against IJs may be initiated in one of two ways. *First*, an individual or group may file a formal complaint with either the Assistant Chief Immigration Judge for Conduct and Professionalism (ACIJ C/P) or the appropriate supervisory Assistant Chief Immigration Judge (ACIJ).¹ The complaint may be communicated either in writing or orally, and it may be anonymous. A written or oral complaint must contain at least a brief statement describing the IJ's alleged conduct that gave rise to concern.

Second, OCIJ may itself become aware of information that suggests an IJ may have engaged in inappropriate conduct. Such information may come to the attention of OCIJ in a variety of circumstances including, but not limited to, news reports, referrals from other components or agencies, such as the Board of Immigration Appeals or Office of Immigration Litigation, or routine reviews of agency and court decisions.

Upon the receipt or identification of a complaint, OCIJ will assign a number to the complaint and create an entry for it in OCIJ's complaint tracking database. When the complaint came from an identifiable complainant who has provided contact information, OCIJ will acknowledge its receipt of the complaint.

Office of Professional Responsibility (OPR)/Office of the Inspector General (OIG)

If the allegations appear to fall under the jurisdiction of either OPR or OIG², the complaint will be referred to those components for further investigation. Before such referral, an ACIJ or the ACIJ C/P may undertake some initial investigation of the complaint and the ACIJ C/P may informally consult with OPR and/or OIG in order to determine whether a referral should be made. Once a matter is referred to OPR and/or OIG, any further OCIJ investigation may be deferred pending the conclusion of the OPR and/or OIG investigation, at which point OPR and/or OIG will report back to EOIR concerning their findings and conclusions.

¹ Please refer to the [ACIJ assignment web page](#) for a directory of each immigration court's supervisory ACIJ.

² OPR has jurisdiction over complaints where there is an appearance or allegation of professional misconduct. OIG has jurisdiction over allegations of criminal conduct or serious waste, fraud or abuse.

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Agency Investigation

For matters that fall outside of OPR or OIG jurisdiction, an ACIJ will investigate the complaint. OCIJ may also investigate after receipt of a report from OPR and/or OIG. If the complaint involves in-court conduct, the investigation will usually begin with a review of the hearing record, including the audio recordings. For complaints that involve in-court or out-of-court conduct, the ACIJ may also solicit statements from the complainant, the IJ, and any witnesses. If the investigating ACIJ concludes that the conduct implicates an issue that may be appropriate for general training of the entire IJ corps, he or she will consult with the ACIJ for Training and Education (ACIJ T/E). Any such general training will be developed separate and apart from the ongoing complaint process. Throughout the process, all complaints will be monitored by the ACIJ C/P to ensure proper and expeditious handling and resolution.

Action

The ACIJ and/or ACIJ C/P may consult with the Employee and Labor Relations Unit (E/LR) in EOIR's Office of the General Counsel (OGC), and/or the ACIJ T/E regarding the appropriate action. Appropriate action may include non-disciplinary corrective action or formal discipline.

If the ACIJ determines that non-disciplinary corrective action is appropriate, the ACIJ may, for example, counsel the IJ orally or in writing, consult with the ACIJ T/E to arrange for individualized training, and/or initiate a performance-based action, as appropriate.

Generally disciplinary actions are progressive. Supervisory judges take the least severe action necessary to correct a problem, followed by increasingly severe measures when an IJ fails to correct a problem after a reasonable opportunity to do so. Where the conduct warrants it, serious disciplinary action may be imposed in the first instance. When imposing discipline, the deciding official, who, as noted below is usually the Deputy Chief Immigration Judge (DCIJ), will consider factors noted in *Douglas v. Veteran's Administration*, 5 M.S.P.B. 313 (MSPB 1981), such as, but not limited to, the nature and seriousness of the conduct, the immigration judge's length of service and past disciplinary record, mitigating circumstances, the likelihood of repeat occurrence absent action by the Agency, the impact of the offense on the reputation of the agency, and the consistency of the penalty with similar instances of misconduct.

Disciplinary actions that can be taken by ACIJs include a reprimand, or proposed suspensions without pay of up to 14 days, which are usually reviewed by the DCIJ who then imposes the appropriate discipline. Suspensions of more than 14 days or an IJ's removal from federal service are proposed by the Director, the CIJ or the CIJ's designee, and decided by other Department officials. If an IJ wishes to challenge a disciplinary action, the IJ may either file a grievance under the negotiated grievance procedure or pursue applicable statutory remedies such as filing a written notice of appeal.³

³ See Articles 8 & 9 of the Labor Agreement between the National Association of Immigration Judges (NAIJ) and USDOJ, EOIR; 5 U.S.C. §7121 (d).

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When there is an identifiable complainant, he or she will be notified in writing once action is taken and/or the matter is closed. Such notification will not disclose information that would violate the privacy rights of an IJ.

Consistent with the Privacy Act, OCIJ will publish statistics periodically on its website to advise the public on the types of actions taken and to increase the transparency of the conduct and discipline process.

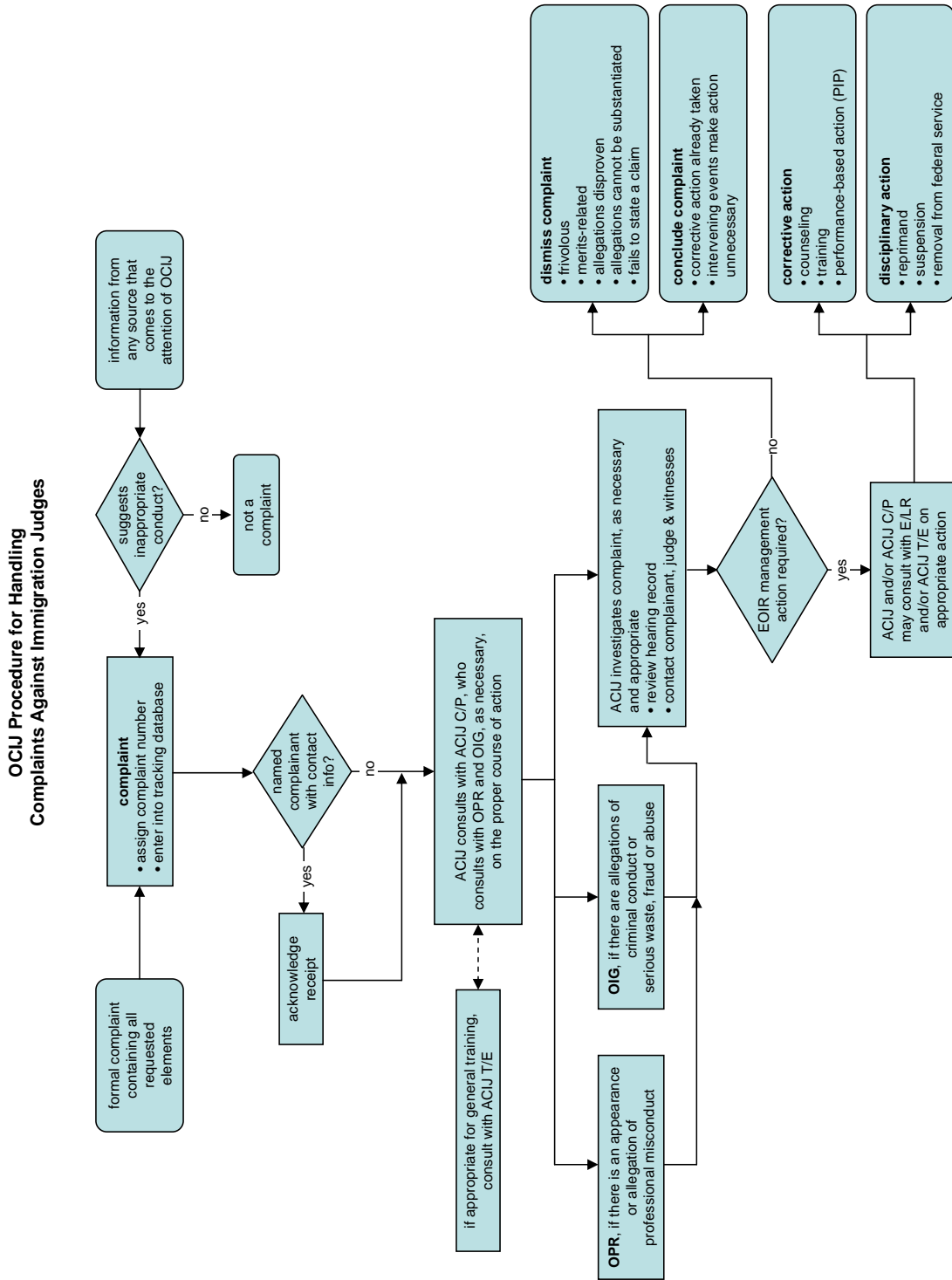
Dismissal and Conclusion

An ACIJ may dismiss or conclude a complaint, with or without disciplinary action. A complaint may be dismissed for one or more reasons, including the following: the complaint is frivolous; the complaint relates directly to the merits of an IJ's decision; after investigation, the facts alleged were disproven or cannot be substantiated; or the facts alleged, even if true, do not constitute inappropriate conduct (i.e., "failure to state a claim"). A complaint will be concluded if, for example, it is determined that appropriate corrective action has already been taken or that action is unwarranted due to intervening events, such as an IJ's retirement or resignation. If a complaint is dismissed or concluded, the complainant and the IJ will be notified of the disposition, consistent with the Privacy Act.

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ETHICS AND PROFESSIONALISM GUIDE FOR IMMIGRATION JUDGES

Preamble

To preserve and promote integrity and professionalism, Immigration Judges employed by the Executive Office for Immigration Review (EOIR) should observe high standards of ethical conduct, act in a manner that promotes public confidence in their impartiality, and avoid impropriety and the appearance of impropriety in all activities.

I. Introduction

The provisions in this Guide are binding on all Immigration Judges employed by the Executive Office for Immigration Review. Violations of these provisions may not be used to challenge the rulings of an Immigration Judge. These provisions do not create any rights or interests for any party outside of the Department of Justice, nor may violations of these provisions furnish the basis for civil liability or injunctive relief. The provisions in this Guide do not supersede the personnel or disciplinary rules, or management policies, of the Executive Office for Immigration Review, the Department of Justice, and/or the United States Government. Similarly, this Guide does not affect the applicability or scope of the provisions of the Standards of Ethical Conduct for Executive Branch Employees, or the rules or code(s) of professional responsibility applicable to an Immigration Judge. 5 C.F.R. § 2635.101.

II. Standards of Conduct

(5 C.F.R. Parts 2635, 3801; 28 C.F.R. Part 45)

An Immigration Judge shall comply with the standards of conduct applicable to all attorneys in the Department of Justice, including the Standards of Ethical Conduct for Employees of the Executive Branch, codified in Title 5 of the Code of Federal Regulations, and the Department's supplemental regulations at 5 C.F.R. Part 3801 and 28 C.F.R. Part 45.

III. Ethics Guidance

(5 C.F.R. § 2635.107(b))

Immigration Judges are encouraged to seek ethics opinions to ensure that their conduct comports with applicable rules and regulations. When an Immigration Judge requests ethics guidance from the Office of Government Ethics, the Departmental Ethics Office, the Office of General Counsel of the Executive Office for Immigration Review, or the Professional Responsibility Advisory Office, the Immigration Judge should endeavor to disclose all legally relevant facts. 5 C.F.R. § 2635.107(b).

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Note: Disciplinary action will not be taken against any Immigration Judge who has engaged in conduct in good faith reliance upon the advice of an agency ethics official provided that the employee, in seeking such advice, has made full disclosure of all relevant circumstances.

IV. Professional Competence

An Immigration Judge should be faithful to the law and maintain professional competence in it.

Note: In order to “maintain professional competence” in the law, Immigration Judges should strive to be knowledgeable about immigration law, should be skillful in applying it to individual cases, and should attempt to engage in preparation that is reasonably necessary to perform an Immigration Judge’s responsibilities.

V. Impartiality

(5 C.F.R. § 2635.101(b)(8))

An Immigration Judge shall act impartially and shall not give preferential treatment to any organization or individual when adjudicating the merits of a particular case. An Immigration Judge should encourage and facilitate pro bono representation. An Immigration Judge may grant procedural priorities to lawyers providing pro bono legal services in accordance with Operating Procedures and Policies Memorandum (OPPM) 08-01.

VI. Appearance of Impropriety

(5 C.F.R. § 2635.101(b)(14))

An Immigration Judge shall endeavor to avoid any actions that, in the judgment of a reasonable person with knowledge of the relevant facts, would create the appearance that he or she is violating the law or applicable ethical standards.

VII. Reporting Misconduct

(5 C.F.R. § 2635.101(b)(11); 28 C.F.R. § 45.12)

An Immigration Judge shall disclose waste, fraud, abuse, and corruption to appropriate authorities, such as a supervisor, or to the Office of the Inspector General. Immigration Judges, like all Department employees, also have a duty to report allegations of misconduct by Department of Justice attorneys, as explained by Chapter 1-4.100 of the United States Attorneys’ Manual (USAM). In addition, Immigration Judges have a duty to report allegations of

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misconduct by non-Department attorneys or judges, as explained by Chapter 1-4.150 of the USAM.

VIII. Acting in a Neutral and Detached Manner

An Immigration Judge should not be swayed by partisan interests or public clamor.

IX. Acting with Judicial Temperament and Professionalism

An Immigration Judge should be patient, dignified, and courteous, and should act in a professional manner towards all litigants, witnesses, lawyers and others with whom the Immigration Judge deals in his or her official capacity, and should not, in the performance of official duties, by words or conduct, manifest improper bias or prejudice.

Note: An Immigration Judge should be alert to avoid behavior, including inappropriate demeanor, which may be perceived as biased. The test for appearance of impropriety is whether the conduct would create in the mind of a reasonable person with knowledge of the relevant facts the belief that the Immigration Judge's ability to carry out his or her responsibilities with integrity, impartiality, and competence is impaired.

Note: An Immigration Judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the immigration process into disrepute. Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant reference to personal characteristics. Moreover, an Immigration Judge must avoid conduct that may reasonably be perceived as prejudiced or biased. Immigration Judges are not precluded from making legitimate reference to any of the above listed factors, or similar factors, when they are relevant to an issue in a proceeding.

Note: An Immigration Judge has the authority to regulate the course of the hearing. See 8 C.F.R. §§ 1240.1(c), 1240.9. Nothing herein prohibits the Judge from doing so. It is recognized that at times an Immigration Judge must be firm and decisive to maintain courtroom control.

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X. Membership in Organizations

An Immigration Judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, or disability.

Note: Membership of an Immigration Judge in an organization that practices invidious discrimination may, at a minimum, give rise to perceptions that the Immigration Judge's impartiality is impaired. Whether an organization practices invidious discrimination is often a complex question to which Immigration Judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on the history of the organization's selection of members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. See New York State Club Ass'n Inc. v. City of New York, 487 U.S. 1 (1988); Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987); Roberts v. United States Jaycees, 468 U.S. 609 (1984). Other relevant factors include the size and nature of the organization and the diversity of persons in the locale who might reasonably be considered potential members. Thus, the mere absence of diverse membership does not by itself demonstrate invidious discrimination unless reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of invidious discrimination.

XI. Impartiality in Performing Official Duties

(5 C.F.R. §§ 2635.501 to 2635.503)

An Immigration Judge may not participate, without authorization, in a particular matter involving specific parties which the Immigration Judge knows is likely to have a direct and predictable effect on the financial interest of members of the Immigration Judge's household or in which the Immigration Judge knows a person with whom the Immigration Judge has a covered relationship is or represents a party.

An Immigration Judge has a covered relationship with: (a) a person with whom the Immigration Judge has or seeks a business, contractual, or other financial relationship that involves other than a routine consumer transaction; (b) a person who is a member of the Immigration Judge's household, or a relative with whom the Immigration Judge has a close relationship; (c) a

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present or prospective employer of a spouse, parent or child; or (d) an organization which the Immigration Judge now serves, or has served, as an employee or in another capacity, within the past year.

An Immigration Judge is banned from adjudicating any cases in which he/she participated personally and substantially prior to becoming an Immigration Judge. An Immigration Judge may not adjudicate a case if he/she: has personal knowledge of the disputed facts; participated as counselor or advisor in the case; or expressed an opinion concerning the merits of the particular case in controversy. A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of the above provision. However, an Immigration Judge formerly employed by a government agency should disqualify himself or herself in a proceeding if the Immigration Judge's impartiality might reasonably be questioned because of such an association.

If a conflict of interest exists, in order for the Immigration Judge to participate in the matter, the EOIR Director or his/her designee must make a determination that the interests of the government in the Immigration Judge's participation outweigh the concern that a reasonable person may question the integrity of the Department's programs and operations. The determination must be made in writing.

If a conflict of interest exists, and the judge has obtained a determination from the EOIR Director or his/her designee that the judge may continue to participate in the matter, the conflict must be disclosed to the parties, either orally on the record or in writing. If an Immigration Judge disqualifies himself or herself from a case that has been assigned to him or her, he or she must do so in a decision in writing or orally on the record before the parties and otherwise follow all the procedures delineated in OPPM 05-02, Procedures for Issuing Recusal Orders in Immigration Proceedings, or any superseding OPPM.

XII. Use of Public Office for Private Gain (5 C.F.R. § 2635.702)

Immigration Judges may not use their public office for their own private gain or the gain of persons or organizations with which they are associated personally. An Immigration Judge's position or title should not be used: to coerce; to endorse any product, service or enterprise; or to give the appearance of government sanction. Regarding a request for a letter of reference or recommendation, an Immigration Judge may only use his or her official title and stationery for someone he or she has dealt with in the course of federal employment or someone he or she is recommending for federal employment.

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XIII. Use of Nonpublic Information (5 C.F.R. § 2635.703)

An Immigration Judge may not engage in a financial transaction using nonpublic information, nor allow the use of such information to further his or her private interests or those of another. Nonpublic information is information an Immigration Judge gains by reason of federal employment that he or she knows or reasonably should know has not been made available to the general public and is not authorized to be made available upon request.

XIV. Use of Government Property (5 C.F.R. § 2635.704)

An Immigration Judge has a duty to protect and conserve government property and shall use government property only for authorized purposes.

Note: Department of Justice employees are generally authorized to make personal use of most office equipment and library facilities where the cost to the Government is negligible and on an employee's own time. 28 C.F.R. § 45.4. Under the Department's policy on the use of its electronic mail systems, an employee may send a short, personal message to another employee. However, personal messages sent to groups of people and messages to disseminate information on non-Government activities, such as charitable events, religious observances and personal businesses, are prohibited.

XV. Use of Official Time (5 C.F.R. § 2635.705)

An Immigration Judge shall use official time in an honest effort to perform official duties. Generally, personal activities should not be conducted during duty hours. An Immigration Judge may not use the official time of another employee for anything other than official business. This section does not apply to official time under section 7131 of the Federal Service Labor-Management Relations Statute.

XVI. Conflicting Financial Interest (5 C.F.R. §§ 2635.401 to 2635.403)

An Immigration Judge is prohibited from participating in any matter in which he or she has a financial interest. In addition to an Immigration Judge's own financial interest, certain interests are considered his or hers (i.e., "imputed" to him or her), including those of a spouse, minor child, general partner or an organization for which the Immigration Judge serves as an officer, director,

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trustee, general partner, or employee. However, an Immigration Judge may participate in such a matter if he or she is granted a waiver. Immigration Judges should contact their Deputy Designated Ethics Officer about possible financial conflicts of interest.

If an Immigration Judge has a financial conflict of interest, remedies include disqualification, divestiture, or a waiver of the disqualification under 18 U.S.C. § 208. Before divesting, however, he/she should determine whether he/she is eligible for a Certificate of Divestiture from the Office of Government Ethics, which would allow him/her to defer paying capital gains tax on the sale of the asset. 5 C.F.R. §§ 2634.1001-1004. A waiver may be granted if the financial interest is found to be not so substantial as to affect the integrity of the Immigration Judge's services.

Note: Immigration Judges (levels IJ-2 and above) employed by the Executive Office for Immigration Review are required to file public financial disclosure reports pursuant to statute every year. Financial disclosure reports are used to identify potential or actual conflicts of interest. If the ethics official charged with reviewing an Immigration Judge's report finds a conflict, the ethics official should, upon consultation with the Immigration Judge's supervisor, decide on the appropriate remedy.

Note: In order to comply with the applicable law and regulations regarding financial reporting and disqualification, Immigration Judges must inform themselves about their personal financial interests, as well as the personal financial interests of spouses and minor children.

XVII. Outside Employment and Activities

(5 C.F.R. §§ 2635.801 to 2635.803)

An Immigration Judge shall not engage in any outside employment or other outside activity that conflicts with his or her official duties. Immigration Judges should regularly reexamine their avocational activities and the organizations with which they are affiliated to ensure that they do not lead to the perception of partiality on the part of an Immigration Judge.

XVIII. Representation before Federal Agencies

(5 C.F.R. § 2635.801)

An Immigration Judge may not represent anyone before a Federal agency or official, or any court, with or without compensation, on a matter in which the United States is a party or has a substantial interest. This prohibition applies whether the Immigration Judge renders the representation personally or

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shares in compensation from someone else's representation. 18 U.S.C. §§ 203 and 205.

Nothing in this Article shall prohibit National Association of Immigration Judges (NAIJ) representatives from acting on behalf of NAIJ, or any of its members or any individual in its collective bargaining unit, as otherwise allowed by law. *See, e.g.*, 18 U.S.C. §§ 205(d), 205(i); 5 U.S.C. § 7102(1).

XIX. Practice of Law (5 C.F.R. § 3801.106)

An Immigration Judge may not engage in the private practice of law unless it is uncompensated and in the nature of community service, or unless it is on behalf of the Immigration Judge himself or herself, or on behalf of the Immigration Judge's parents, spouse, or minor children. An Immigration Judge is prohibited from engaging in the paid practice of law and from engaging in any employment that involves a criminal matter, be it Federal, state or local, or any matter in which the Department is or represents a party, witness, litigant, investigator, or grant-maker. These prohibitions may be waived by the Deputy Attorney General if the restrictions will cause undue personal or family hardship, unduly prohibit a DOJ employee from completing a professional obligation entered into prior to Government service, or unduly restrict the Department from securing necessary and uniquely specialized services. All requests for a waiver of these prohibitions should be made through EOIR's Office of General Counsel.

XX. Serving as an Expert Witness (5 C.F.R. § 2635.805)

An Immigration Judge may not serve, other than on behalf of the United States, as an expert witness, paid or unpaid, in any proceeding before the United States in which the United States is a party or has a direct and substantial interest, unless specifically authorized by the Designated Agency Ethics Official. Opinion testimony or testimony as to procedures or practice given in any arbitration, disciplinary action, or proceeding under or with respect to a labor agreement or any action under the Federal Labor laws is not "expert testimony" within the meaning of this section.

XXI. Teaching, Speaking, and Writing (5 C.F.R. § 2635.807)

Generally, an Immigration Judge may not be compensated for speaking or writing about a subject matter that relates to his or her official duties. A subject matter relates to an Immigration Judge's official duties if it deals in

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significant part with a matter to which the Immigration Judge is presently assigned or has been assigned in the last year; any ongoing or announced policy, program or operation of the Department; or in the case of a non-career employee, the general subject matter primarily affected by the programs and operations of the Department. 5 C.F.R. § 2635.807. Under 5 C.F.R. § 3801.103, an Immigration Judge would only be prohibited from receiving compensation for speaking or writing on a subject matter related to EOIR's policies, programs or operations, not the entire Department's. An Immigration Judge may receive compensation for teaching, even if the course relates to an Immigration Judge's official duties, if the course requires multiple presentations and is offered as part of the regularly established curriculum of: an institution of higher education; an elementary or secondary school; or a program sponsored and funded by the Federal Government or by a state or local government, which is not offered by an entity described above.

When engaging in speaking or writing in a private capacity, an Immigration Judge may not use nonpublic information, nor should there be any use of the Immigration Judge's official title, except as part of other biographical information, or for an article in a scientific or professional journal where there is a disclaimer. An Immigration Judge may not use official time, or that of another employee, to prepare materials. Immigration Judges must seek prior supervisory and ethics approval for written work and speeches.

XXII. Fundraising (5 C.F.R. § 2635.808)

An Immigration Judge may engage in fundraising in a personal capacity as long as the Immigration Judge does not solicit from subordinates or persons having business with the Department, and does not use his or her official title or position. However, an Immigration Judge may use or permit the use of the term "the Honorable" while fundraising in his/her personal capacity, since Immigration Judges are ordinarily addressed using this general term. In addition, soliciting may not be conducted on government property. Immigration Judges may not engage in fundraising, including active participation in a fundraiser, in their official capacity unless authorized by statute, Executive Order, regulation, or agency determination. The only authorized fundraising in the Department is on behalf of the Combined Federal Campaign. However, an Immigration Judge may be authorized to give an official speech at a fundraising event, if the circumstances are appropriate, even though this constitutes participating in a fundraiser.

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XXIII. Just Financial Obligations (5 C.F.R. § 2635.809)

An Immigration Judge shall satisfy in good faith his or her obligations as a citizen, including all just financial obligations imposed by law, especially those such as Federal, state or local taxes, and child support payments.

XXIV. Purchase of Forfeited Property (5 C.F.R. § 3801.104)

Without prior written approval, an Immigration Judge may not purchase, directly or indirectly, or use property that has been forfeited to the Government and offered for sale by the Department of Justice or its agents. Similarly, no Immigration Judge may use property forfeited to the United States that has been purchased, directly or indirectly, from the Department of Justice or its agents by the Immigration Judge's spouse or minor child.

XXV. Gifts from Outside Sources (5 C.F.R. §§ 2635.201 to 2635.205)

An Immigration Judge may not solicit or accept a gift given because of his or her official position, or from a prohibited source. A "prohibited source" is any person who:

- (1) has or seeks official action or business with EOIR;
- (2) is regulated by EOIR;
- (3) has interests that may be substantially affected by the performance of an EOIR Immigration Judge's official duties; or
- (4) is an organization composed mainly of persons described above.

XXVI. Gifts that may be Permissible (5 C.F.R. §§ 2635.201 to 2635.205)

Unless the frequency of the acceptance of gifts would appear to be improper, an Immigration Judge may accept:

- (1) items such as publicly available discounts and prizes, commercial loans, food not part of a meal such as coffee and donuts, and items of little value such as plaques and greeting cards.

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(2) gifts based on a personal relationship when it is clear that the motivation is not the Immigration Judge's official position.

(3) gifts of \$20 or less per occasion, not to exceed \$50 in a year from one source.

(4) discounts and similar benefits offered to a broad class, including a broad class of government employees.

(5) most genuine awards and honorary degrees, although in some cases an Immigration Judge will need a formal determination.

(6) free attendance, food, refreshments and materials provided at a conference or widely attended gathering or certain other social events that an Immigration Judge attends in his or her official capacity, and for which the Immigration Judge has received prior approval from his or her component.

When Immigration Judges are participating in their official capacity as speakers or panel members at a conference or other event, they may accept an offer of free attendance at the conference or event on the day of their presentation. Participation in the event on that day is viewed as a customary and necessary part of the Immigration Judge's duties, and is not considered a gift to them or to the Department. 5 C.F.R. § 2635.204(g)(1).

When it is determined that an Immigration Judge's attendance at all (or an appropriate part) of an event is in the interest of the Department because it will further agency programs and operations, the Immigration Judge may accept an unsolicited gift of free attendance from the sponsor of the event if the event is found to be a widely attended gathering. A gathering is widely attended if a large number of people are expected, and persons with a diversity of views or interests will be present, for example, if it is open to members from throughout the interested industry or profession. 5 C.F.R. § 2635.204(g)(2).

A determination that an Immigration Judge's attendance at a widely attended gathering is in the interest of the Department may be made orally or in writing. However, if the person extending the invitation has an interest that may be substantially affected by the performance or nonperformance of the Immigration Judge's official duties, or is an association or organization the majority of whose members have such interests, the determination must be made in writing. 5 C.F.R. § 2635.204(g)(3).

(7) gifts based on an outside business relationship, such as travel expenses related to a job interview.

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Note: An Immigration Judge should return gifts not meeting the exceptions or contact the Deputy Designated Ethics Officer on how to dispose of them. Perishable items may be given to charity or shared by the office, with approval.

XXVII. Gifts between Employees (5 C.F.R. §§ 2635.301 to 2635.304)

Immigration Judges may not give, or solicit a contribution for, a gift to an official superior, nor may they accept a gift from an employee receiving less pay. There are a few exceptions to this general prohibition, however. On annual occasions where gifts are traditionally given, such as birthdays, Christmas, and Boss's Day, an Immigration Judge may give the following to an official superior:

- (1) items, other than cash, valued at \$10 or less;
- (2) items such as food and refreshments to be shared in the office; and
- (3) personal hospitality provided at a residence which is of a type and value customarily provided by the employee to personal friends.

On special, infrequent occasions, such as marriage, illness, or the birth of a child, or an occasion that terminates the supervisor/subordinate relationship, an Immigration Judge may give an official superior a gift (in excess of the \$10 value) that is appropriate to the occasion. In addition, an Immigration Judge may solicit voluntary contributions of nominal amounts from fellow Immigration Judges, but not subordinates, to contribute to the gift.

XXVIII. Frequent Flyer Miles and Airline "Compensation" (41 C.F.R. § 301)

Some airlines encourage those purchasing tickets to join frequent flyer programs that award free flights and other benefits to frequent flyers. Pursuant to 41 C.F.R. § 301-53.3, Immigration Judges may keep and use for their personal benefit frequent flyer miles accrued incident to government official travel.

Similarly, pursuant to 41 C.F.R. § 301-10.117, Immigration Judges may retain any compensation (e.g., roundtrip airline ticket) an airline gives if they voluntarily surrender their reserved seat on a flight, and if: 1) voluntarily vacating the seat does not interfere with the Immigration Judge's performance of duties; 2) the Immigration Judge bears, and is not reimbursed for, any additional travel expenses incurred as a result of vacating the seat; and 3) the

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Immigration Judge is charged leave if taking a later flight incurs additional duty time in a travel status. If the airline involuntarily denies boarding to an Immigration Judge, the Immigration Judge must give EOIR any compensation an airline gives to him or her. 41 C.F.R. § 310-10.116.

XXIX. Seeking Other Employment (5 C.F.R. §§ 2635.601 to 2635.606)

An Immigration Judge may not take official action on a matter that can affect the financial interest of a person or organization with which he or she is negotiating or has an arrangement for future employment. The remedy is disqualification. 18 U.S.C. § 208.

An Immigration Judge also must disqualify himself or herself from working on a matter when he/she is merely *seeking* employment and is not yet actually negotiating for a job. An Immigration Judge is considered to be seeking employment if he/she sends a resume to a potential employer or if he/she is approached by someone about a position with a potential employer and the Immigration Judge responds in any way other than to clearly decline interest.

See OPJM 05-02, Procedures for Issuing Recusal Orders In Immigration Proceedings.

XXX. Post-Employment Restrictions (18 U.S.C. § 207 and 5 C.F.R. § 2641)

There are statutory prohibitions on former Immigration Judges that generally prevent them from “switching sides” after leaving government. The following are the primary restrictions:

(1) **Lifetime Ban** – A former Immigration Judge is prohibited from representing anyone else before the government on a particular matter involving specific parties in which he or she participated personally and substantially.

(2) **Two-Year Ban** – A former Immigration Judge is prohibited for two years from representing any other person on a particular matter involving specific parties which was pending under his or her responsibility during the Immigration Judge’s last year of government service.

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XXXI. Political Activities **(5 C.F.R. Parts 733 & 734)**

In regard to political activity, Immigration Judges may:

- (1) register and vote as they choose.**
- (2) assist in voter registration drives.**
- (3) express opinions on candidates and issues.**
- (4) be a candidate for public office in non-partisan elections.**
- (5) solicit, accept, or receive political contributions from a fellow member of a Federal labor or employee organization who is not a subordinate, and the request is for a contribution to the multicandidate political committee of a Federal labor organization or to the multicandidate political committee of a Federal employee organization in existence on October 6, 1993.**
- (6) contribute money to political organizations, in general.**
- (7) attend and be active at political rallies and meetings.**
- (8) attend political fundraisers.**
- (9) join and be an active member of a political party or club.**
- (10) sign nominating petitions.**
- (11) campaign for or against referendum questions, constitutional amendments, and municipal ordinances.**
- (12) distribute campaign literature in partisan elections.**
- (13) make campaign speeches for candidates in partisan elections.**
- (14) campaign for or against candidates in partisan elections.**
- (15) hold office in political clubs and parties.**

Immigration Judges may not:

- (1) be a candidate in a partisan election.**

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(2) engage in political activity on duty, in a government office, wearing an official uniform, or using a government vehicle.

(3) solicit, accept or receive political contributions from another person - except as described in paragraph (5), above.

(4) solicit or discourage the political activity of anyone who has business with the Department.

(5) use official authority or influence to interfere with an election.

(6) wear political buttons while on duty.

Note: In 1993, Congress amended 18 U.S.C. § 603, which governs political contributions by Federal employees to their employer or employing authority. The original statute had been interpreted as potentially prohibiting all Executive branch employees from making political contributions to the reelection campaign committee of an incumbent President. However, by memorandum dated May 2, 1995, the White House issued an opinion that states that based on the Hatch Act Reform Amendments of 1993, 18 U.S.C. § 603 would no longer prohibit employees from making contributions to the reelection campaign of an incumbent President.

XXXII. Ex Parte Communications

An Immigration Judge should not initiate, permit, or consider ex parte communications, or consider other communications made to the Immigration Judge outside the presence of the parties or their lawyers, concerning a pending matter, except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided that the Immigration Judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication.

(2) An Immigration Judge may consult with court staff and court officials, including supervisors, whose functions are to aid the Immigration Judge in carrying out the Immigration Judge's adjudicative responsibilities, or with other Immigration Judges, provided the Immigration Judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility to personally decide the matter.

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(3) An Immigration Judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.

If an Immigration Judge inadvertently receives an unauthorized ex parte communication bearing on the substance of a matter, the Immigration Judge should make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond, or to recuse himself or herself if appropriate.

XXXIII. Mechanism for Continuing Dialog

It is understood that the Agency will be providing Immigration Judges with examples relating to the provisions of the Guide. Within thirty (30) days of the effective date of this Guide, each of the parties will designate a person to act as a point of contact (POC) for any updates to the examples.

The NAIJ POC may communicate with the Agency POC any questions or topics about which it would be useful to have an example relating to the Guide. In addition, the NAIJ POC may submit for consideration for use as examples ethics inquiries and answers received by Judges which NAIJ believes would be of general interest.

The Agency POC will consider all suggestions submitted by the NAIJ POC and will notify the NAIJ's POC with the provisions of any updates at least one week prior to any updates. The designated NAIJ POC under this provision will be provided official time to perform a reasonable amount of work associated with these duties.

XXXIV. Disciplinary Action or Action for Failure to Follow the Guide

In the event of conflicting requirements between the provisions of this Guide, the Standards of Ethical Conduct for Executive Branch Employees, the bar rules governing an Immigration Judge's conduct, and/or any oral or written instruction from the Agency, the Immigration Judge should seek appropriate guidance under Article III above. Disciplinary action will not be taken against an Immigration Judge who has engaged in good-faith reliance upon the advice of an agency ethics official in accordance with the Note in Article III. Further, if after consultation with an agency ethics official, the ethics official refers the Immigration Judge to a bar for guidance, compliance with that guidance shall be a defense to disciplinary action against an Immigration Judge.

An Immigration Judge against whom disciplinary or other employment action is taken as a result of an alleged violation of this Guide may avail himself/herself of any rights under the Collective Bargaining Agreement,

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including but not limited to the grievance and arbitration procedures under Articles 8 and 9, or any other applicable provision of law or regulation.

The Agency will not cite the specific provisions of this Guide as a basis for disciplinary or other employment action until six months after ratification of the Guide by members of NAIJ and approval by the head of the Agency.

IN WITNESS WHEREOF, on this 26th day of January, 2011, the Executive Office for Immigration Review and the National Association of Immigration Judges have agreed to the provisions of this Ethics and Professionalism Guide for Immigration Judges.

FOR THE AGENCY:



Mary Beth Keller
Assistant Chief Immigration Judge
Office of the Chief Immigration Judge
Executive Office for Immigration Review

FOR NAIJ:



Denise Noonan Slavin
Vice President
National Association of Immigration Judges

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U.S. Department of Justice

Executive Office for Immigration Review

Office of the Chief Immigration Judge

Chief Immigration Judge

5107 Leesburg Pike, Suite 2500
Falls Church, Virginia 22041

March 21, 2005

MEMORANDUM

TO: All Immigration Judges
All Court Administrators
All Judicial Law Clerks
All Immigration Court Staff

FROM: The Office of the Chief Immigration Judge

SUBJECT: Operating Policies and Procedures Memorandum 05-02:
Procedures For Issuing Recusal Orders In Immigration Proceedings

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I. INTRODUCTION

This Operating Policies and Procedures Memorandum (“OPPM”) sets forth procedures for immigration judges to follow when issuing recusal orders. It replaces my memorandum entitled “Recusal in Immigration Court Proceedings,” dated July 18, 1997.

II. BACKGROUND ON RECUSAL

Recusal is the process under which a judge is excused or disqualifies himself or herself from presiding over a case in which he or she may have an interest or may be unduly prejudiced. This obligation to recuse is not limited to those instances where a party makes a motion; rather,

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it also places a burden on a judge to sua sponte identify those circumstances where recusal may be appropriate. Liteky v. U.S., 510 U.S. 540, 548 (1994). Title 28 United States Code § 455¹ codified this doctrine and states in pertinent part:

§ 455. Disqualifications of justice, judge or magistrate.

- (a) Any justice, judge or magistrate judge of the United States² shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
- (b) He shall also disqualify himself in the following circumstances:
 - (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . .³

In the immigration context,⁴ the regulations provide for withdrawal and substitution of

¹ This section of title 28 is not the only section relating to recusals; 28 U.S.C. § 144 also addresses the issue of judicial bias. Section 144, however, is an older section of the code which requires a judge to examine the issue of recusal upon a party's filing of an affidavit. Section 455 is not only broader in scope but is the more commonly used section. Moreover, it does not require a motion by a party to be invoked.

² Although this section does not specifically mention immigration judges, this section and its applicable case law offers strong guidance on the recusal issue. Moreover, it mirrors the judicial canons of the American Bar Association's Code of Judicial Conduct (see footnote 3), which do apply to immigration judges. Immigration judges are not required to comply with the American Bar Association's Code, but the Code reflects principles to which immigration judges should "aspire." See Ethics Manual For Members of the Board of Immigration Appeals, Immigration Judges, and Administrative Law Judges Employed by the Executive Office for Immigration Review, p. 4.

³ This section parallels Canon 3(E)(1) of the American Bar Association's Code of Judicial Conduct which states:

E. Disqualification.

(1) A judge shall disqualify himself or herself in a proceedings in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

- (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of a disputed evidentiary facts concerning the proceeding; . . .

⁴ Prior to the enactment of IIRIRA, section 242(b) of the INA mandated recusals in certain situations. This provision was eliminated by IIRIRA. Recusals are now only regulatory. Section 242(b) of the INA prior to its amendment read as follows:

No special inquiry officer shall conduct a proceeding in any case under this section in which

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immigration judges, and state, in part:

The immigration judge assigned to conduct the hearing shall at any time withdraw if he or she deems himself or herself disqualified. 8 C.F.R. § 1240.1(b).

The Board of Immigration Appeals (BIA) has addressed the issue of recusal in Matter of Exame, 18 I&N Dec. 303 (BIA 1982). In Exame, the BIA recognized three instances that warrant recusal: (1) when the alien demonstrates that he was denied a constitutionally fair proceeding; (2) when the immigration judge has a personal bias stemming from an “extrajudicial” source; and (3) when the immigration judge’s judicial conduct demonstrates “such pervasive bias and prejudice.” Id. at 305 (quoting Davis v. Board of Sch. Comm’rs of Mobile County, 517 F.2d 1044 (5th Cir. 1975)).

III. WHEN IS RECUSAL WARRANTED?

Recusal is not a tool which parties and judges can arbitrarily invoke to rid themselves of unpleasant or difficult cases. Rather, recusal is mandated only in certain clearly delineated instances. Indeed, **judges have an obligation not to recuse themselves** in certain circumstances. See Laird v. Tatum, 409 U.S. 824, 837 (1972) (holding “a federal judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified”) (and cases cited therein); Nichols v. Alley, 71 F.3d 347, 351 (10th Cir. 1995) (“Further, we are mindful that a judge has as strong a duty to sit when there is no legitimate reason to recuse as he does to recuse when the law and facts require.”) (and cases cited therein); United States v. Greenough, 782 F.2d 1556, 1558 (11th Cir. 1986) (“A second policy is that a judge, having been assigned to a case, should not recuse himself on unsupported, irrational, or highly tenuous speculation.”); Martin-Trigona v. Lavien, 573 F. Supp. 1237, 1243 (D. Conn. 1983) (“There is an obligation on the part of a judge to decline to recuse himself for a ‘relatively trivial reason.’”); Sexson v. Servaas, 830 F. Supp. 475, 482 (S.D. Ind. 1993) (finding “a judge’s duty not to recuse when confronted with a motion that has little basis in reality, both factual and legal, is as strong as the duty to recuse”); but see United States v. Kelly, 888 F.2d 732, 744 (11th Cir. 1989) (holding that § 455 eliminated the doctrine of “duty to sit”).⁵ This obligation is to prevent parties from using

he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions.

⁵ When Congress amended § 455 in 1974 to create an objective standard for recusal, its intent was to “promote public confidence in the impartiality of the judicial process . . .” H. R. Rep. No. 93-1453, 1974 at 6355. Congress, by clarifying § 455, attempted to remove the old “duty to sit” doctrine, a subjective test which required “a judge, faced with a close question on disqualification, was urged to resolve the issue in favor of a ‘duty to sit.’” Id. Congress cautioned, however that “the new test [objective test] should not be used by judges to avoid sitting on difficult or controversial cases . . . Disqualification for lack of impartiality must have a reasonable basis. Nothing in this proposed legislation should be read to warrant the

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recusal as an excuse to judge or forum shop, as well as to preserve the integrity of the judicial process. *See* Martin-Trigona, 573 F. Supp. at 1242 (claiming “the right to an impartial judge cannot be advanced so broadly as to permit the parties to engage in ‘judge-shopping’ under the guise of a motion to recuse . . . or to permit a litigant to disqualify without reasonable grounds a succession of judges for the apparent purpose of impeding the administration of justice”) (*citing* United States v. Boffa, 513 F. Supp. 505, 508 (D. Del. 1981)); In re Parr, 13 B.R. 1010 (E.D.N.Y. 1981)); *see also* Greenough, *supra* at 1558 (“If this [unsubstantiated recusal] occurred, the price of maintaining the purity of the appearance of justice would be the power of litigants or third parties to exercise a veto over the assignment of judges.”); *see also* Laird, *supra*; United States v. Kanahale, 951 F. Supp. 921, 925 (D. Haw. 1995), *dismissed in part, aff’d in part*, 103 F.3d 142 (1996).

The test for determining whether recusal is an appropriate remedy is an objective one. Under this standard, a judge should recuse him or herself when it would appear to a reasonable person, knowing all the relevant facts, that a judge’s impartiality might reasonably be questioned. *See* Liteky v. U.S., *supra*; Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847 (1988); US v. Winston, 613 F.2d 221 (9th Cir. 1980); Davis, 517 F.2d at 1052. Moreover, the Supreme Court has found that prejudice or bias stemming from an “extrajudicial source,” although not required for recusal, is significant and often determinative in establishing grounds for recusal. Liteky v. U.S., *supra*. As one court concisely put it, “the negative bias or prejudice from which the law of recusal protects a party must be grounded in some personal animus or malice that the judge harbors against him, of a kind that a fair-minded person could not entirely set aside when judging certain persons or causes.” U.S. v. Balistrieri, 779 F.2d 1191, 1201 (7th Cir. 1985), *cert. denied*, 477 U.S. 908 (1986).

A. RELEVANT CASE LAW

Case law offers a wealth of guidance for determining when recusal is or is not warranted. The Seventh Circuit concluded that a motion to recuse was properly denied where the respondent claimed that the same immigration judge could not hear both the bond hearing and removal hearing. Flores-Leon v. INS, 272 F.3d 433, 440 (7th Cir. 2001). **Further, a judge should not recuse himself merely because a party sues or threatens to sue him.** Ronwin v. Arizona, 686 F.2d 692 (9th Cir. 1981), *rev’d on other grounds*, 466 U.S. 588 (1984); United States v. Grismore, 564 F.2d 929 (10th Cir. 1977); Kanahale, 951 F. Supp. at 925; United States v. Blohm, 579 F. Supp. 495 (S.D.N.Y. 1984); Martin-Trigona v. Lavien, 573 F. Supp. 1237 (1983). In addition, the **remoteness in time and circumstances of any events which could potentially bias a judge should also be considered.** *See* Balistrieri, *supra*, at 1200 (finding that events

transformation of a litigant’s fear that a judge may decide a question against him into a ‘reasonable fear’ that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.” *Id.* Accordingly, **judges continue to have a duty not to disqualify themselves without a reasonable basis.**

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taking place ten to twelve years earlier were too remote to meet the reasonable person standard); Kanahele, supra at 925 (rejecting a recusal request because of “remoteness and implausibility”). **Nor will a judge’s cutting or hostile comments to an attorney regarding his or her skill mandate recusal.** Pau v. Yosemite Park and Curry Co., 928 F.2d 880, 885 (9th Cir 1991); U.S. v. Tucker, 78 F.3d 1313 (8th Cir. 1996), cert. denied, 117 S.Ct. 76 (1996); see also Davis, supra at 1050 (rejecting a plaintiff’s claim that the judge’s bias against their attorney was imputed on to them). Other circumstances which courts have rejected as insufficient basis for recusal include: adverse rulings against a party; Martin-Trigona, 575 F. Supp. at 1242; a party’s attorney is a former law clerk of the judge; Smith v. Pepsico, 434 F. Supp 524 (S.D. Fla. 1977); when a judge has pretrial knowledge of facts from earlier participation in the case; Winston, supra; when a judge has formulated an understanding or an opinion on a legal issue through his or her previous exposure to it; See Laird, supra; or when the media has made characterizations about the case or the judge. See Greenough, supra. For an excellent summary of factors that would not warrant recusal, see United States v. Cooley, 1 F.3d 985 (10th Cir. 1993), cert. denied, 515 U.S. 1104 (1995).

B. OTHER CIRCUMSTANCES WHERE RECUSAL IS PERMITTED

Recusal is permitted where threats, accompanied by action, are so extreme and rise to such a level as to possibly endanger the judge’s life. See Kanahele, supra at 925 (noting that murder threats and steps taken to murder a judge were sufficient to recuse a judge). Recusal is also permissible when the judge has a financial or fiduciary connection with one of the parties. Liljeberg, supra. It is also necessary when the parties have a familial relationship, but only to certain degrees. 28 U.S.C. § 455(b)(5). Indeed, the statute clearly outlines circumstances where disqualification is mandated. 28 U.S.C. § 455(b) specifically provides:

- (b) He shall also disqualify himself in the following circumstances:
 - (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
 - (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
 - (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
 - (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
 - (5) He or his spouse, or a person within the third degree of

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- relationship to either of them, or the spouse of such a person:
- (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
 - (ii) Is acting as a lawyer in the proceeding;
 - (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
 - (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

Thus, in these instances, a judge is obliged to disqualify him or herself regardless of the reasonable person test. *see id.*; *see also*, H.R. Rep. 93-1453, *supra* (“Subsection (b) of the amended statute sets forth specific situations or circumstances *when the judge must disqualify himself* . . . by setting specific standards, Congress can eliminate the uncertainty and ambiguity arising from the language in the existing statute and will have aided the judges in avoiding possible criticisms for failure to disqualify themselves.”) (emphasis added).

Because recusals attack the essence of our legal system--the impartiality of a judge-- they are a serious matter. Indeed, judges faced with a possible recusal situation must go through an extensive analysis of the surrounding circumstances prior to issuing any decision on the matter. Moreover, **such decisions must be predicated on compelling evidence rather than mere allegations or conclusory facts.** *Balistreri, supra* at 1220 (“Disqualification of a judge for actual bias or prejudice is a serious matter, and it should be required only when the bias or prejudice is proved by compelling evidence.”); *Sexson, supra* at 477 (“the judge makes the disqualification decision considering a truthful and thorough examination of the relevant facts and circumstances, not merely those contentions and innuendos played out by counsel”); *Taylor v. O’Grady*, 888 F.2d 1189, 1201 (7th Cir. 1989) (holding that a judge’s remarks were not “compelling evidence” and “too inconsequential to mandate disqualification”).

C. **BLANKET RECUSALS**

There have been circumstances when parties before the Court have requested blanket recusals of immigration judges. Blanket, or broad disqualifications of a judge should be carefully considered, since the compelling evidence standard dictates that judges examine and analyze each case *individually* to make a determination that disqualification is required. *See In re Acker*, 696 F. Supp. 591 (N.D. Ala. 1988) (rejecting a broad recusal order on all government cases and instead deciding that “case-by-case” analysis was more consistent with applicable case law); *El Fenix de Puerto Rico v. The M/Y Johanny*, 36 F.3d 136 (5th Cir. 1994) (remanding the case because recusals require a sufficient factual basis). Indeed, broad recusals should only be considered in those circumstances in which the statute mandates automatic disqualification. *see* 28 U.S.C. § 455(b).

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IV. PROCEDURES FOR RECUSAL

A judge has an obligation not to recuse himself or herself based upon mere allegations or threats. Therefore, all requests for recusal shall be made on the record, or filed in writing, and supported by specific reasons why recusal is warranted.

A. PRIOR TO THE HEARING

If, at any time prior to the hearing, an immigration judge issues a decision on a recusal matter, he or she must render it in writing and serve it upon the parties to ensure that the parties have sufficient notice that their hearing will be rescheduled with another immigration judge. The written decision must contain a well-reasoned opinion explaining the circumstances and legal reasoning behind either the grant or the denial of the recusal. Moreover, the judge must issue a written decision in every case, regardless if the recusal was *sua sponte* or predicated upon a motion by one of the parties. Simple form or blanket orders will not suffice unless the immigration judge had a role in the case as a DHS attorney or private attorney. In that case, the order shall simply state that the immigration judge had a role in the case as a DHS attorney or private attorney.

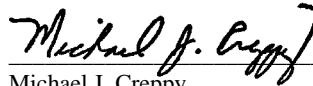
B. DURING THE HEARING

There may be circumstances where the grounds for a recusal may not become apparent until the actual hearing. In these situations, the judge must go on the record and issue an oral decision describing the reasons behind the grant or denial of the recusal motion. The decision must contain a well-reasoned opinion explaining the circumstances and legal reasoning behind either the grant or the denial of the recusal.

V. CONCLUSION

Recusals are a serious matter and judges, including immigration judges, should not recuse themselves from cases without first thoroughly analyzing the circumstances behind such a recusal. Moreover, since a judge has an equally important obligation not to recuse himself or herself arbitrarily, his or her recusal should be based upon compelling evidence indicating that his or her judgment would be compromised. This process is vital to ensure that parties are accorded a hearing with an impartial judge without encouraging the use of recusal as a method to forum or judge “shop.”

If you have any questions regarding this OPPM, please contact Brenda O’Malley, Counsel to the Chief Immigration Judge, at (703) 305-1247, or your Assistant Chief Immigration Judge.



Michael J. Creppy
Chief Immigration Judge

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References for Figure 1

- 1 EOIR Complaint No. 25, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (14 day suspension).
- 2 EOIR Complaint No. 50, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (30 day suspension; previous OPR investigation).
- 3 EOIR Complaint No. 111, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (6-day suspension and could not speak at AILA conference). Another complaint alleged that an IJ was “irate” and “screaming at” CA and resulted in a 1-day suspension. EOIR Complaint No. 619, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 4 EOIR Complaint No. 455, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (10-day suspension).
- 5 EOIR Complaint No. 383, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (14-day suspension and detailed to BIA while investigation pending). Another complaint alleging that an IJ displayed ongoing intemperate behavior in court resulted in suspension plus training. EOIR Complaint No. 588, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 6 EOIR Complaint No. 456, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (5-day suspension).
- 7 EOIR Complaint No. 656, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (1-day suspension).
- 8 EOIR Complaint No. 22, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 9 EOIR Complaint No. 759, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 10 EOIR Complaint No. 254, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 11 EOIR Complaint No. 332, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 12 EOIR Complaint No. 424, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (lists a second source, in addition to Marshal, as “other”).
- 13 EOIR Complaint Nos. 6, 357 & 380, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 14 EOIR Complaint No. 390, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 15 EOIR Complaint No. 30, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 16 EOIR Complaint No. 574, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (respondent's attorney listed as source in addition to BIA).
- 17 EOIR Complaint No. 29, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 18 EOIR Complaint No. 202, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 19 EOIR Complaint No. 410, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (lists a second source, in addition to Marshal, as “other”).
- 20 EOIR Complaint No. 559, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 21 EOIR Complaint No. 615, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 22 EOIR Complaint No. 530, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 23 EOIR Complaint No. 15, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 24 EOIR Complaint No. 591, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (details obtained by viewing more detailed information about complaint following link titled “Complaints 501-600”).
- 25 EOIR Complaint No. 23, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 26 EOIR Complaint No. 58, AILA Data from EOIR FOIA Lawsuit, *supra* note 106. Other incidents in which the IJ was detailed to the BIA pending investigation include EOIR Complaint Numbers 50 & 383, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.

- 27 EOIR Complaint No. 87, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (IJ terminated during trial period).
- 28 EOIR Complaint No. 140, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (IJ terminated during trial period).
- 29 EOIR Complaint No. 221, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (IJ retired).
- 30 EOIR Complaint No. 222, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (IJ terminated during trial period).
- 31 EOIR Complaint No. 224, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (IJ terminated during trial period); *see also* EOIR Complaint No. 235, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (dismissed as unnecessary because the IJ was terminated during the trial period, where BIA noted that the IJ made inappropriate comments about the respondent's deportment); EOIR Complaint No. 240, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (dismissed as unnecessary because the IJ was terminated during the trial period, where BIA noted that the IJ made inappropriate comments about the respondent and her illness that appear to have influenced the outcome).
- 32 EOIR Complaint No. 268, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 33 EOIR Complaint No. 388, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (lists media and Eleventh Circuit as sources in addition to BIA; IJ terminated during trial period).
- 34 EOIR Complaint No. 313, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (IJ retired).
- 35 EOIR Complaint No. 794, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (IJ "no longer with the agency").
- 36 EOIR Complaint No. 125, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (IJ terminated during trial period).
- 37 EOIR Complaint No. 337, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 38 *See also, e.g.*, EOIR Complaint No. 3, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (intemperate remarks on the record and erred in not granting a continuance for a mental competency evaluation); EOIR Complaint No. 11, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (irrelevant and injudicious remarks in the midst of the decision); EOIR Complaint No. 17, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (inappropriate language); EOIR Complaint No. 27, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (brusque and unnecessary comments); EOIR Complaint No. 28, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (inappropriate tone and spoke of matters not germane to the case); EOIR Complaint No. 209, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (inappropriate comments about the medical profession, did not allow an explanation of the impact of the respondent's PTSD on credibility); EOIR Complaint No. 236, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (disparaging comments, indicating prejudice and lack of objectivity).
- 39 EOIR Complaint No. 16, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 40 EOIR Complaint No. 220, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 41 EOIR Complaint No. 258, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 42 EOIR Complaint No. 281, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 43 EOIR Complaint No. 495, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 44 EOIR Complaint No. 273, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (finding that the IJ's conduct had prejudiced the respondent and that IJ's improper speculation did not support the adverse credibility finding).
- 45 EOIR Complaint No. 294, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 46 EOIR Complaint No. 743, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 47 EOIR Complaint No. 280, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 48 EOIR Complaint No. 204, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (BIA also noted that the IJ's conclusion about respondent's circumcision was based on speculation and conjecture. Notes also show that IJ received anger management training).
- 49 EOIR Complaint No. 9, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 50 EOIR Complaint No. 104, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.

- 51 EOIR Complaint No. 549, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 52 EOIR Complaint No. 780, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 53 EOIR Complaint No. 613, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 54 EOIR Complaint No. 2, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 55 EOIR Complaint No. 679, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 56 EOIR Complaint No. 216, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 57 EOIR Complaint No. 267, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (also lists BIA as source).
- 58 EOIR Complaint No. 363, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 59 EOIR Complaint No. 374, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 60 EOIR Complaint No. 562, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 61 EOIR Complaint No. 722, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 62 EOIR Complaint Nos. 663, 274, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 63 EOIR Complaint No. 681, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (showing that IJ issued decision the day after the complaint was referred to the ACIJ); EOIR Complaint No. 440, AILA Data from EOIR FOIA Lawsuit, *supra* note 106 (allegation of failure to render a decision for two-and-a-half years; a week after the oral counseling, the IJ rendered a decision).
- 64 EOIR Complaint No. 230, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 65 EOIR Complaint No. 560, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 66 EOIR Complaint No. 609, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 67 EOIR Complaint No. 630, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 68 EOIR Complaint No. 664, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 69 EOIR Complaint No. 604, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 70 EOIR Complaint No. 503, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 71 EOIR Complaint No. 342, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 72 EOIR Complaint No. 323, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 73 EOIR Complaint No. 738, AILA Data from EOIR FOIA Lawsuit, *supra* note 106.
- 74 EOIR Complaint Nos. 748 (anonymous attorney listed as source), 749 (respondent's attorney listed as source), AILA Data from EOIR FOIA Lawsuit, *supra* note 106.



The Catholic Legal Immigration Network’s commitment to defending the vulnerable

The Catholic Legal Immigration Network, or CLINIC, advocates for humane and just immigration policy. Its network of nonprofit immigration programs—300 organizations in 47 states and the District of Columbia—is the largest in the nation.

In response to growing anti-immigrant sentiment and to prepare for policy measures that will hurt immigrant families, CLINIC launched the Defending Vulnerable Populations Project. The project’s primary objective is to increase the number of fully accredited representatives and attorneys who are qualified to represent immigrants in immigration court proceedings. To accomplish this, the Defending Vulnerable Populations Project conducts court skills training for both nonprofit agency staff (accredited representatives and attorneys) and pro bono attorneys; develops practice materials to assist legal representatives; advocates against retrogressive policy changes; and expands public awareness on issues faced by vulnerable immigrants.

By increasing access to competent, affordable representation, the project’s initiatives focus on protecting the most vulnerable immigrants—those at immediate risk of deportation.

The Defending Vulnerable Populations Project offers a variety of resources including timely practice advisories on removal defense tactics, amicus briefs before the Board of Immigration Appeals and U.S. Courts of Appeals and pro se materials to empower the immigrant community. Examples of these include a practice advisory entitled “Strategies to Combat Government Efforts to Terminate Unaccompanied Child Determinations” (May 2017), an amicus brief on the “serious nonpolitical crime” bar to asylum as it relates to youth filed with the U.S. Court of Appeals for the Eighth Circuit and an article in Spanish and English on how to get back one’s immigration bond money.

These resources are available on the DVP webpage at cliniclegal.org/defending-vulnerable-populations.