

**AMERICAN BAR ASSOCIATION**  
**COMMISSION ON IMMIGRATION**  
**REPORT TO THE HOUSE OF DELEGATES**

**RECOMMENDATION**

1 RESOLVED, That the American Bar Association supports the following measures regarding  
2 immigration courts:

- 3
- 4 (a) Increase the number of immigration judges by at least 100, increase the number of law  
5 clerks to increase the ratio to one clerk per judge, and increase the number of support  
6 personnel;
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- 8 (b) Increase the number of Assistant Chief Immigration Judges, and expand their  
9 deployment to regional courts;
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- 11 (c) Provide additional opportunities for training of immigration judges, including training in  
12 assessing credibility, identifying fraud, changes to U.S. asylum and immigration law,  
13 and cultural sensitivity and awareness; increase funding for in-person training; designate  
14 an administrator to facilitate communication among immigration judges; and
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- 16 (d) Increase administrative time available to immigration judges to allow increased  
17 participation in live training and opportunities to interact with other immigration judges.
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19 FURTHER RESOLVED, That the American Bar Association supports the adoption of the  
20 following measures regarding the immigration judiciary:

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- 22 (a) Provide additional hiring criteria, such as additional questions on applications,  
23 interviews and reference checks designed to evaluate a candidate's background, judicial  
24 temperament, and cultural sensitivity; and allow more public input in the hiring process  
25 by permitting professional organizations to screen candidates during final-level  
26 consideration;
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- 28 (b) Protect immigration judges from removal without cause;
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- 30 (c) Establish and implement a new code of conduct based on the ABA Code of Judicial  
31 Conduct tailored to the immigration adjudication system.
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- 33 (d) Establish and implement judicial model performance reviews for immigration judges  
34 based on the ABA's Guidelines for the Evaluation of Judicial Performance and the  
35 Institute for Advancement of the American Legal System's model for judicial  
36 performance;

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- 37 (e) Establish a new office in Executive Office of Immigration Review (EOIR) that would  
38 segregate the disciplinary function for immigration judges from other supervisory  
39 functions, creating and following publicly available procedures and guidelines for  
40 complaints and discipline, fully implementing a formal right of appeal/review for  
41 adverse disciplinary decisions, and allowing public access to statistical or summary  
42 reporting of disciplinary actions (individual disciplinary records themselves would not  
43 be made public); and  
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- 45 (f) Improve data collection and analysis regarding the performance of immigration judges  
46 and immigration courts, in accordance with GAO recommendations that EOIR develop  
47 and maintain appropriate procedures to accurately measure case completion, identify and  
48 examine cost-effective options for acquiring the data, and acquiring the necessary  
49 expertise to perform useful and reliable analyses of immigration judges' decisions.  
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51 FURTHER RESOLVED, That the American Bar Association recommends the following  
52 changes to immigration court procedures:  
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- 54 (a) Require immigration judges to provide more formal, reasoned written decisions that are  
55 clear enough to allow noncitizens and their counsel to understand the bases of the  
56 decision and to permit meaningful BIA and appellate review;  
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- 58 (b) Limit use of video conferencing to procedural matters in which the noncitizen has given  
59 consent;  
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- 61 (c) Encourage immigration courts to hold prehearing conferences as a matter of course in  
62 order to narrow the issues and provide clearer guidance to noncitizens and their counsel  
63 on evidentiary issues; and  
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- 65 (d) Give priority to completing the installation of digital audio recording systems at all  
66 immigration courts to facilitate fair and efficient proceedings.

## REPORT

The immigration courts in the United States sit in 57 locations in 28 states and hear several hundred thousand matters each year. The matters include, among others, removal proceedings, asylum petitions, bond redeterminations for immigrants held in detention, reviews of credible fear determinations, and rescission hearings to determine whether a lawful permanent resident was wrongfully granted permanent resident status. The vast majority of the matters are removal proceedings. With a low rate of appeal from the decisions of immigration courts, most noncitizens' cases end in those courts.

Since 1983, the immigration courts have been part of the Executive Office for Immigration Review ("EOIR"), which is housed within the U.S. Department of Justice ("DOJ") and answers directly to the Attorney General. The Attorney General appoints a director, who supervises the two offices within EOIR — the Board of Immigration Appeals ("BIA" or "Board") and the Office of the Chief Immigration Judge ("OCIJ"). The OCIJ supervises the immigration courts and the immigration judges. In addition, nine Assistant Chief Immigration Judges ("ACIJs"), five of whom are assigned to the various regional courts, aid in the administration of such courts. Immigration judges are career attorneys appointed by the Attorney General as administrative judges under Schedule A of the excepted civil service and are employed for indefinite terms. As Schedule A appointees, immigration judges are exempted from many of the laws and regulations governing appointment, evaluation, discipline, and removal of civil service employees.

In recent years, the immigration courts have faced harsh criticism — including by federal appellate judges — for inadequate decisions and reasoning and improper behavior by immigration judges. In 2006, then-Attorney General Alberto Gonzales announced 22 reform measures designed to improve the functioning of the immigration courts and the BIA. Some of these measures have been implemented, representing a promising start toward improving the performance and reputation of the immigration courts. However, a number of reforms remain incomplete, and numerous problems with the immigration court system remain.

### **1. Large Caseloads and Inadequate Resources**

The immigration courts have too few immigration judges and support staff, including law clerks, for the workload for which they are responsible. In 2008, immigration judges completed approximately 1,243 proceedings per judge and issued approximately 1,014 decisions per judge. To keep pace with these numbers, each judge would need to issue at least 19 decisions each week, or approximately four decisions per weekday. A recent report indicated that the average time immigration judges have to dispose of cases is at its lowest point in more than a decade.<sup>1</sup> In comparison, Veterans Law Judges decided approximately 729 cases per judge (approximately 178 of which involved hearings) in 2008, and Social Security Administration administrative law judges decided approximately 544 cases per judge in 2007.<sup>2</sup>

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<sup>1</sup> TRAC, IMMIGRATION REPORT, CASE BACKLOGS IN IMMIGRATION COURTS EXPAND, RESULTING WAIT TIMES GROW, <http://trac.syr.edu/immigration/reports/208/> (last visited Nov. 3, 2009).

<sup>2</sup> BD. OF VETERANS' APPEALS, FISCAL YEAR 2008 REPORT OF THE CHAIRMAN 3 (2009), *available at* <http://www.va.gov/Vetapp/ChairRpt/BVA2008AR.pdf>; U.S. SOC. SEC. ADMIN., ANNUAL STATISTICAL SUPPLEMENT 2008, at 2.F (2009), *available at* <http://www.ssa.gov/policy/docs/statcomps/supplement/2008/index.html>.

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A lack of adequate staff support for the immigration judges compounds the problem. On average, there is only one law clerk for every four immigration judges, and the ratio is even worse in some immigration courts. The shortage of immigration judges and law clerks has led to very heavy caseloads per judge and a lack of sufficient time for judges to properly consider the evidence and formulate well-reasoned opinions in each case. In fact, judges generally have been limited to issuing oral decisions shortly after the merits hearing is completed.

In order to bring the caseload down to a level roughly on par with the number of cases decided each year by judges in other federal administrative adjudicatory systems (around 700 cases per judge annually), the recommendation calls for hiring approximately 100 additional immigration judges as soon as possible, but at least within the next three to four years. In addition, it recommends the hiring of enough law clerks to provide one law clerk per judge. This would entail hiring approximately 269 additional law clerks (assuming the addition of the 100 immigration judges).

## **2. Insufficient Training and Professional Development**

Insufficient resources also contribute to inadequate opportunities for judicial training and professional development. Although training of newly-hired and existing judges has been increased and improved over the past few years, some of the existing training has been cut back due to a shortage of funds. Moreover, heavy caseloads result in a lack of administrative time during which immigration judges could participate in training and network with other judges.

### **A. Provide Additional Training and Support for Immigration Judges**

Some commentators have recommended that increased funding be available for professional development, training, and support of immigration judges and support staff.<sup>3</sup> Any increased funding will be more effective if it is designated to include in-person experiences for both newly-hired judges and veterans of the bench.

In terms of the substance of trainings, many immigration judges have expressed a need for more training in assessing credibility, identifying fraud, and understanding changes to U.S. asylum law.<sup>4</sup> Although a relatively low percentage of judges felt that sensitivity and cultural awareness training is needed,<sup>5</sup> the view that such training would lead to better decision making has been expressed by others.<sup>6</sup>

Many immigration judges have also indicated that informal meetings with other judges and opportunities to observe experienced judges in other courts would enhance their abilities to carry

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<sup>3</sup> See, e.g., HUMAN RIGHTS FIRST BLUEPRINT, HOW TO REPAIR THE U.S. ASYLUM SYSTEM: BLUEPRINT FOR THE NEXT ADMINISTRATION 12 (2008) available at <http://www.humanrightsfirst.org/pdf/081204-ASY-asylum-blueprint.pdf>.

<sup>4</sup> GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, U.S. ASYLUM SYSTEM: AGENCIES HAVE TAKEN ACTION TO HELP ENSURE QUALITY IN THE ASYLUM ADJUDICATION PROCESS, BUT CHALLENGES REMAIN 131 (2008), available at <http://www.gao.gov/new.items/d08935.pdf> [hereinafter CHALLENGES REMAIN].

<sup>5</sup> *Id.* at 132.

<sup>6</sup> See, e.g., Lindsey R. Vaala, *Bias on the Bench: Raising the Bar for U.S. Immigration Judges to Ensure Equality for Asylum Seekers*, 49 Wm. & Mary L. Rev. 1011, 1036 (2007).

out their duties.<sup>7</sup> This could be accomplished with a minimum amount of effort or additional funding. A single administrator, for example, could serve as a liaison with local court administrators to help facilitate regular meetings among immigration judges at each court. Similarly, arranging for immigration judges to observe judges at other courts would involve some expense for travel, but would not involve a significant increase in staffing.

Therefore, we recommend that sufficient funding be made available to permit both newly-hired and experienced immigration judges to participate in regular live, in-person trainings on a wide range of topics in immigration law. This training should include (without limitation) sessions on: (i) making credibility determinations across cultural divides; (ii) identifying fraud; (iii) changes in U.S. asylum law; and (iv) cultural sensitivity.

We also recommend that an administrator be designated to facilitate increased communication among immigration judges, both within each court and among the various courts. This should involve both formal and informal meetings among immigration judges, as well as opportunities for immigration judges to observe other judges in their own courts or in other courts. Both of the above recommendations, of course, rely on the hiring of additional immigration judges, so that the decreased caseloads would permit judges to take advantage of additional training and networking opportunities.

### **B. Increase Administrative Time Available to Immigration Judges**

Without additional administrative time available to immigration judges during which they could take advantage of training and professional development resources, improvements to these resources would be ineffective.<sup>8</sup> If the caseloads of immigration judges are successfully decreased by hiring more judges and they are assisted by more law clerks, a greater portion of each judge's time could be designated as administrative time and used as such. Furthermore, participation in live trainings such as the annual conference for immigration judges would be more feasible. Increased administrative time also would permit immigration judges more time to interact with other immigration judges on their courts or immigration judges from other courts. Among other things, judges could be encouraged to attend weekly or monthly lunch meetings to discuss their cases or new developments in immigration law.

### **3. Problems with Selection and Qualification of Immigration Judges**

The standards used to hire immigration judges are incomplete and opaque, open positions are not filled quickly, and there is a lack of public input into the hiring decisions. As a result, some judges are hired with inadequate experience, there is a general lack of diversity in the professional backgrounds of judges, and there are problems with inappropriate judicial

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<sup>7</sup> See CHALLENGES REMAIN, *supra* note 4, at 130-31 (showing that 85% of respondents felt that informal meetings with other immigration judges would enhance their ability to adjudicate cases and 63% of respondents felt that observing an experienced judge in another court would enhance their ability to adjudicate cases).

<sup>8</sup> TRAC, IMMIGRATION REPORT, IMPROVING THE IMMIGRATION COURTS: EFFORTS TO HIRE MORE JUDGES FALLS SHORT, <http://trac.syr.edu/immigration/reports/189/> (last visited Nov. 3, 2009); *Oversight Hearing on the Executive Office of Immigration Review, Subcomm. on Immigr., Citizenship, Refugees, Border Security, and International Law of H. Comm. on the Judiciary, 110th Cong. 30-39, 35 (2008)*, available at [http://trac.syr.edu/immigration/reports/199/23Sep08Statement\\_TRAC\\_Susan\\_B\\_Long.pdf](http://trac.syr.edu/immigration/reports/199/23Sep08Statement_TRAC_Susan_B_Long.pdf) (prepared testimony and statement for the record of Susan B. Long, Co-Director, Transactional Records Access Clearinghouse).

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temperament. EOIR has recently made significant improvements to the process of hiring immigration judges. We generally recommend allowing those reforms time to take effect, while suggesting a few additional improvements.

## **A. Additional Hiring Criteria**

EOIR should add questions to the application that seek, in narrative form, information from the candidate about his or her experience and aptitude in areas such as sensitivity to cultural differences and the ability to treat all persons with respect. Those conducting interviews of candidates should pose questions designed to elicit the candidate's background in these areas. A candidate's references should be asked about the candidate's demonstrated capacity for judicial temperament, cultural sensitivity, respect for peers and subordinates, and any predispositions in making credibility determinations.

## **B. More Public Participation in the Hiring Process**

EOIR should incorporate more public input into the hiring process.<sup>9</sup> EOIR could accomplish this goal by inviting organizations within the profession, such as the American Bar Association ("ABA") or the American Immigration Lawyers Association ("AILA"), to participate in the screening or rating of candidates who reach the final levels of consideration. To minimize delay, EOIR could allow a reasonable, but fairly narrow, window within which such groups could comment on candidates. While the outside input would be considered during the hiring process, EOIR and the Attorney General's office would retain ultimate authority to approve or reject a candidate.<sup>10</sup>

## **4. Inadequate Supervision and Discipline**

Inadequate experience and problems with judicial temperament theoretically could be addressed with proper supervision and discipline, but inadequacies exist in those areas as well. For instance, many observers have noted that there are too few ACIJs (nine) supervising the more than 220 other immigration judges spread throughout the country. In addition, supervision of immigration judges suffers from a lack of appropriate feedback mechanisms such as performance reviews.

In terms of discipline, the standards of ethics and conduct applicable to the judges are currently numerous and unclear, and the disciplinary system lacks transparency. The disciplinary system also lacks independence, since it rests within EOIR and DOJ. The lack of independence and clarity raises a concern about the potential for improper political influence on judges' decisions.

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<sup>9</sup> See Stacy Caplow, *A New Year and the Old Debate: Has Immigration Reform Reformed Anything?*, 13 Nexus 85, 97 (2007-2008).

<sup>10</sup> This recommendation is consistent with the appointment process recommended as part of the restructuring reforms outlined in Part 6. Under the restructuring recommendations, the Standing Referral Committee would allow outside stakeholders, including government agencies and non-government entities, to participate in the appointment of the trial level immigration judges, either through representation on the Committee or through a comment process.

### **A. Improve Supervision of Immigration Judges by Increasing the Number of ACIJ's and Expanding Their Deployment to Regional Courts**

To address the shortcomings observed in the supervision of immigration judges, we recommend increasing the number of ACIJ's overall and expanding the deployment of ACIJ's to the regional courts. EOIR has reported that the pilot program to deploy ACIJ's to regional courts has been successful, and it recommends making the program permanent.<sup>11</sup>

Reducing the ratio of immigration judges to ACIJ's would allow the ACIJ's to give more attention to each supervised judge and allow ACIJ's to act more proactively in supervision, addressing areas that may currently be overlooked in the face of unmanageable dockets, such as training programs.<sup>12</sup> Such a change also will provide more time for ACIJ's to attend to their own dockets and other administrative duties. Deploying new ACIJ's onsite to regional courts could also improve supervision by allowing greater opportunity for personal observation, and could reduce the time and cost associated with travelling between many geographically dispersed courts.

There are currently only five ACIJ's deployed outside of the headquarters immigration court and the current ratio of immigration judges to ACIJ's exceeds twenty to one. While the optimal ratio is not known, we recommend a significant increase in the number of ACIJ's relative to the total number of immigration judges, particularly in high volume circuits. Importantly, if the number of immigration judges is expanded (as recommended above), the desired number of ACIJ's should grow proportionately.

### **B. Implement Judicial-Model Performance Reviews for Immigration Judges**

As previously noted, former Attorney General Gonzales included performance evaluations of immigration judges among his 22 proposed reform measures.<sup>13</sup> In light of DOJ's position that immigration judges are merely "adjudicatory employees,"<sup>14</sup> Attorney General Gonzales proposed annual reviews similar to the performance appraisals used elsewhere within DOJ.<sup>15</sup> While Attorney General Gonzales claimed that the proposal "fully recogniz[es] [an immigration

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<sup>11</sup> See TRAC, IMMIGRATION REPORT, BUSH ADMINISTRATION PLANS TO IMPROVE IMMIGRATION COURTS LAGS, <http://trac.syr.edu/immigration/reports/194/> (last visited Nov. 3, 2009) [hereinafter TRAC PROGRESS REVIEW]. TRAC noted that EOIR prepared a report on the effectiveness of the ACIJ pilot program for the Deputy Attorney General, but EOIR has not made that report public. *Id.*

<sup>12</sup> With more ACIJ's and more immigration judges, it may eventually be possible to assign ACIJ's exclusively to supervisory and administrative duties. We recommend, however, that ACIJ's should be required to maintain at least a minimal docket to ensure that they remain familiar with the day-to-day work of immigration judges. Further, while EOIR has created at least two specialized ACIJ positions as part of the AG's reforms, we caution against over-specialization and assignment of tasks to ACIJ's that may be more appropriately handled by administrative staff. See EOIR Fact Sheet, Office of the Chief Immigration Judge Biographical Information, <http://www.usdoj.gov/eoir/fs/ocijbio.htm> (last visited Nov. 3, 2009) (noting special ACIJ positions for conduct and professionalism and for training of immigration judges, law clerks, and court staff).

<sup>13</sup> See DEPARTMENT OF JUSTICE, MEASURES TO IMPROVE THE IMMIGRATION COURTS AND THE BOARD OF IMMIGRATION APPEALS 1 (AUGUST 9, 2006), available at <http://trac.syr.edu/tracatwork/detail/P104.pdf> [hereinafter ATTORNEY GENERAL REFORM MEASURES].

<sup>14</sup> See Letter from the National Association of Immigration Judges to David Margolis, Associate Deputy Attorney General (Oct. 21, 2008) (on file with The Commission on Immigration).

<sup>15</sup> See ATTORNEY GENERAL REFORM MEASURES, *supra* note 13, at 1.

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judge's] role as an adjudicator,"<sup>16</sup> critics worry that such a civil service model would further erode the decisional independence of the immigration judges.<sup>17</sup> In recognition of these concerns, we instead recommend a judicial performance review model based on the ABA's Guidelines for the Evaluation of Judicial Performance (the "ABA Guidelines")<sup>18</sup> and the model for judicial performance evaluation proposed by the Institute for Advancement of the American Legal System ("IAALS").<sup>19</sup>

Although both the ABA Guidelines and the IAALS model are targeted primarily at state judiciaries, they are useful models for the evaluation of immigration judges. Both stress judicial improvement as the primary goal, emphasize process over outcomes, and place a high priority on maintaining judicial integrity and independence.<sup>20</sup> The ABA Guidelines, first adopted in 1985 and updated in 2005, outline the essential characteristics of a judicial performance evaluation program. These include the following:

- Evaluation programs should focus on promoting judicial self-improvement, enhancing the quality of the judiciary as a whole, and improving the design of continuing education programs. (Guidelines 2.1 and 2.2)
- Evaluation programs should not be used for judicial discipline. (Guideline 2.3)
- Dissemination of data and results from evaluations should be consistent with the above uses, and data and results should otherwise be confidential. (Guideline 3.1)
- Evaluation programs should operate through independent, broadly based, and diverse committees, consisting of members from the bench, the bar, and the public, as appropriate. (Guideline 4.2)
- Evaluation programs should be free from political, ideological, and issue-oriented considerations. (Guideline 4.4)
- Judges should be evaluated on legal ability, integrity and impartiality, communication skills, professionalism and temperament, and administrative capacity. (Guidelines 5.1 through 5.5)
- Expert competence should be used in developing methods for evaluating judges, and collecting and analyzing data. Behavior-based instruments should be used. (Guidelines 6.2 and 6.3)
- Multiple, reliable sources should be used, including attorneys, litigants, witnesses, non-judicial court staff, and appellate judges. (Guideline 6.5)
- Judges should be evaluated periodically, with the frequency dependent on factors such as length of tenure. (Guideline 6.8)

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<sup>16</sup> *Id.*

<sup>17</sup> *See, e.g.*, National Association of Immigration Judges, Immigration Court Needs: Priority Short List (November 2008), at 1 [hereinafter NAIJ Short List] (on file with The Commission on Immigration).

<sup>18</sup> ABA, GUIDELINES FOR EVALUATION OF JUDICIAL PERFORMANCE (2005), available at [http://www.abanet.org/jd/lawyersconf/pdf/jpec\\_final.pdf](http://www.abanet.org/jd/lawyersconf/pdf/jpec_final.pdf). [hereinafter ABA GUIDELINES].

<sup>19</sup> *See* INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, SHARED EXPECTATIONS: JUDICIAL ACCOUNTABILITY IN CONTEXT (2006), available at <http://www.du.edu/legalinstitute/publications2006.html> [hereinafter SHARED EXPECTATIONS]; INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, TRANSPARENT COURTHOUSE: A BLUEPRINT FOR JUDICIAL PERFORMANCE EVALUATION (2006), available at <http://www.du.edu/legalinstitute/publications2006.html> [hereinafter BLUEPRINT].

<sup>20</sup> *See generally* ABA GUIDELINES, *supra* note 18; SHARED EXPECTATIONS, *supra* note 19. For a discussion of adapting the IAALS model to the federal judiciary, *see* Rebecca Love Kourlis and Jordan M. Singer, *A Performance Evaluation Program for the Federal Judiciary*, 86 DENV. UNIV. L. REV. 7 (2008).

The IAALS model builds on these principles and provides more detailed recommendations based on lessons learned from state judicial performance review programs.<sup>21</sup> For example, IAALS recommends, among other things, that: judges with no set terms should be evaluated once every three years; the evaluation committee should reflect a balance of attorneys and non-attorneys and political or other relevant constituencies; benchmarks and minimum standards should be set before any evaluations are performed and variances from these standards should be permitted only in extraordinary circumstances; judges should be observed in the courtroom, whether by the committee directly or via trained independent observers; data collection should be conducted by a body independent of the committee; comprehensive and clear evaluation reports should be provided to each evaluated judge; and judges should be teamed with mentors to develop improvement strategies after being evaluated.<sup>22</sup>

A performance review system based on the guidelines and recommendations discussed above would address both the concerns raised regarding the quality of immigration judges and the reservations of the immigration judges and others related to preserving judicial independence. In surveys of judges subject to performance reviews in four state systems, the majority of judges agreed that the evaluations provided useful feedback on their performance and that the evaluation process made them appropriately accountable for their job performance.<sup>23</sup> Similarly, federal district, magistrate, and bankruptcy judges participating in a pilot performance review system in the Central District of Illinois rated the value of the program as “overwhelmingly positive.”<sup>24</sup> In addition, in a survey of Colorado judges subject to a robust performance evaluation system, over two-thirds of the judges felt that the evaluations either had no effect or a positive effect on judicial independence.<sup>25</sup>

While we recommend performance reviews of immigration judges based on the ABA Guidelines and the IAALS model, we refrain from making more detailed recommendations as to the specific elements of the performance review systems (such as particular benchmarks, etc.). Both the ABA Guidelines and the IAALS model recognize that the specifics of a performance evaluation must be tailored to each judicial system.<sup>26</sup> Therefore, full implementation of performance reviews may need to wait until other proposed reforms have been put in place.

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<sup>21</sup> See SHARED EXPECTATIONS, *supra* note 19, at 59-61; BLUEPRINT, *supra* note 19.

<sup>22</sup> See SHARED EXPECTATIONS, *supra* note 19, at 79-93.

<sup>23</sup> Rebecca L. Kourlis and Jordan M. Singer, *Using Judicial Performance Evaluations to Promote Judicial Accountability*, 90 JUDICATURE 200, 203 (2006).

<sup>24</sup> *Id.*

<sup>25</sup> Kourlis, *Performance Evaluation Program*, *supra* note 20, at 20.

<sup>26</sup> See generally ABA GUIDELINES, *supra* note 18 (providing general guidelines and alternatives rather than specific recommendations); BLUEPRINT, *supra* note 19, at 59 (noting that evaluation programs can be shaped in many different ways to meet the specific needs of a court system).

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## C. Consolidate, Clarify, and Strengthen Codes of Ethics and Conduct Applicable to Immigration Judges

The various codes of conduct and ethics applicable to immigration judges should be consolidated, clarified, and adapted to the particular issues facing immigration judges.<sup>27</sup> While the Codes of Conduct proposed in 2007 by EOIR are a step in the right direction, more is needed.<sup>28</sup> We recommend specifically that a new code of conduct, based on the ABA Model Code of Judicial Conduct (“ABA Model Code”)<sup>29</sup> and tailored to the immigration adjudication system, be adopted.

In ABA Resolution 101B, adopted August 6, 2001, the ABA recommended that members of the administrative judiciary be held accountable under appropriate ethical standards adapted from the ABA Model Code in light of the unique characteristics of the particular positions in the administrative judiciary. Citing this resolution, the ABA’s Section of Administrative Law and Regulatory Practice has recommended that the drafters of ethical rules should also consider the codes of ethics adopted by groups such as the National Conference of the Administrative Law Judiciary (“NCALJ”), which is a conference of the Judicial Division of the ABA, and the 1989 Code of Conduct for Administrative Law Judges.<sup>30</sup>

The NCALJ has adopted both a Model Code of Judicial Conduct for Federal Administrative Law Judges<sup>31</sup> and a Model Code of Judicial Conduct for State Administrative Law Judges.<sup>32</sup> While the NCALJ codes may be most relevant to immigration judges as administrative adjudicators, they are both based on *prior* versions of the ABA Model Code<sup>33</sup> and do not represent the most

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<sup>27</sup> See, e.g., Michele Benedetto, *Crisis on the Immigration Bench: An Ethical Perspective*, 73 Brook. L. Rev. 467, 486 (2008) (noting that “the number of applicable codes is itself indicative of a problem”).

<sup>28</sup> *Id.*; see also Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits of Consistency*, 60 STANFORD L. REV. 413, 420-421 (2007).

<sup>29</sup> MODEL CODE OF JUDICIAL CONDUCT (2007), available at [http://www.abanet.org/judicialethics/ABA\\_MCJC\\_approved.pdf](http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf) [hereinafter ABA MODEL CODE].

<sup>30</sup> See ABA SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE, [UNTITLED REPORT] 9 (2005) [hereinafter ADLAW ADJUDICATION REPORT]. In addition to the ABA Model Code and the NCALJ model codes, other potential models are available, including the Code of Conduct for United States Judges, National Association of Administrative Law Judges Model Code of Conduct for State Administrative Law Judges, and state judicial codes of conduct. See, e.g., JUDICIAL CONFERENCE OF THE UNITED STATES, CODE OF CONDUCT FOR UNITED STATES JUDGES (2009), available at [http://www.uscourts.gov/library/codeOfConduct/Code\\_Effective\\_July-01-09.pdf](http://www.uscourts.gov/library/codeOfConduct/Code_Effective_July-01-09.pdf); NATIONAL ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMINISTRATIVE LAW JUDGES, XVI J. NAALJ 279 (1994). Many of these codes are themselves modeled on the ABA Model Code or the NCALJ model codes. It is also worth noting that NAIJ, in response to the publication of the proposed Codes, drafted and proposed its own code of conduct for EOIR’s consideration, also based on the ABA Model Code. See Hon. Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER’S IMMIGR. BULL. 1, 14 n.71 (2008).

<sup>31</sup> NATIONAL CONFERENCE OF THE ADMINISTRATIVE LAW JUDICIARY, MODEL CODE OF JUDICIAL CONDUCT FOR FEDERAL ADMINISTRATIVE LAW JUDGES (1989).

<sup>32</sup> NATIONAL CONFERENCE OF THE ADMINISTRATIVE LAW JUDICIARY, MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMINISTRATIVE LAW JUDGES (1995).

<sup>33</sup> The NCALJ model codes for federal and state ALJs are based on the 1972 and 1990 versions of the ABA Model Code, respectively. The ABA Model Code underwent a major revision in 1990 and has been amended multiple times since then, most recently in 2007.

current statement of the ABA on judicial conduct.<sup>34</sup> While many differences are minimal, some are significant. For example, the NCALJ model code for federal ALJs retains hortatory language throughout the canons and commentary, which the ABA Model Code abandoned in 1990 in favor of mandatory language.

The ABA Model Code also has significant advantages over EOIR's proposed Codes of Conduct. While many of the canons included in the proposed Codes of Conduct are drawn directly from the ABA Model Code, these are abbreviated or otherwise modified in many cases. For a notable example, while the proposed Codes of Conduct state simply that an immigration judge "shall not, in the performance of official duties, by words or conduct, manifest bias or prejudice,"<sup>35</sup> Canon 3B(5) of the ABA Model Code states:

A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, *including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.*<sup>36</sup>

In addition, many relevant canons from the ABA Model Code are not included at all in EOIR's proposed codes. For example, Canon 3C(3) of the ABA Model Code addresses judges with supervisory power over other judges.<sup>37</sup> EOIR's proposed Codes of Conduct provide no similar guidance for the CIJ or ACIJs. Other areas of weakness in the proposed Codes of Conduct, such as treatment of *ex parte* contacts and enforcement mechanisms, are more fully addressed in the ABA Model Code. The proposed Codes of Conduct are lacking in guidance by comparison.

This is not to suggest that the ABA Model Code should be adopted wholesale and without modification. There are a number of provisions that are generally inapplicable to or inappropriate for immigration judges, such as canons regarding juries. In addition, there are aspects of adjudication in the immigration context that are not fully addressed by the ABA Model Code.<sup>38</sup> For instance, the definitions of and commentary regarding "bias" and "prejudice" could be enhanced even further to take into account the central role that cultural differences can play in immigration proceedings.<sup>39</sup> Another area that may require additional attention is the unique role that immigration judges play in developing the evidentiary record.<sup>40</sup>

The adoption and adaptation of the ABA Model Code for immigration judges would address the concerns with immigration judge behavior and temperament. The implementation of a new code

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<sup>34</sup> While these model codes for ALJs were adopted by the NCALJ, they were never formally adopted by the ABA House of Delegates.

<sup>35</sup> See Codes of Conduct for the Immigration Judges and Board Members, 72 Fed. Reg. at 35,511 (quoting Canon IX).

<sup>36</sup> See ABA MODEL CODE, *supra* note 29 (emphasis added).

<sup>37</sup> See ABA MODEL CODE, *supra* note 29.

<sup>38</sup> See, e.g., Benedetto, *supra* note 27, at 503-08 (comparing and contrasting the ABA Model Code to the proposed Codes of Conduct).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 504.

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of conduct should provide for ample opportunity for public input. EOIR attracted significant criticism for withdrawing the proposed Codes of Conduct from the formal rulemaking process (thus cutting off the opportunity for public comment).<sup>41</sup> A return to the rulemaking process, congressional debate, or some other public process (such as consideration and formal adoption of a model code by the ABA) would allow input from significant stakeholders, including attorneys practicing before the courts and the immigration judges themselves via the NAIJ, and enhance the legitimacy of the final product.

## **D. Make the Disciplinary Process for Immigration Judges More Transparent and Independent**

Clarity and accountability are essential to a successful disciplinary system for immigration judges.<sup>42</sup> To achieve these goals, we recommend establishing a new, more independent and transparent system to manage complaints and the disciplinary process. The key components of such a system include segregating the disciplinary function from other supervisory functions, establishing and following publicly available procedures and guidelines for complaints and discipline, and fully implementing a formal right of appeal/review for adverse disciplinary decisions.<sup>43</sup>

Segregation of the responsibility for discipline into an independent or semi-independent body or office would benefit the immigration courts in several ways. First, in bypassing persons in the direct chain of supervision (ACIJ and the CIJ), personal conflicts of interest could be avoided, and supervisors would be able to focus on proactive improvement rather than reactive discipline. Second, a distinct and centralized body would provide a more neutral venue for potential complainants to present their claims, thereby ensuring equal consideration of all complaints, protecting anonymity where appropriate, and reducing the possibility of “retaliation” by immigration judges (particularly against practitioners who may appear before a particular judge frequently). While such segregation could potentially be achieved via a fully independent body,<sup>44</sup> we believe that political and administrative efficacy concerns favor creation of a semi-independent body or office within EOIR.<sup>45</sup>

All formal complaints against immigration judges, whether from litigants, practitioners, DHS attorneys, other immigration judges, BIA members, court of appeals judges, or others, should be made directly to the new office. The clarified and strengthened Codes of Conduct (as recommended above) should be the governing standard, and all complaints should be based on

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<sup>41</sup> See, e.g., TRAC PROGRESS REVIEW, *supra* note 11 (reporting NAIJ’s concern over the lack of transparency in the process of updating the EOIR Ethics Manual).

<sup>42</sup> See, e.g., Benedetto, *supra* note 27, at 505-511; NAIJ Short List, *supra* note 17, at 4.

<sup>43</sup> It should be noted that the NAIJ advocates a complaint and disciplinary procedure modeled on the process used for federal judges, codified at 28 U.S.C. §§ 351-364, a system with many similar features, including public, codified procedures and opportunity for appeal. NAIJ Short List, *supra* note 19, at 4.

<sup>44</sup> For example, in the District of Columbia, the authority to suspend or remove judges is vested in an independent body, the Commission on Judicial Disabilities and Tenure. See D.C. CODE § 11-1521.

<sup>45</sup> Such an office could be modeled on the proposal of the American Immigration Lawyers Association to create an Office of Professional Responsibility at the EOIR level, specifically charged with discipline of immigration judges and BIA members via specially convened review panels. See AILA Draft Immigration Agency Legislation, as sent to the Commission on Immigration on February 23, 2009 [hereinafter AILA Draft Legislation].

alleged violations of the Codes of Conduct.<sup>46</sup> To provide guidance for immigration judges and complainants, the new office should establish an advisory board to issue interpretations of the Codes of Conduct.<sup>47</sup> Complaints relating directly to the merits of an immigration judge's decision or procedural ruling should not be entertained. These and other procedures that may be adopted should be widely publicized.

All complaints would be reviewed by the office, and, if found to be non-frivolous, investigated, either through trained staff or specially convened panels.<sup>48</sup> Upon the completion of the investigation, the office (or the panel, if applicable) could dismiss the complaint, resolve the complaint through alternative dispute resolution (if appropriate), or take private or public disciplinary action.<sup>49</sup> Upon a final adverse decision, an immigration judge should be allowed to appeal the decision to the Merit Systems Protection Board,<sup>50</sup> and in no event should discipline involving removal or loss of pay or grade be made effective prior to the resolution of such appeal.

All investigations and disciplinary proceedings should be documented by a written record. These records, while not generally made public, would be available in an appeal by an immigration judge.<sup>51</sup> In addition, decisions in appeals to the Merit Systems Protection Board would be published in accordance with its established procedures.<sup>52</sup> Further, such records could provide the basis of statistical or other summary reporting of disciplinary actions to the public.

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<sup>46</sup> See, e.g., Benedetto, *supra* note 27, at 519-20.

<sup>47</sup> See, e.g., THE JUDICIAL CONDUCT AND DISABILITY ACT STUDY COMM., IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980: A REPORT TO THE CHIEF JUSTICE 110 (2006), *available at* <http://www.supremecourtus.gov/publicinfo/breyercommitteereport.pdf> (recommending that the Judicial Conference authorize the Committee to Review Circuit Council Conduct and Disability Orders to provide advice and counsel to chief circuit judges and judicial councils regarding implementation of the Judicial Conduct and Disability Act).

<sup>48</sup> See, e.g., AILA Draft Legislation, *supra* note 45 (recommending specially convened six-member conduct review panels). Based upon the initial review, the office could dismiss complaints without further investigation if such complaints are "frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred, or containing allegations which are incapable of being established through investigation" or plainly "lack any factual foundation or are conclusively refuted by objective evidence," standards used in review of complaints against federal judges, See 28 U.S.C. § 352(b)(1).

<sup>49</sup> Alternatively, the office or panel could be given the power to make recommendations only, leaving ultimate authority to the CIJ, the Chair of the BIA, or some other delegate of the AG (or solely with the AG). See AILA Draft Legislation, *supra* note 45 (proposing that ultimate authority be vested in the CIJ); Benedetto, *supra* note 27, at 520 (suggesting appeal to the Office of the AG, who holds ultimate responsibility for the immigration judges).

<sup>50</sup> Immigration judges currently may only appeal removal decisions to the Merit Systems Protection Board. Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 374 (2006).

<sup>51</sup> See, e.g., 28 U.S.C. § 360 (providing for confidentiality of all records of proceedings related to investigations of misconduct of federal judges, except to the extent released to the complainant or the judge under investigation, or as necessary for further investigations and proceedings). Notably, each written order implementing disciplinary action against federal judges are made available to the public. See *id.* § 360(b). In contrast, public notifications of disciplinary action against California state judges are only issued when the action involves removal, "public admonishment," or "public censure." See State of Cal. Comm'n on Judicial Performance, *The Complaint Process*, <http://cjp.ca.gov/index.php?id=24> (last visited Nov. 3, 2009).

<sup>52</sup> See 5 C.F.R. Part 1201 (practices and procedures of the Merit Systems Protection Board); U.S. MERIT SYS. PROT. BD., *JUDGES' HANDBOOK 52-59* (2007), *available at* <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=241913&version=242182&application=ACROBAT>.

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The benefits of the structure outlined above include the use of a semi-independent body; clear, established, and publicly available standards and procedures; the opportunity for appeal by the affected immigration judge; and the public availability of the results of the process, either in the form of public disciplinary actions or summary reporting. A semi-independent disciplinary body, as outlined here, should be implemented via congressional legislation, as the entities involved should be limited in their ability to modify the system to ensure its integrity.

## **E. Improve Data Collection and Analysis Regarding the Performance of Immigration Judges and Immigration Courts**

The Government Accountability Office (“GAO”) has identified shortcomings in EOIR’s ability to collect and analyze empirical data regarding the performance of the immigration courts and immigration judges.<sup>53</sup> In response, the GAO has recommended that EOIR develop and maintain appropriate procedures to accurately measure and ensure the accuracy of case completion data, identify and examine cost-effective options for acquiring the data and analytical expertise necessary to perform periodic multivariate statistical analyses of immigration judges’ asylum decisions, and develop more sophisticated plans for assessing the resources and guidance needed for effective supervision of immigration judges.<sup>54</sup> We support the GAO recommendations.

### **5. Tenure, Retention, and Removal of Immigration Judges**

Immigration judges serve as career attorneys in DOJ with no fixed term of office and are subject to the discretionary removal and transfer authority of the Attorney General. The immigration judges have no statutory protection against removal without cause. This arrangement raises a number of issues. An unlimited term that can result in essentially life tenure limits the accountability of the judges. On the other hand, the lack of fixed terms or actual life tenure raises the possibility that judges may be subject to removal or discipline based on politics or for other improper reasons. This erodes judicial independence and may undermine public opinion regarding the competence and impartiality of immigration judges.

In order to protect immigration judges from reprisal for engaging in ethical and independent decision making, we recommend that they be provided statutory protection against being removed or disciplined without good cause (as is provided for administrative law judges who adjudicate cases in other federal agencies).

### **6. Problems with Immigration Court Proceedings**

Problems affecting the immigration court proceedings include extensive use of oral decisions made without sufficient time to conduct legal research or thoroughly analyze the issues and evidence; problems with courtroom technological resources and support services for judges (including unreliable recording equipment and the lack of timely transcripts); and the use of videoconferencing in ways that may undermine the fairness of proceedings.

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<sup>53</sup> See GAO REPORT TO CONGRESSIONAL REQUESTERS, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES (Sept. 2008), at 62 [hereinafter GAO REPORT ON VARIATION]; CHALLENGES REMAIN, *supra* note 4, at 74; U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-771, EXECUTIVE OFFICE OF IMMIGRATION REVIEW CASELOAD PERFORMANCE REPORTING NEEDS IMPROVEMENT, at 30-31 (2006), available at <http://www.gao.gov/new.items/d06771.pdf>.

<sup>54</sup> *Id.*

### A. Written Decisions

Immigration judges typically render their decisions in merits hearings orally, sometimes after only a short break in the proceedings. Although EOIR provides decision outlines to encourage clear and reasoned oral decisions,<sup>55</sup> time constraints and the complexity of cases make it difficult for immigration judges to fully deliberate before issuing a decision. Notably, many immigration judges have expressed frustration with the lack of time to properly research legal issues and country conditions before issuing their opinions.<sup>56</sup>

The lack of reasoned written decisions by immigration judges makes it difficult to determine the bases of a decision for respondents and their counsel, for the BIA and for the circuit courts. This can discourage legitimate appeals of adverse decisions and frustrate effective review of those cases that are appealed. In particular, federal appellate judges have frequently criticized the ill-reasoned and/or incomplete oral decisions of immigration judges that have reached the circuit courts.<sup>57</sup>

With additional resources and more time for judges to decide each case, judges should be required to provide more formal, reasoned written decisions, particularly in proceedings, such as asylum cases, where the complexity of the cases requires more thoughtful consideration than can be given during the hearing itself. Immigration judges should at a minimum produce written decisions that are clear enough to allow respondents and their counsel to understand the bases of the decision and to permit meaningful BIA and appellate review.

### B. Recording of Proceedings

Immigration judges have complained about the technological resources and support services they receive, attributing some of the systemic problems in part to these underlying issues. According to a September 2008 GAO survey of roughly 160 immigration judges, 90% of them were dissatisfied with the quality of recording equipment (72% were very dissatisfied), over 60% of them were dissatisfied with the quality of transcription services, and 40% were dissatisfied with the quality of over-the-phone contract interpreters. Asked whether various changes would improve their ability to carry out their judicial responsibilities, 73% said that digital recording

<sup>55</sup> See EOIR, Immigration Judge Benchbook, <http://www.justice.gov/eoir/vll/benchbook/index.html> (last visited Nov. 3, 2009).

<sup>56</sup> See, e.g., Stuart L. Lustig et al., *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57, 64-67 (2008) (discussing immigration judge comments regarding significant time constraints); CHALLENGES REMAIN, *supra* note 4, at 138 (noting that 83% and 77% of immigration judges found time limitations and caseload management, respectively, to be very or moderately challenging).

<sup>57</sup> See, e.g., *Ming Shi Xue v. B.I.A.*, 439 F.3d 111, 113 (2nd Cir. 2006) (“[D]espite their volume, these suits are not to be disposed of improvidently, or without the care and judicial attention -- by immigration judges in the first instance . . . -- to which all litigants are entitled.”); *Rexha v. Gonzales*, 165 F. App’x 413, 418 n.3 (6th Cir. 2006) (“Immigration courts must review all of the evidence and make decisions based on consideration of the record as a whole . . . . These proceedings are not about speed and docket clearing. . . . [I]mmigration courts should take some extra time to consider all of the evidence . . . . [T]here must be evidence in the record that all the evidence was considered.”); *Zhen Li Iao v. Gonzales*, 400 F.3d 530, 535 (7th Cir.2005) (“[W]e are not authorized to affirm unreasoned decisions even when we understand why they are unreasoned.”).

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equipment would greatly improve their performance, and over half said that written transcripts of their proceedings before making a decision would improve their ability to carry out their duties.<sup>58</sup> We recommend that EOIR give priority to completing the rollout of digital audio recording systems to all immigration courts.

## C. Videoconferencing

Noncitizens, their lawyers and commentators have expressed concern that videoconferencing may be undermining the fairness of the immigration court system. In 1996, amendments to the INA explicitly authorized the use of videoconferences in removal proceedings.<sup>59</sup> As of 2006, videoconferencing equipment was available at 40 immigration courts across the country, 77 other facilities, and EOIR headquarters.<sup>60</sup> The recent growth in the use of videoconferencing has made it difficult for attorneys and their clients to communicate with one another in a confidential setting.

EOIR has defended videoconferencing as a useful tool for case management that saves time and reduces cost. Attorneys have lodged a variety of complaints, however, noting that translators are often in a separate location, compounding issues with the accuracy of translation for detainees who do not speak English; that poor equipment and sound quality exacerbate the problem of understanding even those who do speak English; that only security guards (rather than court officials) are available at detention centers to assist the court when problems arise; and that it is harder to use, present, and address evidence in these settings.<sup>61</sup> Commentators have also noted that the lack of nonverbal communication, specifically the inability to use and closely observe body language, makes it difficult for parties to truly understand one another.<sup>62</sup> And because it makes it more difficult to establish credibility and connect emotionally with the judge, videoconferencing makes it harder for respondents to argue their case.<sup>63</sup>

Evidence of these concerns is neither purely theoretical nor conjectural. In 2004, researchers observed 110 immigration hearings in Chicago using videoconferencing. They reported observing problems in 45% of the proceedings, ranging from technical difficulties, to issues of translation, to lack of access to counsel.<sup>64</sup> Another study — analyzing decisions in over 500,000

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<sup>58</sup> See CHALLENGES REMAIN, *supra* note 4, at 124-25. Digital recording equipment provides a number of benefits, including enhanced sound quality and more durable storage media, immediate and remote access to all or part of a recording within seconds, reduced storage requirements, simultaneous recording and playback, and more timely and lower cost transcriptions. See LIZBETH L. PATTERSON, INST. FOR COURT MGMT., TRANSITION FROM AUDIOTAPES TO DIGITAL TECHNOLOGY IN THE FEDERAL IMMIGRATION COURTS 12-13 (2000), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/tech&CISOPTR=127>.

<sup>59</sup> See 8 U.S.C. § 1229a(b)(2)(A)(iii).

<sup>60</sup> See Aaron Haas, *Videoconferencing in Immigration Proceedings*, 5 PIERCE L. REV. 59, 63 (2006).

<sup>61</sup> See generally Peggy Gleason, *Reality TV for Immigrants: Representing Clients in Video Conference Hearings*, 5 BENDER'S IMMIGR. BULL. 732 (2000); see also APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS 23 (2009).

<sup>62</sup> See Haas, *supra* note 60, at 68-71; APPLESEED, *supra* note 61, at 22.

<sup>63</sup> See Haas, *supra* note 60, at 68.

<sup>64</sup> See THE LEGAL ASSISTANCE FOUND. OF METRO. CHI. & CHIC. APPLESEED FUND FOR JUSTICE, VIDEOCONFERENCING IN REMOVAL HEARINGS: A CASE STUDY OF THE CHICAGO IMMIGRATION COURT 5-7 (2005).

cases — concluded that the use of video teleconferencing “*doubles* the likelihood that an asylum applicant will be denied asylum.”<sup>65</sup>

Due to these significant concerns, we recommend limiting the practice of conducting immigration hearings by videoconference to use in procedural matters where the respondent has given his or her consent. This would include procedural hearings where no testimony is given, e.g., at master calendar and bond hearings.<sup>66</sup>

#### **D. Prehearing Conferences**

As noted above, immigration judges have overwhelming caseloads, and time in the courtroom is at a premium. Federal regulations allow immigration judges to conduct prehearing conferences at their discretion. The conference may be held to narrow issues, to obtain stipulations between the parties, to exchange information voluntarily, and otherwise to simplify and organize the proceeding.<sup>67</sup> Yet these prehearing conferences are rarely used by the immigration courts.<sup>68</sup>

There should be a strong presumption in favor of immigration courts holding prehearing conferences in order to expedite subsequent proceedings, to narrow the issues, and to provide clearer guidance to respondents and their counsel on what evidence and testimony will be important.<sup>69</sup> Increased use of prehearing conferences has the potential to make the immigration adjudication process more efficient and run more smoothly.

Prehearing conferences also could serve as an opportunity to emphasize to lawyers their responsibility to handle immigration matters in a timely and professional fashion and to develop a reasonable timetable for all of the parties. Lawyers who are unprepared for merits proceedings or who simply fail to appear jeopardize their clients’ cases and inject unnecessary delay.<sup>70</sup> To

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<sup>65</sup> Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L.J. 259, 271 (2008) (emphasis added).

<sup>66</sup> See Walsh, et al., *supra* note 55, at 278-79. Alternatively, if substantive hearings continue to be conducted by videoconference, a preferred solution would be to provide the respondent and the respondent’s counsel with private rooms and a dedicated private phone line — with a translator on the line, if necessary — so that they can communicate effectively during these proceedings. See generally Haas, *supra* note 68, at 17; Gleason, *supra* note 51.

<sup>67</sup> 8 C.F.R. § 1003.21(a) (formerly at 8 C.F.R. § 3.21(a)). When this rule was first promulgated, EOIR explained that, in addition to codifying existing practice, the section “provide[s] for prehearing conferences to be held in the discretion of the Immigration Judge for the purpose of narrowing issues, attaining stipulations between the parties, voluntarily exchanging information, or for any other purpose which might simplify, organize, and expedite the proceeding.” Aliens and Nationality; Rules of Procedure for Proceedings Before Immigration Judges, 52 Fed. Reg. 2931, 2933 (Jan. 29, 1987). At that time, it was noted that “[c]omments were diverse on this section ranging from the position that pre-hearing conferences are unnecessary and cause delay to the opposite extreme that they be mandatory.” *Id.*

<sup>68</sup> APPLESEED, *supra* note 61, at 18.

<sup>69</sup> The recently released Appleseed report goes further and recommends mandatory prehearing conferences at the request of either party. *Id.* Nonetheless, the Appleseed report recognizes that there are cases where the conferences would be of little use, which accords with this Report’s recommendation that there be a strong presumption in favor of the conferences if requested by either party, but that they not be mandatory.

<sup>70</sup> See, e.g., *Hernandez-Gil v. Gonzales*, 476 F.3d 803, 805 (9th Cir. 2007) (remanding an immigration case to the BIA where the immigration judge had proceeded to hold a merits hearing, even after the respondent had requested a

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protect noncitizens' interests and to avoid such delays and last-minute requests for continuances and extensions, we also recommend that judges use prehearing conferences to make clear when and under what circumstances requests for extensions of time should be made.

Respectfully Submitted,

Karen Grisez, Chair  
Commission on Immigration  
February 2010

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continuance so that he could obtain the assistance of the lawyer he had retained for the case who had failed to appear).

**GENERAL INFORMATION FORM**

Submitting Entity: Commission on Immigration

Submitted By: Karen T. Grisez, Chair, Commission on Immigration

1. Summary of Recommendation(s).

The Recommendation supports measures to improve immigration courts and create a more professional, independent and accountable immigration judiciary. The recommendations include a provision to increase the number of immigration judges by approximately 100, increase the number of law clerks to a ratio of one clerk per judge, increase the number of support personnel, and increase the number of Assistant Chief Immigration Judges, and expand their deployment to regional courts. The recommendations also suggest additional opportunities for training of immigration judges, and an increase in the administrative time available to immigration judges. Further, the proposals recommend additional hiring criteria, seek to protect immigration judges from removal without cause, and to clarify and strengthen codes of ethics via consolidation in a new code of conduct based on the ABA Code of Judicial Conduct, tailored to the immigration adjudication system. Additionally, implementation of judicial model performance reviews for immigration judges based on the ABA's Guidelines for the Evaluation of Judicial Performance and the Institute for Advancement of the American Legal System's model for judicial performance. As well as making the disciplinary process more independent and transparent by establishing a new office in Executive Office of Immigration Review ("EOIR") that would segregate the disciplinary function from other supervisory functions, creating and following publicly available procedures and guidelines for complaints and discipline, fully implementing a formal right of appeal/review for adverse disciplinary decisions, and allowing public access to statistical or summary reporting of disciplinary actions (individual disciplinary records themselves would not be made public). Additionally there is a recommendation to improve data collection and analysis regarding the performance of immigration judges and immigration courts, in accordance with the GAO recommendations that EOIR develop and maintain appropriate procedures to accurately measure case completion, identifying and examining cost-effective options for acquiring the data, and acquiring the necessary expertise to perform useful and reliable analyses of immigration judges' decisions.

The recommendations also suggest the following changes to immigration court procedures to ensure fair and efficient proceedings. First, requiring immigration judges to provide more formal, reasoned written decisions that are clear enough to allow noncitizens and their counsel to understand the bases of the decision and to permit meaningful Board of Immigration Appeals ("BIA") and appellate review, second, limiting the use of video conferencing to procedural matters in which the noncitizen has given consent, third, encouraging immigration courts to hold pre-hearing conferences as a matter of course in order to narrow the issues and provide clearer guidance to noncitizens and their counsel on evidentiary issues; and finally, to give priority to completing the installation of digital audio recording systems at all immigration courts to facilitate fair and efficient proceedings.

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## 2. Approval by Submitting Entity.

On November 17, 2009, the Commission approved this recommendation.

## 3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

## 4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

Current ABA policy addresses the need for immigration judges to provide hearings that are in person and on the record, with notice and opportunity to be heard, and a decision that includes findings of facts and conclusions of law (06M107C). This recommendation supplements the current policy by detailing the specific measures necessary to ensure due process, uniformity, predictability, professionalism, efficiency and fairness in immigration adjudications. These elements are a core concern of the ABA. Promoting these goals through system-wide improvement to our overburdened immigration adjudication system will only serve to advance the rule of law (Goal IV) by providing for a fair legal process. The ABA has previously addressed similar issues in a series of reports addressing immigration procedures, immigration detention and fairness in the administrative immigration process:

In 1983, the House of Delegates adopted a policy to recommend that the United States reform its immigration laws and practices in accord with the following principles, that those federal agencies charged with administering the immigration and refugee laws and the pertinent laws governing fair labor standards and practices be provided sufficient resources and organization to enforce and administer the laws effectively and fairly. This policy also favored legislative proposals that would require that administrative law judges for immigration proceedings be appointed pursuant to the provisions of the Administrative Procedure Act, and opposing legislative proposals relating to immigration and naturalization that would limit the availability and scope of judicial review of administrative decisions under the Immigration and Nationality Act to less than what is provided for in applicable provisions of the relevant section of the Administrative Procedure Act, 5 U.S.C. 706: in particular judicial review of decisions regarding the reopening and reconsideration of exclusion or deportation proceedings, asylum determinations outside of such proceedings, the reopening of applications for asylum because of changed circumstances, denials of stays of execution of exclusion or deportation orders, administrative decisions to exclude aliens from entering the United States and constitutional and statutory writs of habeas corpus. (2/83)

In 2006, the House of Delegates adopted a policy urging an administrative agency structure that will provide all non-citizens with due process of law in the processing of their immigration applications and petitions, and in the conduct of their hearings or appeals, by all officials with responsibility for implementing U.S. immigration laws. Such due process in removal proceedings should include proceedings like those governed by the Administrative Procedure Act, in person and on the record, with notice and opportunity to be heard, and a decision that

includes findings of facts and conclusions of law; availability of full, fair, and meaningful review in the federal courts where deportation or removal from the United States is at stake; and the restoration of discretion to immigration judges when deciding on the availability of certain forms of relief from removal. The policy supported the neutrality and independence of immigration judges, both at the trial and appellate levels, and of any federal agency by which they are employed, so that such judges and agencies are not subject to the control of any executive branch cabinet officer. (06M107C)

In 2006, the House adopted a policy on the administration of U.S. immigration laws, calling for “a system for administering our immigration laws that is transparent, user-friendly, accessible, fair, and efficient, and that has sufficient resources to carry out its functions in a timely manner.” Supporting the free availability of user-friendly legal resources for participants in immigration matters, and the development of self-help assistance centers in all facilities where immigration matters are processed or adjudicated. (06M107D)

In 2006, the House of Delegates adopted a policy supporting the establishment of laws, policies, and practices that ensure optimum access to legal protection for refugees, asylum seekers, torture victims, and others deserving of humanitarian refuge. (06107F)

These policies recognize the importance of immigration judges in ensuring due process for immigrants facing removal proceedings. However, they do not fully address the steps necessary to improve adjudications by immigration judges and foster systematic reform of the immigration removal adjudication system to promote fairness, efficiency and professionalism in the adjudication of all removal cases.

5. What urgency exists which requires action at this meeting of the House?

Given the overburdened and inefficient nature of the current system, there is a strong likelihood that Congress will address the need for comprehensive immigration reform in the next few months, between the Annual Meeting and the next meeting of the House.

The current removal adjudication system handles several hundred thousand matters annually, overwhelming the resources that have been dedicated to the task of determining whether noncitizens in immigration proceedings should be removed from the United States and sent back to their home countries or elsewhere. Due to this overwhelming burden, and the known inefficiencies in the current system, there is intense political pressure for immediate and immigration reform.

6. Status of Legislation. (If applicable.)

Several bills have been introduced addressing various aspects of immigration system; however, as of this time, none have received legislative action.

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7. Cost to the Association. (Both direct and indirect costs.)

None. Existing Commission and Governmental Affairs staff will undertake the Association's advocacy on behalf of these recommendations, as is the case with other Association policies.

8. Disclosure of Interest. (If applicable.)

There are no known conflicts of interest with this resolution.

9. Referrals.

This recommendation is being circulated to Association entities and Affiliated Organizations including:

Section of Administrative Law and Regulatory Practice  
Criminal Justice Section  
Commission on Domestic Violence  
Section of Family Law  
Government and Public Sector Lawyers Division  
Section of Individual Rights and Responsibilities  
Section of International Law  
Judicial Division  
Legal Services Division/Center for Pro Bono  
Legal Services Division/Standing Committee on Pro Bono and Public  
Council on Racial and Ethnic Justice  
Commission on Law and Aging  
Commission on Law and National Security  
Section of Litigation  
Standing Committee on Legal Aid and Indigent Defendants (SCLAID)  
Young Lawyers Division  
American Immigration Lawyers Association (AILA)  
National Legal Aid and Defender Association (NLADA)

10. Contact Person. (Prior to the meeting.)

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# 114B

## EXECUTIVE SUMMARY

### 1. Summary of the Recommendation

This Recommendation supports measures to improve immigration courts and create a more professional, independent and accountable immigration judiciary. The recommendations include a provision to increase the number of immigration judges by approximately 100, increase the number of law clerks to a ratio of one clerk per judge, increase the number of support personnel, and increase the number of Assistant Chief Immigration Judges, and expand their deployment to regional courts. The Recommendation also suggests additional opportunities for training of immigration judges, and an increase in the administrative time available to immigration judges. Further, the Recommendation adds additional hiring criteria, seeks to protect immigration judges from removal without cause, and to clarify and strengthen codes of ethics via consolidation in a new code of conduct based on the ABA Code of Judicial Conduct, tailored to the immigration adjudication system. Additionally, implementation of judicial model performance reviews for immigration judges based on the ABA's Guidelines for the Evaluation of Judicial Performance and the Institute for Advancement of the American Legal System's model for judicial performance. As well as making the disciplinary process more independent and transparent by establishing a new office in Executive Office of Immigration Review ("EOIR") that would segregate the disciplinary function from other supervisory functions, creating and following publicly available procedures and guidelines for complaints and discipline, fully implementing a formal right of appeal/review for adverse disciplinary decisions, and allowing public access to statistical or summary reporting of disciplinary actions (individual disciplinary records themselves would not be made public). Additionally there is a recommendation to improve data collection and analysis regarding the performance of immigration judges and immigration courts, in accordance with the GAO recommendations that EOIR develop and maintain appropriate procedures to accurately measure case completion, identifying and examining cost-effective options for acquiring the data, and acquiring the necessary expertise to perform useful and reliable analyses of immigration judges' decisions.

The recommendations also suggest the following changes to immigration court procedures to ensure fair and efficient proceedings. First, requiring immigration judges to provide more formal, reasoned written decisions that are clear enough to allow noncitizens and their counsel to understand the bases of the decision and to permit meaningful Board of Immigration Appeals ("BIA") and appellate review, second, limiting the use of video conferencing to procedural matters in which the noncitizen has given consent, third, encouraging immigration courts to hold pre-hearing conferences as a matter of course in order to narrow the issues and provide clearer guidance to noncitizens and their counsel on evidentiary issues; and finally, to give priority to completing the installation of digital audio recording systems at all immigration courts to facilitate fair and efficient proceedings.

### 2. Summary of the Issue that the Resolution Addresses

The existing immigration courts are not doing as good a job as they should in providing fair decision-making and due process to those who become subject to the system. Further, they do

not provide efficient and timely decision-making by highly qualified and well-trained professionals. This is evident by the harsh criticism immigration courts have faced in recent years — including by federal appellate judges — for inadequate decisions and reasoning and improper behavior by immigration judges. Some problems facing the immigration courts are of a systemic nature, while others affect particular aspects of the system.

Problems affecting the immigration court proceedings include extensive use of oral decisions made without sufficient time to conduct legal research or thoroughly analyze the issues and evidence; problems with courtroom technological resources and support services for judges (including unreliable recording equipment and the lack of timely transcripts); and the use of videoconferencing in ways that may undermine the fairness of proceedings

### 3. Please Explain How the Proposed Policy Position will Address the Issue

Existing ABA policy recognizes the crucial importance of due process for noncitizens facing removal proceedings, and supports numerous improvements to the immigration bench. However, existent policy does not specifically address the systematic challenges to the system or the exact details of improvements necessary to achieve fair results in immigration proceedings. The immigration courts have too few immigration judges and support staff, including law clerks, for the workload for which they are responsible, the proposed policy specifically seeks to improve these ratios as well as improve the processes for selection and removal of judges, protecting immigration judges from retaliation and supporting unbiased decision making. Further, the recommendations include specific changes to encourage a fair and efficient process, including the use of pre-hearing conferences, limiting video conference hearings to procedural matters, and requiring written decisions and recorded proceedings.

### 4. Summary of Minority Views

None to date.