

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 administrative review by the Board of Immigration Appeals:

- 3
- 4 (a) Increase resources available to the Board, including additional staff attorneys and
5 additional Board members;
- 6
- 7 (b) Require three-member panel review in all non-frivolous merits cases that lack obvious
8 controlling precedent, and allow single-member review for purely procedural motions
9 and motions unopposed by DHS;
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- 11 (c) Extend the deadline for issuance of single-member decisions from 90 to 180 days from
12 receipt of appeal (i.e., the same deadline as for panel review);
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- 14 (d) Restore the Board's ability to conduct de novo review of immigration judge factual
15 findings and credibility determinations;
- 16
- 17 (e) Issue more precedential decisions and continue to require the full Board to authorize
18 designation of an opinion as precedential;
- 19
- 20 (f) Make non-precedential opinions available to noncitizens and their representatives;
- 21
- 22 (g) Make Affirmance Without Opinion discretionary, and implement a rule that all written
23 decisions include responses to all non-frivolous arguments raised by the parties; and
- 24
- 25 (h) Apply a new code of conduct to Board Members based on the ABA Code of Judicial
26 Conduct, tailored to the immigration adjudication system.

REPORT

The Board of Immigration Appeals (“BIA” or “Board”) is the highest administrative body that interprets the immigration laws. The Board is currently part of the Executive Office for Immigration Review (“EOIR”), a component of the Department of Justice that operates under the authority and supervision of the Attorney General.¹ Regulations promulgated by the Attorney General give the Board jurisdiction to hear all appeals of removal and other decisions made by immigration judges, as well as of certain decisions by DHS staff.²

In carrying out its review function, the Board is responsible for resolving the questions before it in a manner that is timely, impartial, and consistent with the immigration laws.³ Its role is also to provide clear and uniform guidance to DHS, immigration judges, and the public on the proper interpretation and administration of the immigration laws.⁴ Thus, its decisions range from complex legal interpretations to nuanced matters of administrative discretion.⁵ As the final administrative body charged with implementing the immigration laws, the Board also performs a number of functions in addition to appellate review, including assisting in the training of immigration judges and implementing and publicizing rules regarding the practice of attorneys before the administrative system.⁶

Although the Board (in one form or another) has served as the highest administrative review body for immigration decisions for many years, the standards governing the Board’s appellate review have changed significantly over the last decade as a result of “streamlining” reforms implemented in 1999 (the “1999 Streamlining Reforms”) and 2002 (the “2002 Streamlining Reforms”).⁷ These measures revised the structure and procedures of the Board in an attempt to reduce delays in administrative review, eliminate a mounting case backlog, and focus resources on those cases presenting the most significant legal issues.⁸ The 1999 Streamlining Reforms enabled a single Board Member to affirm a decision of an immigration judge without opinion in a limited category of cases, while the majority of cases continued to be heard by three-member panels.⁹ The 2002 Streamlining Reforms, however, essentially reversed this practice,

¹ 8 C.F.R. § 1003.1(a)(3); EOIR, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL § 1.2(b) (2004) [hereinafter BIA PRACTICE MANUAL], available at <http://www.usdoj.gov/eoir/bia/qapracmanual/apptmnt4.htm>.

² 8 C.F.R. §§ 1003.1(b), 1292.3. For a summary of those matters that the Board generally does (or does not) have authority to review, see BIA PRACTICE MANUAL, *supra* note 1, § 1.4.

³ BIA PRACTICE MANUAL, *supra* note 1, § 1.2(a).

⁴ *Id.*

⁵ See generally Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the “Rule” of Immigration Law*, 51 N.Y.L. SCH. L. REV. 161 (2006); Gerald Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L. J. 611 (2006).

⁶ 8 C.F.R. § 1003.1(d).

⁷ See Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135 (Oct. 18, 1999); Board of Immigration Appeals: Procedural Reforms to Improve Case Management; Final Rule, 67 Fed. Reg. 54,878 (Aug. 26, 2002).

⁸ See Press Release, Department of Justice, Board of Immigration Appeals: Final Rule (Aug. 23, 2003), available at <http://www.usdoj.gov/eoir/press/02/BIARulefactsheet.pdf> (last visited Jan. 29, 2009).

⁹ See Board of Immigration Appeals: Streamlining, 64 Fed. Reg. at 56,141.

114C

dramatically expanding the category of cases that were suitable for review by single members, and also expanding the category of cases in which affirmances without opinion were appropriate.¹⁰ As a result of these changes, nearly all cases reviewed by the Board in recent years have been decided by a single Board Member.¹¹ Furthermore, since only decisions issued by a three-member panel or the Board en banc may be considered for designation as precedent,¹² the vast majority of the Board's decisions are now unpublished. Although these unpublished decisions are binding on the parties, they do not serve as precedent; this low volume of precedent limits the Board's traditional function of crafting greater uniformity in immigration law.

In addition to simplifying the review process, the 2002 Streamlining Reforms also narrowed the Board's standard of review. Traditionally, the Board possessed the authority to conduct de novo fact finding and thus overrule the factual findings, and in certain cases the credibility determinations of immigration judges, without requiring a remand.¹³ The 2002 Streamlining Reforms, however, eliminated this authority, narrowing fact and credibility determinations to a "clearly erroneous" standard of review.¹⁴ These changes have inspired much debate as to whether the BIA as currently structured adequately serves as an oversight and adjudicative body.

The 1999 and 2002 Streamlining Reforms were successful in reducing backlogs and delays in adjudication by the Board. The reforms have increased the number of cases decided by the Board annually and reduced the number of appeals pending before the Board. The reforms also helped reduce the average time taken for each appeal. In 2000, it took an average of 1,100 days for the Board to render a decision after an appeal in an asylum case was filed; by 2006 the average duration was down to 400 days.¹⁵ But this increase in Board efficiency has come at a substantial cost, including the reduced likelihood of finding immigration judge error, the lack of precedent guidance coming from the Board, significant burdens imposed on Board Members, and increased burdens on the federal appellate courts as more BIA decisions are appealed.

Following a review of EOIR, on August 9, 2006, then-Attorney General Alberto Gonzales directed EOIR to implement 22 specific measures claimed to enhance the performance of the

¹⁰ See Board of Immigration Appeals: Procedural Reforms to Improve Case Management; Final Rule, 67 Fed. Reg. at 34,663.

¹¹ See Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 364 fig. 40 (2007). For an expanded version of the Refugee Roulette study, with commentary by scholars from Canada and the United Kingdom as well as from the United States, please see JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ & PHILIP G. SCHRAG, *REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM* (NYU Press 2009).

¹² 8 C.F.R. § 1003.1(g).

¹³ See, e.g., *In re Burbano*, 20 I. & N. Dec. 872, 873-74 (BIA 1994).

¹⁴ 8 C.F.R. § 1003.1(d)(3)(i).

¹⁵ U.S. GOV'T ACCOUNTABILITY OFFICE, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 49 & fig. 6 (2008) [hereinafter 2008 GAO REPORT], available at <http://www.gao.gov/new.items/d08940.pdf>.

immigration courts and the Board of Immigration Appeals.¹⁶ At the Board level, the memorandum required the institution of performance evaluations, two-year trial periods after appointment, written immigration law exams for Board Members, improved training for Board Members and staff, mechanisms to detect poor conduct and quality in Board adjudication, a code of conduct for Board Members, a formal complaint procedure, updated sanctions power for the Board, procedures for referring cases of immigration fraud and abuse, and an expanded EOIR-sponsored pro bono program.¹⁷ Budget increases were proposed to provide for more staff attorneys and Board Members.¹⁸ The measures also proposed changes to the 2002 Streamlining Reforms to encourage the use of one-member written opinions and three-member panels,¹⁹ and to encourage the publication of precedent.²⁰ To date, these reforms only have been partially implemented.

In a further effort to implement the 2006 EOIR reforms, in June 2008, the Department of Justice proposed additional revisions to the streamlining regulations —the “2008 Proposed Streamlining Reforms”.²¹ That revision would alter existing regulations regarding the use of affirmances without opinions, expand the scope of panel review, and also devolve the power to designate decisions as precedent to individual panels. At this time, the 2008 Proposed Streamlining Reforms have not been finalized, but neither have they been withdrawn by the current Administration.

I. Recommendations

Review of immigration court decisions by the BIA has the potential to reconcile disparities and correct errors in immigration judge decision making before such cases are appealed, if at all, to the federal circuit courts. In the last several years, the Board has instituted several improvements in its processes — such as issuing fewer affirmances without opinions — that help it come closer to achieving this goal than its past practice after the two Streamlining Reforms allowed.

¹⁶ See Memorandum from the Attorney General, Measures to Improve the Immigration Courts and the Board of Immigration Appeals (Aug. 9, 2006), *available at* <http://www.usdoj.gov/ag/readingroom/ag-080906.pdf>.

¹⁷ See *id.* at 1-7.

¹⁸ See *id.* at 6.

¹⁹ See *id.* at 4-5 (“The Director of EOIR will draft a proposed rule that will adjust streamlining practices to (i) encourage the increased use of one-member written opinions to address poor or intemperate immigration judge decisions that reach the correct result but would benefit from discussion or clarification, and (ii) allow the limited use of three-member written opinions — as opposed to one-member written opinions — to provide greater analysis in a small class of particularly complex cases.”).

²⁰ See *id.* at 5 (“The Director of EOIR will draft a proposed rule that will revise processes for publishing opinions of three-member panels as precedential to provide for publication if a majority of panel members or a majority of permanent Board Members votes to publish the opinion, or if the Attorney General directs publication.”).

²¹ Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. 34,654, 34,655 (June 18, 2008).

114C

Nevertheless, the Board's current review process does not appear to have significantly altered the appeal rate to the circuit courts, or reduced the result of adjudication disparities among the decisions of immigration judges. Furthermore, studies have suggested that single-member review and affirmances without opinion result in decisions that unduly favor the government at the expense of the noncitizen.²²

Therefore, to help the Board achieve its purpose of crafting uniformity in immigration law, exercising oversight, and correcting the errors of immigration judges, we suggest the following reforms to the Board's processes. These recommendations are most relevant if broader restructuring proposals — such as creation of an Article I court or independent agency — are not implemented, at least in respect to the Board of Immigration Appeals, and are proposed in the event that the Board continues as an administrative body within the Department of Justice. These recommendations are designed as a series of relatively low cost measures that would introduce greater confidence in the Board's ability to fairly consider cases.

As noted above, other groups have recommended reform of the Board's decision making processes. The majority of those recommendations largely advocate a repeal of the 2002 Streamlining Reforms rules, on occasion implicitly suggesting that the Board's previous procedures were adequate.²³ Our recommendations do not purely align with practice either before or after implementation of the 1999 Streamlining Reforms, recognizing, for instance, that in certain circumstances single-member review may be adequate for certain limited categories of removal cases. In addition, some of our recommendations address issues that would remain unaddressed by a simple repeal of the 2002 Streamlining Reforms.

A. Increase the Resources Available to the Board

Whether or not the reforms outlined in this Recommendation are implemented, the Board would benefit from increased resources to fund additional support staff. EOIR announced in March 2007 that it was seeking budget increases that would allow for an additional 20 Board staff attorneys. Though EOIR recently received some additional funding under the 2009 Omnibus Appropriations Act, the extra funding will likely only allow for hiring six additional attorneys. Based on interviews and assessment, we think that a ratio of ten staff attorneys to one Board Member (assuming existing regulations and practice remain unchanged) would be more appropriate than the current ratio; meeting that ratio would require the hiring of approximately 40 additional staff attorneys. Congress should appropriate the necessary funding for these additional 40 positions, and for more positions if the scope of panel review is expanded as outlined in this Recommendation.

²² See, e.g., 2008 GAO REPORT, *supra* note 15, at 55.

²³ See ABA, ENSURING FAIRNESS AND DUE PROCESS IN IMMIGRATION PROCEEDINGS 8 (2008), *available at* http://www.abanet.org/poladv/transition/2008dec_immigration.pdf. Other recent studies have not stated this explicitly, but have, in substance, recommended a shift back to the pre-2002 procedures without additional modifications. See, e.g., APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS 32 (2009).

B. Require Three-Member Panel Review for Non-Frivolous Appeals

Both anecdotal and empirical evidence indicate that three-member panels provide more transparent, meaningful review than single-member decisions and AWOs: indeed, the 2008 Proposed Streamlining Reforms, which would provide a Board Member discretion to refer a case to a three-member panel whenever the case “presents a complex, novel, or unusual legal or factual issue,” acknowledges that the Board should expand panel review.²⁴ While the 2008 proposed rule is certainly a step in the right direction, the amorphous standard of a “complex, novel, or unusual legal or factual issue” seems tailor-made for a narrow construction (or a construction varying depending on Board management). In addition, there is little guarantee that Board Members would fully utilize their enhanced discretion to refer cases to three-member panels, rather than deciding them as they currently do, particularly in light of the existing time and resources constraints under which Board Members operate.²⁵

Therefore, the Board’s existing regulations should be amended to make review by three-member panels the default form of adjudication and to allow single-member review only in very limited circumstances. Such a change would bring Board review in line with the practice of federal appellate courts, in which most cases are decided by a three-judge panel. Panel review should be required for all merit cases unless the appeal is frivolous or there is obvious precedent controlling the issue. “Obvious precedent” would require an absence of any conflicting authority; such practice is consistent with the rule promulgated as part of the 2002 Streamlining Reforms that requires panel review to settle inconsistencies among the rulings of different immigration judges or to establish precedent.²⁶ Single-member review also may be appropriate to decide purely procedural motions and motions that are unopposed by DHS.²⁷

Such limits on single-member review would allow for significantly more panel review than exists under the 2002 Streamlining Reforms, though it would not return completely to the levels that existed under the 1999 Streamlining Reforms. Under the 1999 Streamlining Reforms, all cases were heard by three-member panels unless they were part of a relatively narrow category

²⁴ Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. 34,654, 34,655, 34,658 (June 18, 2008).

²⁵ See Letter from Thomas M. Susman, ABA Director, Government Affairs Office, to John Blum, Acting Gen. Counsel, EOIR (Aug. 18, 2008) (“In the face of what is still a massive backlog of 27,000 pending cases, it is unlikely that this new flexibility will be widely utilized. The modified process will still place considerable pressure upon members to conduct single-member review or issue AWOs”). However, it is not entirely clear what percentage of the “pending” cases are part of any backlog rather than simply part of the Board’s active docket, and some have claimed that the backlog has disappeared entirely.

²⁶ 8 C.F.R. § 1003.1(e)(6).

²⁷ A similar proposal was recently endorsed by Appleseed. See APPLESEED, *supra* note 23, at 33. In addition, the ABA has previously recommended that, with very limited exceptions, three-member panels should preside over all cases, although this recommendation is a subset of a recommendation to completely repeal the 2002 Streamlining Reforms. See ABA, *supra* note 23, at 8. Restoration of three-member review has also been supported by Human Rights First. HUMAN RIGHTS FIRST, HOW TO REPAIR THE U.S. ASYLUM SYSTEM: BLUEPRINT FOR THE NEXT ADMINISTRATION 9 (2008).

114C

of procedural issues or non-compliant appeals.²⁸ This proposal thus represents a partial expansion from the category of cases suitable for single-member review articulated in the 1999 Streamlining Reforms. Limiting the scope of three-member panel review to exclude some types of motions and merits appeals is beneficial, however, because it would help limit the resources required for panel review and minimize the likelihood of a return to the backlog typical of the 1990s. Nevertheless, since the expansion of panel review would still affect the majority of the Board's docket, this recommendation would realistically require an accompanying increase in the number of Board attorneys and likely additional Board Members. Instituting panel review of most appeals without at the same time substantially increasing the number of Board Members and staff attorneys would undoubtedly lead to the mounting backlog that triggered the 1999 and 2002 reforms.

C. Relax Time Limits on Board Members

The time limits imposed on Board Members to issue decisions (90 days for single-member review and 180 days for panel review), although arguably necessary to aid in clearing the longstanding backlog, should now be relaxed. At least the same amount of time to decide appeals should be granted to single members as is currently allowed to three-member panels. Allowing more time for single-member review would provide the resources and time for Board Members to issue longer, more detailed opinions that provide noncitizens and their counsel greater assurance that their arguments were fully considered.²⁹ Current Board processes provide for consultation between the staff attorneys and between Board Members, even in decisions ultimately authored by single members rather than panels, and such consultation improves the Board's decision making. Mandating that decisions be issued within 90 days, however, necessarily limits the time for such consultation, and implicitly discourages it from occurring. Doubling the current time allotted to single members will promote this process and thereby enhance the Board's decision making, without unduly extending the decision making process.³⁰

²⁸ Dismissal by a single-member was appropriate in certain categories of cases including, *inter alia*, cases in which the BIA lacks jurisdiction, untimely appeals, cases in which the alien has filed an appeal from an immigration judge's entry of an order in absentia in removal proceedings, appeals failing to meet essential regulatory or statutory requirements, appeals from orders granting the requested relief, and appeals filed with the Board in which the Notice of Appeal fails to specify any grounds for appeal. Board of Immigration Appeals: Streamlining, 64 Fed. Reg. at 56,141; *see also* Memorandum from Paul W. Schmidt, Chairman of the BIA, to all BIA Members (Aug. 28, 2000).

²⁹ Human Rights First has recognized the need for the Board to have adequate time to hear and evaluate each case, but does not advocate for a specific period of time. *See* HUMAN RIGHTS FIRST, *supra* note 27, at 9.

³⁰ The regulations allow for these time periods to be extended for up to 60 days by the Board Chairman in "exigent circumstances." This extension is generally used for the issuing of precedential decisions. *See* Maria Baldini-Potermín, *Practice Before the Board of Immigration Appeals: Recent Roundtable and Additional Practice Tips*, 86 INTERPRETER RELEASES 2011, 2012 (2009). This authority is insufficiently flexible to allow for extended decision making.

D. Permit De Novo Review of Immigration Judge Factual Findings and Credibility Determinations

Allowing the Board to review de novo and correct immigration judge factual findings and credibility determinations would help reduce the current disparity among immigration judge decisions and decrease the chance that applicants will be harmed by erroneous decision making. The traditionally deferential standard applied during appellate review, while appropriate for appellate courts of general jurisdiction, is not a good fit for the Board's function. In contrast to traditional trial courts, immigration court hearings use informal procedures, and a significant number of respondents are unrepresented or poorly represented by inexperienced or ill-prepared attorneys. The practice of immigration judges dictating their decisions from the bench further increases the possibility for error in fact and credibility determinations. Moreover, given that much immigration court testimony is given through a translator and that cultural differences may affect demeanor and behavioral cues in a way that can make the noncitizen seem untruthful, de novo review of a transcript can be a valuable method for evaluating credibility in immigration proceedings.

E. Encourage Publication of Precedent Decisions and Increase Access to Non-Precedent Decisions

Given the importance of BIA precedent to noncitizens, asylum officers, immigration judges, and all parties involved in the immigration adjudication process, the relatively minimal amount of BIA precedent is a serious problem. A substantial body of Board precedent could provide a solid, orderly body of law. Such law would facilitate efforts to minimize disparity among immigration judges, decrease both the number of appeals and the rate of reversals, and decrease the frustration and cost of representing noncitizens in the immigration adjudication process. Increased precedent should not come at the cost of full Board review, however. Because Board precedent can have a far-reaching effect, the input of the full Board is essential before issuing a precedent opinion.³¹ Therefore, the Attorney General should continue to encourage the Board to publish more precedent decisions, while preserving the existing regulatory requirement that the entire Board authorize the designation of an opinion as precedential.

Further, wherever possible, non-precedential opinions should be made available to applicants and their attorneys. The Board currently maintains an internal database of all decisions it has issued. Although some expense would be required to redact these decisions for the public (as opinions regarding asylum and withholding of removal claims are confidential to the parties),³² advocates and applicants often are not as familiar with the specifics of immigration law as could be desired. A free, publicly available source of recent decisions would be very useful to these

³¹ Under current practice, the permanent members of the Board meet once a week en banc to review and vote on three-member panel publications to designate as precedential. Although unanimity is not required, a clear majority of the permanent members must vote in favor for a decision to be published as precedent. See Maria Baldini-Potermin, *supra* note 30, at 2012.

³² See 8 C.F.R. § 208.6.

114C

parties and would likely improve the quality of the briefs and applications submitted to the immigration courts and the BIA.

F. Improve the Quality of Board Decisions

1. If Retained, Make Affirmances Without Opinions Discretionary Rather than Mandatory

In recent years, case management practices at the Board have significantly reduced the number of Affirmances Without Opinion (AWOs) to less than 5% of all Board decisions. Although the 2002 Streamlining Reforms require an AWO if the appeal meets certain regulatory criteria, current Board practice gives Board Members discretion to decide whether to issue an AWO or to issue a short written opinion. Nevertheless, it would be better if this management practice were reflected in the Board's regulations, as the Board's internal procedures could be too easily changed in response to new administration policy, increased time pressures, or an expanded docket. Furthermore, formally codifying this informal procedure would promote awareness of the Board's change in practice and help improve the reputation of the Board, which was badly damaged in the last decade due to the proliferation of AWOs. Therefore, in the event that our recommendations are not adopted regarding the expansion of panel review and/or the requirement that opinions address all issues, the Department of Justice should at a minimum make affirmances without opinions discretionary rather than mandatory.

2. Require that Written Decisions Respond to all Non-Frivolous Arguments Raised by the Parties

While the 2008 Proposed Streamlining Reforms would encourage the use of written opinions, rather than AWOs, they do not delineate any requirements for how such opinions should be written. The current practice at the Board is to address all issues perceived by the adjudicator to be "dispositive," but not to engage every argument an applicant makes. This practice, if followed diligently, could provide applicants in most cases with sufficient information to understand the Board's decision making. However, given the prevalence of pro se applicants and the widespread perception among practitioners that the Board is not fulfilling its function of reviewing immigration court decisions, the Board should be held to a higher standard. The Board's existing regulations should be amended to require that Board opinions respond to all non-frivolous arguments properly raised by the parties in all cases.³³ Opinions need not repeat the statement of facts or conclusions of law written by the immigration judge, but they should respond explicitly to all non-frivolous contentions that the parties made during their appeals to the BIA, and not merely to those the adjudicator perceives to be dispositive.

More developed opinions are important if losing parties and their counsel are to believe that they were heard and understood. If the Board addressed all contentions that are properly raised, then the rate of appeals from the Board to federal court might decline, given that a comprehensive and

³³ Human Rights First has, similarly, recommended that the Board be required to "provide the full legal basis for their decisions and address the arguments made by the parties." HUMAN RIGHTS FIRST, *supra* note 27, at 9.

thoroughly developed opinion would give less cause to believe an appeal might be successful. Even if more substantial opinions do not in themselves lead to reduced appeals, the Courts of Appeals would have a clearer and more complete statement of views from the Board that would place them in a better position to decide whether to affirm or remand the Board's decision.

G. Apply to Board Members the Code of Conduct Proposed for Immigration Judges

EOIR has made some progress on developing a Code of Conduct for adjudicators within EOIR. The proposed Code of Conduct, however, is not well-tailored to the demands of EOIR adjudicators. We recommend that the consolidated code of conduct for immigration judges (discussed in the previous recommendation), based on the ABA Model Code of Judicial Conduct, be applied to Board Members as well.

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.³⁴

The NCALJ has adopted both a Model Code of Judicial Conduct for Federal Administrative Law Judges³⁵ and a Model Code of Judicial Conduct for State Administrative Law Judges.³⁶ 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 Code³⁷ and do not represent the most

³⁴ 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; 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).

³⁵ NATIONAL CONFERENCE OF THE ADMINISTRATIVE LAW JUDICIARY, MODEL CODE OF JUDICIAL CONDUCT FOR FEDERAL ADMINISTRATIVE LAW JUDGES (1989).

³⁶ NATIONAL CONFERENCE OF THE ADMINISTRATIVE LAW JUDICIARY, MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMINISTRATIVE LAW JUDGES (1995).

³⁷ 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.

114C

current statement of the ABA on judicial conduct.³⁸ 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,"³⁹ 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.*⁴⁰

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.⁴¹ 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.⁴² 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.⁴³ Another area that may require additional attention is the unique role that immigration judges play in developing the evidentiary record.⁴⁴

³⁸ While these model codes for ALJs were adopted by the NCALJ, they were never formally adopted by the ABA House of Delegates.

³⁹ See Codes of Conduct for the Immigration Judges and Board Members, 72 Fed. Reg. at 35,511 (quoting Canon IX).

⁴⁰ See ABA MODEL CODE, *supra* note **Error! Bookmark not defined.** (emphasis added).

⁴¹ See ABA MODEL CODE, *supra* note **Error! Bookmark not defined.**

⁴² See, e.g., Benedetto, *supra* note **Error! Bookmark not defined.**, at 503-08 (comparing and contrasting the ABA Model Code to the proposed Codes of Conduct).

⁴³ *Id.*

⁴⁴ *Id.* at 504.

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 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).⁴⁵ 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.

Respectfully Submitted,

Karen Grisez, Chair
Commission on Immigration
February 2010

⁴⁵ See, e.g., TRAC PROGRESS REVIEW, *supra* note **Error! Bookmark not defined.** (reporting NAIJ's concern over the lack of transparency in the process of updating the EOIR Ethics Manual).

114C

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 improving the efficiency, transparency and fairness of administrative review by the Board of Immigration Appeals (“BIA” or “Board”) through increasing the resources available to the Board, including additional staff attorneys and additional Board members. Requiring three-member panel review in all non-frivolous merits cases that lack obvious controlling precedent, and allowing single-member review for purely procedural motions and motions unopposed by DHS. The recommendation seeks to extend the deadline for issuance of single-member decisions from 90 to 180 days from receipt of appeal, and restore the Board's ability to conduct a de novo review of factual findings and credibility determinations by an immigration judge. The proposal supports increased precedential decisions, and continuing to require that the full Board designate an opinion as precedential. Non-precedential Board opinions should be made available to noncitizens and their representatives, and Affirmance Without Opinion (“AWO”) decisions should be discretionary. The Board should implement a rule that all written decisions must include responses to all non-frivolous arguments and finally, the recommendations support the application of a new code of conduct to Board Members based on the ABA Code of Judicial Conduct, tailored to the immigration adjudication system.

The Board is the highest administrative body that interprets the immigration laws. The Board is currently part of the Executive Office for Immigration Review (“EOIR”), a component of the Department of Justice that operates under the authority and supervision of the Attorney General. Regulations promulgated by the Attorney General give the Board jurisdiction to hear all appeals of removal and other decisions made by immigration judges, as well as of certain decisions by DHS staff.

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?

The need for due process, uniformity, predictability, professionalism, efficiency and fairness in immigration adjudications is 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 1974, the House of Delegates adopted a policy on the enactment of legislation to amend Section 106(b) of the Immigration and Nationality Act, as amended, 8 U.S.C.1105a(b), by authorizing judicial review of a final order excluding a person seeking to enter the United States either by habeas corpus or declaratory judgment in the district in which the final exclusion order was entered. (8/74)

In 1983, the House of Delegates adopted a policy 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. This policy also opposed legislative proposals relating to immigration and naturalization that would require the filing of actions for judicial review of administrative decisions, including deportation orders, rendered under the Immigration and Nationality Act within less than 60 days of such decisions. (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 also supported the need for 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.” (06M107D)

114C

These policies recognize the crucial importance of uniformity, fairness, and due process for immigrants facing removal and other negative immigration consequences. However, they do not fully address the role of the Board of Immigration Appeals in adjudications and the need for 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.

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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11. Contact Person. (Who will present the report to the House.)

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EXECUTIVE SUMMARY

1. Summary of the Recommendation

The Recommendation supports improving the efficiency, transparency and fairness of administrative review by the Board of Immigration Appeals (“BIA” or “Board”) through increasing the resources available to the Board, including additional staff attorneys and additional Board members. Requiring three-member panel review in all non-frivolous merits cases that lack obvious controlling precedent, and allowing single-member review for purely procedural motions and motions unopposed by DHS. The recommendation seeks to extend the deadline for issuance of single-member decisions from 90 to 180 days from receipt of appeal, and restore the Board's ability to conduct a de novo review of factual findings and credibility determinations by an immigration judge. The proposal supports increased precedential decisions, and continuing to require that the full Board designate an opinion as precedential. Non-precedential Board opinions should be made available to noncitizens and their representatives, and Affirmance Without Opinion (“AWO”) decisions should be discretionary. The Board should implement a rule that all written decisions must include responses to all non-frivolous arguments and finally, the recommendations support the application of a new code of conduct to Board Members based on the ABA Code of Judicial Conduct, tailored to the immigration adjudication system.

2. Summary of the Issue that the Resolution Addresses

Review of immigration court decisions by the BIA has the potential to reconcile disparities and correct errors in immigration judge decision making before such cases are appealed, if at all, to the federal circuit courts. In the last several years, the Board has instituted several improvements in its processes. However, the Board’s current review process does not appear to have significantly altered the appeal rate to the circuit courts, or reduced the result of adjudication disparities among the decisions of immigration judges. Furthermore, studies have suggested that single-member review and affirmances without opinion result in decisions that unduly favor the government at the expense of the noncitizen. Therefore, these recommendations are made to improve the processes at the Board, to help the Board achieve its purpose of crafting uniformity in immigration law, exercising oversight, and correcting the errors of immigration judges.

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

Existing ABA policy recognizes the crucial importance of representation for immigrants facing removal, and supports the provision of counsel for indigent noncitizens in removal proceedings who are potentially eligible for relief from removal and cannot otherwise obtain representation. However, existent policy does not directly address the level to which representation should be afforded or the role of the BIA and immigration judges in selection and disciplining attorneys. This recommendation will further current ABA policy, and enhance the means by which adequate legal representation can assist in achieving uniform and fair results in immigration proceedings.

4. Summary of Minority Views

None to date.