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Via email: kevin.chapman4@usdoj.gov

Executive Office for Immigration Review (EOIR)
ATTN: Kevin Chapman, Acting General Counsel
5107 Leesburg Pike
Suite 2600
Falls Church, VA 22041

Re: EOIR No. 162
Comments to Proposed Codes of Conduct for Immigration Judges and BIA Board Members
72 Fed. Reg. 35510 (June 28, 2007)

Dear Mr. Chapman:

The American Immigration Lawyers Association (AILA) submits the following comments to the Notice on Codes of Conduct for Immigration Judges and BIA Board Members issued by the Executive Office for Immigration Review (EOIR) and published in the Federal Register on June 28, 2007 (Volume 72, Number 124).

Introduction

AILA is a voluntary bar association of more than 10,000 immigration attorneys and law professors across the country who practice and teach in the field of immigration and nationality law. We are the nation's leading training and information-sharing organization in immigration law in the country.

We welcome the opportunity to comment on this very important initiative and believe we are particularly well-qualified to do so. Founded in 1946, AILA is dedicated to promoting justice, advocating for fair and reasonable immigration law and policy, and advancing the quality of immigration and nationality law and practice. Among other

areas of activity, our members represent individuals in removal proceedings. In addition, some members mentor other attorneys in *pro bono* representation before the court and/or screen detainees who appear in court on a *pro se* basis.

We applaud EOIR's efforts to develop codes of conduct for the court and for BIA. For too long, there has been an absence of a comprehensive document to guide judges' conduct and which litigants, other stakeholders, and the public could use to assess the conduct of the judges.

We also greatly appreciate EOIR's decision to allow public comment on these draft codes. The Attorney General did not publicly require or suggest this step. We are heartened by EOIR's invitation for this feedback. Though separate codes are proposed for EOIR and BIA, we will address our comments collectively to both sets of codes.

We urge EOIR to modify this code to serve as a "stand-alone" document. As proposed, references are made to various precedents, policies, and regulations. While these external sources of course cannot be comprehensively incorporated into this code, a sufficient summary of these sources should be provided so that users of the code have a sense of their thrust. This goes to the issue of usefulness and accessibility of the code, which is discussed below in the Overview. Such a stand-alone document would be consistent with other codes of judicial conduct, reinforcing the message that the Immigration Judge corps and the Board of Immigration Appeals members are professional adjudicatory bodies.

Overview

As a general observation, before providing comments on specific aspects of the proposed code, we are concerned by the brevity of the proposed document. The canons themselves tend to be brief and several provide only rudimentary guidance. There is a heavy reliance on generalized terms which we suspect will be marginally useful for attorneys and perhaps not at all for persons appearing unrepresented. Examples of these terms include "applicable ethical standards," "manifest bias and prejudice" and "judicial precedent and agency policy."

The Commentary section offers little information and primarily repeats language from some of the canons. Additionally, the supplementary language offers very little in terms of additional guidance or context for interpreting the canons. The section captioned Supplementary Information refers to a lengthy review of EOIR's adjudicative process conducted by the Deputy Attorney General and Associate Attorney General and entailing hundreds of interviews, creation of an online survey and analysis of thousands of documents. We are pleased that DOJ and EOIR undertook this survey process. Many of our members participated in aspects of it and unanimously applaud that it took place.

However, the supplementary language offers absolutely no indication of the results of these efforts other than that the Attorney General "announced that the review was complete." A more thorough description of the results of the review would provide more clarity regarding how this code of conduct addresses EOIR's concerns. We – and other stakeholders – would then have a better understanding of the successes, shortcomings,

and challenges that this review highlighted and consequently be in a better position to engage in a meaningful analysis.

For comparison, we have reviewed other judicial codes of conduct. In contrast to the cursory nature of EOIR's proposed code is the rich and detailed nature of the Code of Conduct for United States Judges. Of particular note is the helpful commentary accompanying each canon and an extensive body of published advisory opinions. The American Bar Association's (ABA) Model Code of Judicial Conduct (hereinafter, ABA model code) adopts the same approach of providing copious commentary to the briefer individual canons.

AILA believes that EOIR should provide more detailed guidance than it has offered in the proposed code for a number of reasons. First is the troubling past conduct of some immigration judges. Clearly, the majority of immigration judges engage in appropriate and professional conduct and work hard to reach decisions that are fair and adhere to applicable law. At the same time, however, we are cognizant of circuit court decisions which take immigration judges to task for unprofessional conduct, inappropriate remarks, or appearance of bias. We have also taken note that the Attorney General, in his January 9, 2006 memo, expressed concern about "intemperate" and "abusive" conduct on the part of some judges. Given the extraordinary genesis of the proposed code – essentially a long-overdue directive from the Attorney General – the offering of a code of conduct that truly guides judges and stakeholders is imperative.

Second, the immigration court is large and growing in visibility and importance. According to EOIR's 2006 Statistical Yearbook, immigration judges completed 365,000 cases in FY 2006, a 34% increase over FY 2002. Decisions increased at an even faster rate. In March, EOIR announced the creation of new courts in three cities. The increased attention by the American public and news media to immigration matters, coupled with EOIR cases that frequently contain elements related to national security, have put EOIR – and its operations and decisions – in the spotlight as never before. Clear standards for judicial conduct are vital.

Third, the unique nature of stakeholders in immigration court proceedings also compels the development of more accessible and useable guidance regarding the conduct of judges than what is presented here. EOIR engages in matters which can have extremely serious and adverse consequences for respondents – removal to a country where one may face persecution or death, permanent separation from US citizen family members, and continued incarceration due to denial of bond reduction, are but a few examples. The work of immigration judges and BIA members is more closely akin to that of members of the judicial branch, and a comprehensive code reinforces this perception both with the public and with the judges themselves.

Despite these potential impacts, and in stark contrast to criminal matters, a high proportion of respondents in EOIR lack representation. EOIR's 2005-2010 Strategic Plan states that fully half appear *pro se.* According to the EOIR Statistical Year Book, the percentage of those represented has gone down steadily from FY 2002 through FY 2006 to 35% and the number of persons without counsel has increased 68% to 210,000. Such

results are hardly surprising given the increase in the size of the detained population since detainees face particular challenges in obtaining legal representation. EOIR's Legal Orientation Program has been very successful and was expanded last year, but increasing representation is not one of the LOP's missions.

In addition, a significant percentage of *pro se* respondents are not fluent in English and are thus even less ably equipped, despite the presence of court interpreters, to assess the appropriateness of judges' conduct. A significant number of respondents are survivors of torture or war trauma. Some respondents are juveniles or are subject to a mental disability. In these cases, the inability to assess appropriate judicial conduct is compounded. Their predicament is often heightened by the lack of prior exposure to the U.S. system of justice.

A code of conduct must reasonably provide enough information to make it useable to all litigants. But this accessibility is not achieved with vague terms, such as when Canon VI instructs judges to "act impartially." The same may hold true for family members whose loved ones are in proceedings; they would also have a keen interest in knowing how to assess a judge's conduct. The ABA model code, in commentary to its rule on Bias, Prejudice, and Harassment, offers multiple examples of manifestations of bias or prejudice. We urge EOIR to adopt this approach.

We also wish to remind EOIR that this code is intended to provide guidance to the judges themselves. Immigration judges and BIA members face difficult decisions, have large case loads, see a high proportion of *pro se* respondents, and have limited administrative support. Given the constraints of the system, it is particularly important that EOIR provide meaningful, clear guidance to the judges so they can easily incorporate that guidance into their day-to-day work. Many canons, as presently formulated, do not do so.

Discussion of the Canons

Canon VI

EOIR proposed canon: An immigration judge shall act impartially and shall not give preferential treatment to any organization or individual when adjudicating the merits of a particular case.

Comment: We strongly disagree with the draft proposal which imposes this obligation on judges only while adjudicating the merits of a case. This is far too narrow. Immigration judges routinely adjudicate matters which do not go to the merits of a case but which are nevertheless quite important to one or both of the parties. Examples include decisions related to master calendar hearings, bond redetermination hearings and oral and written motions. These processes and resulting decisions also deserve and require impartiality.

In addition, we endorse the concept that immigration judges should be encouraged to adjust some procedures in deference to *pro se* respondents and to *pro bono* counsel, to which EOIR has largely turned in the absence of a publicly-funded defender system. Such accommodations, within limits, do not constitute preferential treatment and go a

long way toward ensuring due process. Most immigration judges make some adjustments already, such as explaining certain types of relief to those without representation, allowing additional time to secure counsel, etc. We note that the Immigration Judge Benchbook instructs judges to explain to those appearing *pro se* the nature and purpose of the proceeding, potential relief from removal, and other matters.

Indeed, the Benchbook requires that judges be "careful and solicitous" to unrepresented individuals. This approach is consistent with the ABA model code which, in commentary to the rule on fair and impartial performance of judges' duties, states that it is "not a violation of this Rule for a judge to make reasonable accommodations to ensure *pro se* litigants the opportunity to have their matters fairly heard."

AILA members report that, when performed properly, such conduct helps to ensure fuller and more informed participation by those without counsel while not unduly impeding the efficiency of the proceedings. Such care and information is critically important in proceedings which can be utterly mystifying to many who are not familiar with the U.S. system of justice or fluent in English.

Similarly, EOIR's Operating Policies and Procedures Memorandum #07-01, issued May 22, 2007, encourage accommodations to unaccompanied alien children in proceedings. Such adjustments include courtroom modifications and removal of the robe, when deemed appropriate by the judge.

We urge the insertion of commentary into the final canons in this regard.

AILA suggested canon: An immigration judge shall act impartially and shall not give preferential treatment to any organization or individual on any matter before the court, including but not limited to matters related to motions, bonds, master calendar hearings and merits hearings.

Canon VII

EOIR proposed canon: An immigration judge shall avoid any actions that, in the judgment of a reasonable person, would create the appearance that he or she is violating the law or applicable ethical standards.

Comment: We agree wholeheartedly with this canon. However, we would broaden the language to explicitly include immigration judges' actions both inside and outside of the courtroom. The ABA model code is in agreement with this approach. Its Rule 1.2 includes extrajudicial conduct. The ABA comments relating to this rule explain that a judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens and must accept the restrictions imposed by the code. Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary.

In addition, since it is not practicable to create an inclusive list of proscribed conduct or to create a "bright line" rule, we suggest the inclusion of commentary that provides

examples to help guide judges and stakeholders in assessing the appropriateness of conduct. While most conduct will clearly fall on one side or the other, illustrative language will assist all concerned. For example, fraternization by judges with members of the private bar or ICE attorneys on a personal level may be acceptable in some instances but may cross the line in others. We urge EOIR to remember and take into account the large percentage of persons appearing in removal proceedings who are without representation and may have only these canons as guidance for determining the appropriateness of judicial conduct.

AILA suggested canon: An immigration judge at all times shall avoid any actions that, in the judgment of a reasonable person, would create the appearance that he or she is violating the law or applicable ethical standards.

Canon IX

EOIR proposed canon: An immigration judge shall be patient, dignified and courteous to litigants, witnesses, lawyers and others with whom the judge deals in his or her official capacity, and shall not, in the performance of official duties, by words or conduct, manifest bias or prejudice.

Comment: One of the most important elements of due process in the immigration court is the immigration judge's performance of official duties without bias or prejudice. Immigration judges are called upon to adjudicate cases involving a wide variety of individuals, whose common trait is that they are in removal proceedings. It is crucial that the immigration judge exhibit no bias or prejudice against any individual appearing before the immigration judge, whether the individual is a respondent, an applicant, an attorney, an interpreter, or a witness.

The commentary section for this canon should list examples of unacceptable manifestations of bias or prejudice. Such examples include, but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts or statements; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant and demeaning references to personal characteristics.

It is also important that all detained individuals appearing before an immigration judge be treated with respect and dignity, not only by the immigration judge, but by all EOIR personnel, attorneys, interpreters, employees of the Department of Homeland Security, and Federal and State authorities. Due process requires that all detained individuals appearing before the immigration judge be fully capable of participating in their own proceedings and defense and not be incapacitated by lack of food, sleep or appropriate clothing. This should also include allowing all detained individuals who appear for an individual calendar hearing to be dressed in their own clothing and to be free of handcuffs and/or manacles.

AILA suggested canon: An immigration judge shall be patient, dignified, respectful, and courteous to all respondents, applicants, lawyers, and others with whom the

immigration judge deals in an official capacity. The immigration judge shall encourage similar conduct of those appearing before the immigration judge, including but not limited to EOIR personnel, interpreters, attorneys, and attorneys for or representatives of the Department of Homeland Security.

An immigration judge shall not, in the performance of official duties, by words or conduct, manifest bias or prejudice based upon, among other factors, perceived, alleged or actual alienage, race, nationality, ethnicity, national origin, religion, gender, sexual orientation, age, disability, membership in a particular social group, socioeconomic status, or custodial status, and shall discourage EOIR personnel, interpreters, attorneys, attorneys for or representatives of the Department of Homeland Security and others subject to the immigration judge's direction and control in the courtroom from doing so.

Canon X

EOIR proposed canon: An immigration judge shall act in a professional manner toward the parties and their representatives before the court, and toward others with whom the immigration judge deals in an official capacity.

Comment: While we agree with the language in Canon X, it should be expanded to provide guidance regarding what constitutes – and does not constitute – acting in a "professional manner." Clear distinctions should be provided between professional conduct here and impartial conduct (Canon VI), ethical conduct (Canon VII), and courteous, unbiased behavior (Canon IX).

At the risk of sounding repetitive, many of the people who may read and attempt to apply this code of conduct are unfamiliar with American jurisprudence and the accompanying ethical and professional obligations. Barebone statements with such terms of art will provide little guidance to these persons, nor provide encouragement to use this document in their quest to ensure a fair process for themselves. We strongly urge the provision of explanatory or illustrative language and examples.

Further, we are concerned that this canon specifies that immigration judges shall act in a professional manner only when acting in an "official capacity." In fact immigration judges' demeanor and behavior outside of the courtroom, even when they are not acting in an official capacity, affect the public's perception of the immigration court. This should be explicitly expressed.

Similar to recommendation in Canon IX, a judge's duty of professionalism extends to all the persons under his or her direction or control. It would be helpful for the canon or comments to clarify that a judge must demand conduct from these individuals that conforms to the highest degree of professionalism.

AILA suggested canon: An immigration judge at all times shall act in a professional manner toward the parties and their representatives before the court, and shall demand professional conduct from those under the judge's direction or control, including but not limited to court staff, contract interpreters and personnel, attorneys, and litigants.

Canon XI

EOIR proposed canon: An immigration judge shall refrain from any conduct, including but not limited to financial and business dealings, which tends to reflect adversely on impartiality, demeans the judicial office, interferes with the proper performance of judicial duties, or exploits the immigration judge's official position.

Comment: The only change we recommend is to add "at all times," as we have suggested in previous canons, in order to emphasize that the directive applies to extra-judicial as well as judicial conduct.

AILA suggested canon: An immigration judge at all times shall refrain from any conduct, including but not limited to financial and business dealings, that tends to reflect adversely on impartiality, demeans the judicial office, interferes with the proper performance of judicial duties, or exploits the immigration judge's official position.

Canon XV

EOIR proposed canon: An immigration judge shall not initiate, consider, or permit *ex parte* communications about the substance of a pending or impending case unless authorized by precedent, statute, or regulation. Communications about purely ministerial matters, such as a request for an extension of time, shall not be regarded as *ex parte* communications, provided the judge makes provision promptly to notify all other parties of the substance of the communication and allows an opportunity to respond. An immigration judge's communications with other employees of the Department of Justice shall not be considered *ex parte* communications unless those employees are witnesses in a pending or impending proceeding before the immigration judge and the communication involves that proceeding.

Comment: We of course agree with the thrust of this proposed canon. *Ex parte* communications undermine the perception of fairness as well as actual fairness in any court system. They must be avoided at all costs, with minor and clearly delineated exceptions. However, we are troubled because this proposal contains three large and unnecessary exceptions. Absolutely no explanation is offered as to the reasons for them.

First, while *ex parte* communications about the substance of a case are prohibited (except where authorized by precedent, statute, or regulation), no similar prohibitions apply to non-substantive information or to the identity of applicants. Whether by oversight or design, the absence of these elements from this canon could be quite problematic for some parties, particularly asylum applicants. As offered, this language would seem to allow communications on non-substantive matters even where not authorized by statute or regulation, even though we are certain this is not what EOIR intends.

Regarding asylum cases, we note that 8 CFR §1208.6(a) is intended to protect against disclosure to "third parties" all information "contained in or pertaining to any asylum application." Though the regulation contains some exceptions, the essential point is that

the regulations do not differentiate between substantive and non-substantive material. Dates, names of relatives, and political or religious affiliations are all matters which, while frequently non-substantive, could put asylum applicants in extreme danger if disclosed.

Similarly, the publication of their very identity as asylum applicants could have the same effect. CFR §1208.6(b) ensures that records kept by EOIR that "indicate(s) that a specific alien has applied for asylum . . . shall also be protected from disclosure."

The same concerns apply to others who appear in proceedings, such as VAWA adjustment applicants and trafficking victims. We urge that the distinction between substantive information on the one hand and non-substantive and identity information on the other be removed.

Second, the proposal would allow *ex parte* communications on "purely ministerial matters." However, *ex parte* communications, even when pertaining to administrative matters, have the potential to inject bias or preferential treatment, despite the best of intentions. The proposal's mention of requests for continuances seems particularly poignant. Several AILA members report not-infrequent incidents of seemingly inappropriate communications between judges and ICE attorneys on this type of request during cases. Numerous circuit courts have found denial of motions to continue to equate to denial of due process.[1] While the ABA model code is consistent with EOIR's language, the prolific presence of unrepresented parties in EOIR, unlike in the criminal context, particularly compels the comprehensive exclusion of *ex parte* communications. We strongly urge that the final canon prohibit <u>all</u> *ex parte* communications.

Finally, we are quite concerned about the allowance of judges to communicate with Department of Justice officials, even with the noted exception. We assume that EOIR contemplates that such communications will pertain to issues of national security. The provision of some context or background information as to the reasons for this exception would be helpful in this regard.

In the absence of such background, however, we note that 8 CFR §1003.46 sets out very clear procedures for the sealing of information that presents national security concerns. This regulation contemplates that ICE provide the needed information to the court in support of its request to seal documents. However, the proposed canon suggests that the judge, *sua sponte*, may initiate investigations through *ex parte* communications. At the very least, this canon or accompanying commentary should require that judges inform the parties of *ex parte* communications and the subject of these communications with appropriate specificity and clarify that they are not to initiate inquiries on their own.

<u>AILA suggested canon</u>: An immigration judge shall not initiate, consider, or permit *ex parte* communications, including to employees of the Department of Justice, about any

[1] For instance, some federal courts have found immigration judge decisions regarding motions to continue to constitute violations of due process. *See, e.g.,* Biwot v. Gonzalez, 403 F.3d 1094, 1098-1101 (9th Cir. 2005) and *Yi v. INS*, 257 F. Supp. 2d 791, 796-797 (E.D. Pa. 2003).

information pertaining to any pending or impending case unless authorized by precedent, statute, or regulation. This shall include communications regarding purely ministerial matters, such as a request for an extension of time.

Canon XVI

EOIR proposed canon: An immigration judge shall follow judicial precedent and agency policy regarding recusal when deciding whether to remove himself or herself from a particular case.

Comment: This proposed canon does not provide sufficient guidance either to immigration judges or to litigants. It is unclear which judicial precedents and/or agency policy it is referencing. Precedents and policies change over time, but basic concepts do not, so it would be advisable to include specific examples of when recusal is mandatory. This would provide clarity and ensure the integrity of the court. The ABA model code includes extensive circumstances in which disqualification is mandatory. These include, for instance, where a judge has a personal bias or prejudice or has personal knowledge of disputed evidentiary facts.

The ABA model code places the primary burden for recusal on the shoulders of the judge. It states that "(a) judge *shall* disqualify himself or herself . . ." (emphasis added) In contrast, the language in EOIR's code is silent in this regard. Certainly immigration judges are certainly free to disqualify themselves when warranted and litigants may bring a motion for recusal. But inserting the ABA's imperative language would help to reaffirm with judges their affirmative obligation to recuse themselves in appropriate circumstances.

The ABA's standard for recusal is when a judge's impartiality might be questioned. While EOIR's proposed code is silent on a standard, the EOIR Ethics Manual uses a similar test. That manual at section V does not discuss recusal, instructing judges instead to seek advice prior to engaging in potentially conflicting cases. But the standard it sets out is matters where a judge's "impartiality could be questioned."

Finally, the ABA uses the term "disqualify" rather than "recuse" and we recommend the same usage. Recusal is an esoteric term and, we suspect, not well-known especially to persons whose first language is other than English.

AILA's proposed canon mirrors EOIR's in brevity. But, again, we urge extensive commentary in order to provide guidance to judges, litigants, and other stakeholders.

AILA suggested canon: An immigration judge shall disqualify himself or herself at any point in any proceedings in which, based on judicial precedent and agency policy, the judge's impartiality might reasonably be questioned.

Conclusion

We reiterate our appreciation of EOIR for taking the important step of developing a code of conduct for immigration judges and BIA board members. Because we have highlighted several proposed canons that we feel could be improved with modified or expanded language, we urge EOIR to revise the canons based on our input and that received from other stakeholders and allow another opportunity for comment. We also request that this revised draft contain a fuller Supplementary Information section as well as explanatory commentary accompanying each of the canons. As always, AILA stands ready to assist EOIR in this process in any way that we can.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION