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Cultivating a Culture of Professionalism in the Immigration Courts

When individuals make decisions that can deprive their fellow human beings of liberty, family and community, those individuals must adhere to the highest standards of professionalism, lest their decisions be tainted by illegitimacy. Although we heard many stories of Immigration Judges who are highly professional and solicitous of the immigrants who appear before them, we also heard a shocking number of examples of a lack of professionalism that infects Immigration Court proceedings.

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During our interviews, we heard about an Immigration Judge who "cannot control her temper," "often yells at the attorneys and clients" appearing before her and "throws paper at people." Her conduct is so egregious that "law school clinics will not allow their students to appear in front of her." We heard about another Immigration Judge who scolded an attorney appearing before her pro bono "at least 10 times" and "told her that she was a naïve, inexperienced 'New York big firm do-gooder.'" We heard about yet another Immigration Judge who became enraged that an immigrant would not look him in the eye, not understanding that eye contact was inappropriate in this immigrant's culture. We heard about immigrants entering courtrooms to find the Immigration Judge and DHS Trial Attorney—the judge and prosecutor of their cases—laughing and joking in personal conversation. As one person succinctly put it, such ex parte communications between judge and

prosecutor are "fairly rampant."

While some of these lapses in professionalism betray outright bias on the part of an individual Immigration Judge, others convey the appearance of bias and leave immigrants with the feeling that they did not receive a fair hearing. Both types of misconduct severely undermine the Immigration Court system. With the stakes so high and the consequences so dire, any lack of professionalism—or even the appearance of impropriety—is simply unacceptable. Appleseed therefore recommends the following action items to cultivate a stronger culture of professionalism in the Immigration Courts.

Enhance and implement the Department of Justice's proposed Code of Conduct for Immigration Judges.

DOJ has long recognized concerns about the lack of professionalism in the Immigration Courts. In 2007, DOJ proposed a Code of Conduct for Immigration Judges, which according to DOJ is being revised and incorporated into the EOIR Ethics Manual but still has not been implemented. While the proposed Code is clearly a step in the right direction, we believe it should be significantly strengthened.

For example, while the Code requires Immigration Judges to avoid actions that create the appearance that they are violating the law or applicable ethical standards, the Code should go further by specifically prohibiting any actions that undermine, or give the appearance of undermining, confidence in the impartiality of the Immigration Judge. The Code should then provide specific examples of activities that fall under this prohibition, such as the following:

- an Immigration Judge shall not be present in the courtroom unless both the immigrant and DHS Trial Attorney are present (unless, of course, the hearing is being conducted by videoconference); and
- an Immigration Judge shall not yell at, verbally abuse, or engage in any other similar conduct toward any person appearing before the court or with whom the judge deals in his or her official capacity.

These enhancements are critical because many immigrants come from countries where a courtroom is not an institution of justice, but rather an extension of a corrupt state. Any actions that suggest the Immigration Judge is anything other than impartial irreparably damage the credibility of the court in the mind of such an immigrant because the Immigration Judge appears to be on the government's side rather than a neutral arbiter.

The Code should also require Immigration Judges to ensure basic due process safeguards for immigrants appearing in court. For instance, the Code should require that the Immigration Judge ensure that an immigrant receive a complete and simultaneous translation of the proceedings. Immigration Judges must make every effort to facilitate each immigrant's understanding of everything that is happening in court as it happens. The Code should also require that an Immigration Judge carefully and slowly explain—not simply recite from a prepared script—to an immigrant how to appeal an adverse decision in Immigration Court in every case, with particular care given to unrepresented immigrants. While this information may be explained in a number of Immigration Courts today, it should be mandatory in all cases; the right to appeal is a fundamental right that immigrants should understand up front. Including these due process safeguards in the Code would make them the explicit obligation of the Immigration Judge presiding in the case.

The Case for Court-Watching

The time is ripe to create a comprehensive court-watching program in Immigration Courts around the country to observe and report on the conduct of Immigration Judges. The sensitive nature of immigration proceedings demands that Immigration Judges exhibit the highest degree of professionalism and treat all participants in their courtrooms with courtesy, tact, sensitivity and patience. A court-watching program by independent observers would help determine the extent to which Immigration Judges demonstrate professionalism and an appropriate temperament. To be successful, EOIR should work with interested groups to establish the program and require that Immigration Judges allow the observers in their courtrooms, subject to the right of immigrants to request a closed hearing. Natural participants include the American Immigration Lawyers Association, other national and local bar associations, nonprofit groups and pro bono law firms. The data compiled by the program should be publicly available in order to spotlight the most and least professional Immigration Judges. The data will also be a critical resource for highlighting best practices in Immigration Courts throughout the country. EOIR should use the data to identify those Immigration Judges who require additional training and possible disciplinary action.

Fashion appropriate mechanisms to discipline judges for violations of the Code of Conduct.

Unless it has teeth, the new Code will be just another well-meaning, but ultimately failed, effort to improve the Immigration Court system. There must be meaningful consequences for Immigration Judges who fail to live up to the high standards that America's Immigration Courts must demand. The proposed Code requires Immigration Judges to be patient, dignified and courteous to immigrants, witnesses and lawyers, and prohibits Immigration Judges from manifesting bias or prejudice. Based on the reports we heard, some Immigration Judges regularly fail to meet these standards. It is critical that DOJ implement appropriate mechanisms to discipline Immigration Judges for violations of the Code and that there be a credible process for submitting complaints about Immigration Judges who violate the Code. Many practitioners agreed that the current process for submitting complaints about Immigration Judges was a "black hole." Indeed, attorneys who submitted complaints said they did not receive any sort of acknowledgment or response from DOJ, while others said that they had given up on the process altogether, fearing retaliation by the Immigration Judge in future cases.

"My client was cross-examined by the DHS attorney, and then went on to be cross-examined again, as well as bullied and badgered, by the judge."

The mechanism for disciplining Immigration Judges for violating the enhanced Code must address these issues. Most importantly, the process must be transparent. DOJ should promptly acknowledge receipt of every complaint. In a reasonable amount of time thereafter, DOJ should provide a statement of the actions, if any, it is taking to investigate

or address the complaint. Each complainant should receive the final results of the inquiry and any action taken as a result of his or her complaint, where doing so would not violate DOJ's personnel policies or privacy obligations. DOJ should adopt appropriate procedures to ensure that the data on complaints is compiled and made available on a periodic basis, both to senior EOIR officials and (in redacted form if appropriate) to the public. Furthermore, judge-specific information should be provided to court-monitoring groups, with appropriate obligations of confidentiality, in order to permit them to prioritize their court-monitoring function.

Supplement the training of Immigration Judges via periodic and mandatory training sessions.

DOJ could also improve the level of professionalism among Immigration Judges through enhanced training. Better training might have prevented one Immigration Judge who, according to our interviewee, declared that the immigrant "didn't look gay" to the judge and therefore would not be subject to persecution in Mexico. Training in this case was provided by the Court of Appeals, which sent the case back to the Immigration Judge, who then reconsidered his earlier stereotyping and granted asylum.

We recognize that DOJ has conducted a number of training sessions since 2007, particularly on substantive immigration law issues and certain emerging issues in asylum adjudication. DOJ should institutionalize these training sessions so that they become regular and mandatory fixtures in an Immigration Judge's schedule, and DOJ should ensure that judges have the time to attend all sessions. Moreover, DOJ should significantly expand the training topics to cover cultural competence, country conditions, bias, professionalism (including problems with fraternization with counsel, impartial procedural decisions and creation of an open and evenhanded forum), and how to conduct a hearing, assess credibility and exercise discretionary power.

Furthermore, DOJ should expand the training for newly appointed Immigration Judges to include a comprehensive “boot camp” in the above areas. According to the *Refugee Roulette* study, asylum officers receive five weeks of intensive boot camp-like training, which includes testing. While we understand that DOJ has recently expanded training for new Immigration Judges from two weeks to five weeks, most of this time is spent “on the job” rather than in the classroom learning the fundamentals of what it takes to be a great Immigration Judge. It makes little sense that training for asylum officers is more extensive than the training of the Immigration Judges reviewing their decisions; thus, the length of classroom training for new Immigration Judges should at least match the amount of classroom training that new asylum officers receive.

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